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THE INDIAN LAW REPORTS, CALCUTTA SERIES
CONTAINING CASES DETERMINED BY THE
HIGH COURT AT CALCUTTA, AND BY THE
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
ON APPEAL FROM THAT COURT AND FROM
ALL OTHER COURTS IN BRITISH INDIA NOT
SUBJECT TO ANY HIGH COURT.

CALCUTTA—Vol. VIII—1882.

PRIVY COUNCIL.

The 24th May, 1881.

PRESENT :

SIR B. PEACOCK, SIR M. E. SMITH, SIR R. P. COLLIER, SIR R. COUCH
AND SIR A. HOBHOUSE.

Suleman Kadr.....Defendant

versus

Dorab Ali Khan.....Plaintiff.

(On appeal from the Court of the Commissioner of Lucknow.)

Mahomedan Law—Construction of Will—Gift

A testatrix, entitled to Government notes under a gift, coupled with the condition that she was to receive only the interest during her life, and that after her death, the notes were to be held in trust for all her heirs, gave the following directions to *S K*, whom she made her principal legatee :—

“ I direct *S K*, under this will, to pay every month Rs. 614-1-7 (being one-third of Rs. 1,933-5-4, my monthly pay allowed by the Government for notes, which are deposited) to my dependents and personal servants, as detailed below. Be it known, that the expenses of the imambara, &c., will be continued forever; and also the pay of *G K* and *M A* will be defrayed forever, *i.e.*, generation after generation. The rest of the servants will be paid for life only.”

[2] *Held*, that these words constituted a bequest, and were not merely the expression of wish. Also, that the bequest was not one of legacies payable out of a specified sum and no other; the statement that the monthly payments to be made amounted to one-third of the sum received monthly by the testatrix, not limiting the source of the legacies.

Quere.—Whether, under the Mahomedan law, the gift made to the testatrix was not a gift to her absolutely, the condition being void?

APPEAL from a decree of the Court of the Commissioner of Lucknow (20th June 1876), reviewing a previous decree of the same Court (3rd December 1875), and affirming a decree of the Civil Judge of Lucknow (13th April 1875).

The questions raised on this appeal related to the will of the late Nawab Malka Ahad, who died on the 26th August 1866, a widow of the ex-King of Oudh. The appeal was in a suit brought by the respondent, one of the legatees (ten others bringing similar suits), against the appellant, who was the son and

representative of the testatrix, and principal legatee under the will. The claim was made to enforce payment by the latter of Rs. 3,700, on account of a bequest of Rs. 100 per mensem unpaid from the 15th December 1871 to the 15th December 1874. The decree now under appeal was made by the Commissioner of Lucknow, in accordance with a decision of the Judicial Commissioner of Oudh, dated the 11th March 1876, given in the suit of another legatee (*Qudrat Ali v. Suleman Kadr*). Of the latter suit the record was printed under an order of Her Majesty in Council, together with that of the proceedings in the present case, which was understood to have been taken as a test for the other suits.

The testatrix had become entitled to the Government notes, referred to in the will, under a gift from her deceased husband in 1842. In that year, with a view to securing payment of perpetual pensions to certain members of his family, the King of Oudh applied to the British Government, through the Resident at his Court, to allow, in return for payments made by him, "Government notes to be issued in the names of the parties and to be kept in the British Treasury, so that the principal sums could not be squandered away after His Majesty's death, and that interest be paid monthly." To this request the Government acceded; and in a letter, dated the 25th September 1842, the Resident at Lucknow was informed accordingly. Notes were issued to the amount of the money advanced by the King, and each note was enfaced thus: "This note is not negotiable, and is to remain in deposit with the Resident at [3] Lucknow; the interest accruing on it to be paid to [name of recipient] during her lifetime, and after her decease to her heirs." The Government paper issued in the name of the Nawab Malka Ahad was for Rs. 4,80,000, giving, at 5 per cent. per annum, the monthly sum of Rs. 2,000. On a reduction, in the year 1851, of the rate of interest to 4 per cent. per annum, and on a further payment of Rs. 1,00,000 by the King, 4 per cent. papers of corresponding value were held in deposit for the testatrix.

On the 24th August 1866, the Queen made a will, by which she desired her son Mirza Suleman Kadr Shah Alam Bahadur "to pay every month Rs. 644-1-7 (being one-third of Rs. 1,933-5-4, my monthly pay allowed by Government for Government promissory notes, which are deposited) to my dependents and personal servants." The testatrix then directed that the expenses of the *inambara* should be defrayed forever, and that the rest of the legatees should be paid for life only.

Mr. J. Graham, Q.C., and Mr. Herbert Cowell appeared for the Appellant.

Mr. C. W. Arathoon for the Respondent.

It was submitted, on behalf of the appellant, that the effect of the transaction between the King of Oudh and the British Government was to establish a monthly pension for Nawab Malka Ahad during her life only, and for her heirs, after her decease, secured by the Government papers remaining in deposit. Consequently, the testatrix had no power to dispose of the *corpus* of the fund represented by the notes; which, so far as she was concerned, were held by the Government for her life only. Those who might become entitled after her death would derive title, not from her, but from the King, the donor. Moreover, the words of the will did not create bequests or legacies; they were *precatory*. In this they corresponded to the fact, that the testatrix had no such disposing power as was attributed to her on the part of

the respondent. Reference [4] was made to Jarman on Wills, Vol. 1 [Edn. of 1881], p. 404; also to *In re Hutchinson and Tenant* (L. R., 8 Chan. Div., 540).

If the words could be held to amount to a bequest, it was a specific bequest, payable out of a specified fund indicated by the reference to the 'monthly pay.' This fund had failed at the time when the will operated, the Government paper no longer belonging to the estate of the testatrix after her death: *Morley v. Bird* (3 Vesey, 629), *Hosking v. Nicholls* (1 Y. & C. C. C., 478), *Bothamley v. Sherson* (L. R., 20 Eq. Cas., 304), and *Shepherd v. Beetham* (L. R., 6 Chan. Div., 597).

Their Lordships' **Judgment** was delivered by

Sir R. P. Collier.—This is one of many actions brought by servants and retainers of one of the widows of the late King of Oudh, asserting their right to certain legacies under her will. The defendant is her only son and the principal devisee under that will. This may be considered a test action, inasmuch as it is understood that upon its decision the other actions pending, to the number of ten, will depend.

In order to make the case intelligible, a short statement of the facts is necessary. It appears that the late King of Oudh desired to have a Government guarantee for the payment of annuities to many persons, and for that purpose he deposited a large sum of money with the Government, obtaining from the Government promissory notes in favour of these persons. It becomes, however, necessary in this case only to refer to the principal of those persons, namely, his Queen. He obtained from the Government a promissory note for four lacs and eighty thousand rupees for the purpose of securing her an annuity of Rs. 2,000 a month. Subsequently, upon the rate of interest being lowered from five per cent. to four per cent., he deposited the further sum of a lac of rupees, and received a note corresponding in value. He died, and subsequently the Queen died, having made a will on the 24th August 1866, which is in these terms:—"Whereas the life of mankind is altogether uncertain,"—and so on,—“after my death, my son, Mirza Suleman [5] Kadr Shah Alam Bahadur, will be my sole heir and proprietor of all my assets, including moveable and immoveable property, groves, Company's promissory notes, &c., without there being a participator thereof; and all my relations and Government officers are to recognize him as my son and heir after my death. No one but Shah Alam Bahadur has any right to be my heir after my death.” Then comes the important bequest now in question: “I desire Mirza Suleman Kadr Shah Alam Bahadur, under this will, to pay every month Rs. 644-1-7 (being one-third of Rs. 1,933-5-4, my monthly pay allowed by Government for Government promissory notes, which are deposited) to my dependents and personal servants, as detailed below; and they will give their receipts for the same. It will also be the duty of Mirza Suleman Kadr Shah Alam Bahadur to defray the expenses of the imambara, of mourning assemblies, of illumination of imambara during the Moharram, and of monthly assemblies. Shah Alam Bahadur and all Government officers are to hold this my last will to be of sufficient force forever, and to carry out its provisions without any alterations. They will not, in the least, contravene the provisions of this will. Shah Alam Bahadur will treat all the dependents and servants with such kindness and affability as will secure him fame and good name, and give satisfaction to the soul of his deceased father, King Amjad Ali Shah. I have, therefore, executed this will,” and so on. “Be it known that the expenses of imambara, &c., will be continued forever, and also the pay of

Gumani Khanam and Mir Amjad will be defrayed forever, *i.e.*, generation after generation. The rest of the servants will be paid for life only." At the end of the will there is a detail of expenses, and first we have expenses of imambara, assemblies, Koran readers, &c., to be continued forever under the management of Dorab Ali Khan, Rs. 214-7-1." Then there is:—"Gumani Khanam Shahaba, my sister, to be paid" Rs. 20 per month; then comes the present plaintiff, who was the principal eunuch, Mahomed Dorab Ali Khan, Rs. 100; and then come the rest of the servants.

The case has been before three Courts. The first and the last Court, that being the Court of the Judicial Commissioner, [6] have held, that the legacy sued for, was payable out of the whole estate of the deceased Queen, including the Government promissory notes. The second Court held, that she had only a life-interest in the promissory notes, and therefore it was not payable out of that fund; but, nevertheless, that it was payable out of her general estate.

This appeal has been preferred by her son Mirza. The main grounds which have been contended for are, first, that there is no absolute bequest, but a mere expression of a wish that Mirza shall pay the legacies; secondly, that if there is a specific bequest of the legacies, it is a bequest of legacies to be paid out of a certain specified fund, and no other, *viz.*, Rs. 1,933, which was the actual amount which the lady received from her Government promissory notes; that the lady had only a life-interest in that fund, and therefore could not exercise any testamentary power over it. It was contended further, that the legacies were only to be paid during the continuance of the services of the servants, but that point has been abandoned.

With respect to the first question, their Lordships have no doubt that the words, "I desire Mirza to pay, every month, my dependents and personal servants," coupled with the statement at the end, "Be it known that the expenses of imambara, &c., will be continued forever," and "the pay of Gumani Khanam and Mir Amjad will be defrayed forever, *i.e.*, generation after generation, the rest of the servants will be paid for life only"—constitute a bequest, and not merely the expression of a wish or a direction.

The next question is, whether these legacies are to be paid solely out of this fund of Rs. 1,933, the income of the Government promissory notes. If the paragraph which has been read had stood alone, *viz.*, "I desire Rs. 644 (being a third of Rs. 1,933) to be paid to my dependents and personal servants," there might have been a question whether it was not a legacy to be paid only out of a specific fund; but when their Lordships proceed further, and find that the Queen desires that the expenses of the imambara shall be paid, without specifying out of what fund,—and indeed it is but natural to suppose that for a purpose of that sort she would be disposed to appropriate her [7] general estate,—and when it is found that the sum of no less than Rs. 214-7-1 is part of this Rs. 644 which has been mentioned as being a third of the Rs. 1,933, it appears to their Lordships that, taking these portions of the will together, the bequest of the Rs. 644-7-1 cannot be treated as appropriated entirely, as far as payment is concerned, to that particular sum of Rs. 1,933. The mention of its being a third of Rs. 1,933 appears to their Lordships on the whole to amount to no more than a statement of her belief, that that was the proportion which all the sums mentioned in the schedule bore to her annuity from the Government notes, but did not amount to a specified limitation of the payment from that sum.

This being so, and the rest of the estate being admittedly sufficient to pay all these legacies, the case is disposed of in favour of the plaintiff. At the same time, their Lordships think it right to guard themselves against it being supposed that they assent to the proposition that, even if this had been a specific legacy payable out of the specific fund mentioned, it would have been invalid. Their Lordships are by no means satisfied that the gift to this lady of these Government promissory notes subject to a condition that she is to have the interest only for life, and that after her death there is to be a trust in perpetuity for all her heirs to all time, is not, according to Mahomedan law, in its legal effect, a gift to her absolutely, the condition being void. However, without determining a point which is not necessary for the decision of the case, their Lordships think it enough to say that, for the reasons which they have given, they will humbly advise Her Majesty that this judgment should be affirmed, and this appeal dismissed with costs.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *Watkins and Lattey*.

Solicitor for the Respondent: Mr. *T. L. Wilson*.

NOTES.

[I. MAHOMEDAN LAW—WAGF—

Wagfs can be created by will:—(1902) 25 All. 236; 30 I. A. 94 P.C., overruling 14 All., 429; this was assumed in this case; see also 7 Bom. 170.

II. CONDITIONAL GIFT—

The donee takes an absolute estate, the condition itself being void:—17 W. R., 525; 13 Bom., 264; 17 Bom., 1; 28 All., 342; 30 Bom., 178; 31 Cal., 431.

It is suggested that life-estates may be created, under the Trust Act, or the Contract Act, s. 26, though not as *hiba*:—Tyabji, Mahomedan Law (1913), p. 346.]

[8] APPELLATE CIVIL.

The 16th August, 1881.

PRESENT:

MR. JUSTICE PRINSEP AND MR. JUSTICE FIELD.

Ram Loll Mookerjee.....Defendant

versus

Debender Nath Chatterjee and others.....Plaintiffs.*

Sale for arrears of rent—Joint owners—Darpatnidars—Purchase by defaulter—Constructive Trust.

Of three joint owners of a darpatni, two held each a four-anna share and the third an eight-anna share. Default having been made by all three in the payment of the rent, the patnidar brought a suit and obtained a decree for the arrears. In execution of this decree, proclamation was made that the darpatni would be sold on the 5th of October 1877. Up to

* Appeal from Appellate Decree, No. 690 of 1880, against the decree of P. Dickens, Esq., Judge of Nuddea, dated the 26th January 1880, reversing the decree of Baboo Kishen Chunder Chatterjee, Officiating Subordinate Judge of that district, dated the 23rd August 1878.

the commencement of the sale, the four-anna share-holders were unable to pay their proportionate amount of the decree. The eight-anna share-holder declined paying his share, and, when the sale took place, he became the purchaser of the darpatni. In a suit brought by the four-anna share-holders to recover their shares from the purchaser, the lower Appellate Court, reversing the decree of the Court of First Instance, decided in favour of the plaintiffs.

Held, on second appeal, that the sale having taken place as much through the default of the plaintiffs as through the default of the defendant, the former had no equity against the latter; and that, therefore, the suit should be dismissed.

THIS was a suit for the recovery of possession of an eight-anna share of a darpatni which, on the 5th of October 1877, had been purchased at a sale in execution of a decree obtained by the patnidar for arrears of rent of the darpatni. The defaulting darpatnidars were the two plaintiffs and the defendant Ram Loll, whose share was, the plaintiffs alleged, held benami in the name of his son, the defendant Jodunath. The plaint alleged, that the two plaintiffs and Ram Loll had agreed each to pay his share of the amount on the day fixed for the sale; that, on that day, the plaintiffs were ready with their shares, but the defendant Ram Loll declared his inability to pay his; that the [9] sale consequently took place, and Ram Loll became the purchaser. The plaint charged, that the declaration of inability to pay made by Ram Loll at the last moment, was false, and was made with the view of purchasing the whole darpatni for himself in fraud of the plaintiffs.

The Judge of the Court of First Instance disbelieved the charge of fraud. He found that the plaintiffs were not, on the day of the sale, ready to pay in that proportion of the whole amount which corresponded to their shares, and he found that the defendant Ram Loll, with a view to purchase the whole darpatni himself, declined to pay his share. The Court, citing *Huree Churn Bose v. Mehroonnissa Bibee* (7 W. R., 318) and s. 66, Beng. Act VIII of 1869, considered, that the mere fact of the defendant not paying his share did not debar him from becoming the purchaser at the execution sale, and he dismissed the plaintiff's suit with costs.

The plaintiffs appealed; and the District Judge, though he agreed with the Court of First Instance that the charge of fraud had not been proved, and that the plaintiffs were not in a position to pay their shares on the day of the sale, held, that as the plaintiffs and the defendant Ram Loll had been joint owners of the darpatni previous to the sale, Ram Loll could not purchase the darpatni for himself to the exclusion of the plaintiffs. For this position the Judge cited Lindley on Partnership (2nd ed.), pp. 494-5; White and Tudor's Leading Cases in Equity (4th ed.) Vol. I, p. 19. The defendant appealed.

Babu *Doorgulass Banerjee* and Babu *Rash Behary Ghose* for the Appellant.

Babu *Sreenath Doss* and Babu *Saroda Prosunno Roy* for the Respondents.

The **Judgment** of the Court (PRINSEP and FIELD, JJ.) was delivered by

Field, J.—The facts of the case are briefly as follows:—The two plaintiffs were co-sharers to the extent of four annas each [10] in a darpatni taluk. The other eight-anna share belonged to the defendant No. 1, the defendant No. 2 holding this moiety benami for him. It appears that the rent of the darpatni fell into arrear, and that the patnidar brought suits, and recovered decrees for the rent so in arrear. The darpatni was brought to sale in execution of these decrees, and was purchased at the execution-sale by the defendant No. 1. The plaintiffs now bring this case to recover from the defendant No. 1 the moiety of the darpatni to which they were jointly entitled before the

sale. The case made by them in their plaint, in paragraph six, was a case of actual or positive fraud. They there alleged that, after time had been given by the decree-holder to pay the sum due under the decree, the plaintiffs were prepared to pay their share on the date up to which time was given, and that the defendant led them to believe that he also would have his share of the money ready to make the payment on that date; they suggested that this representation was fraudulently made to mislead them, and with the intention of preventing them from raising the whole of the money which would have been necessary to satisfy the decree fully and so prevent the sale.

If that case had been proved, that would have been a case of actual fraud, and would have entitled the plaintiffs to relief in the Court in which the suit was instituted; but, as a matter of fact, that case was held below not to have been proved; and there is no appeal at present before us upon this question. The bare point urged before us is, that because the plaintiffs and the defendant were co-owners of the darpatni before the sale, the defendant, purchasing at the execution-sale, must be taken to have purchased for himself and his co-sharers: in other words, that he is to be regarded as a constructive trustee for the plaintiffs so far as their shares are concerned.

The learned Judge in the Court below has referred to certain cases well known in the Courts of Equity in England, in which it was decided that when persons occupying a fiduciary position had renewed leases or otherwise acquired property for themselves, taking advantage of their fiduciary position to do so, they could not be permitted to retain the benefit thus acquired, but must be regarded as constructive trustees for those towards [11] whom they occupied a position of trust. We think that the principle of those cases is not applicable in the present instance. We are of opinion that co-sharers in immoveable property in this country do not occupy the same position towards each other as partners under English law.

Under the decrees passed for rent, both the plaintiffs and the defendant were jointly liable. There was no several liability, and the result of all the parties being jointly liable was, that each one of them was liable to make good the whole amount due under the decree. But we will assume, for argument's sake, that the plaintiffs ought to have paid one moiety of the amount due under the decree, that moiety representing their joint interest in the darpatni taluk, and that the defendant was liable to pay the other moiety of the sum due under the decree. This assumption is the most favourable possible to the plaintiffs' case. Now it has been found, as a matter of fact, by both the Courts below, that the plaintiffs had not paid the moiety of the sum due under the decree, which moiety they admit their liability to pay.

Under these circumstances, we think that the plaintiffs, coming into a Court of Equity, cannot say that they have done all that they were bound to do, and that the sale was due to the laches of the defendant alone; and both parties being thus in default, the plaintiffs are not entitled to the assistance of a Court of Equity.

It may be well to observe, that no case was made by the plaintiffs in the Courts below; that the defendant No. 1, being a defaulter, was not at liberty to bid at the execution-sale; and that, therefore, that execution-sale must be treated as a complete nullity. The superior landlord, the patnidar, has not been made a party to this suit; and as that case was not raised or tried in the Courts below, we have not to deal with or pronounce our opinion upon it. We also deem it unnecessary to decide what the result might have been if the plaintiffs had paid the whole of the moiety of the sum due under the decree which they admit their liability to pay.

We deal with this appeal merely on the ground, that as the plaintiffs did not pay that share of the rent which they admit [12] that they were bound to pay, they are not in a position to ask that relief which they have sought in their plaint from a Court of Equity. Further, the case for relief put forward by them in their plaint was based upon actual or positive fraud, and this they have failed to establish.

Under these circumstances, we are of opinion that the decree of the District Judge must be reversed and the decree of the first Court be restored, the plaintiffs' case being dismissed with all costs in this and the lower Appellate Court.

Appeal allowed.

NOTES.

[A co-sharer-defaulter is not precluded from purchasing at a revenue-sale, even though the default might have been deliberately made :—(1889) 16 Cal., 194 ; 1 C. L. J. 565 571.]

[8 Cal. 12]

APPELLATE CIVIL.

The 20th June, 1881.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Greeman Singh and others.....Defendants.

versus

Wuhari Lall Singh.....Plaintiff.*

Hindu law—Reversioner—Alienation by Hindu widow—Parties—Vested and Contingent interest—Declaratory decree—Specific Relief Act (I of 1877), s. 42.

The plaintiff, claiming to be entitled in reversion to certain property on the death of his grandfather's widow, sued for a declaration that certain alienations made by the widow were void as against him. To this suit the widow and her alienee were defendants. The defence was, that the plaintiff was not the reversioner, and certain parties, who claimed to be the real reversioners, intervened and were made defendants by order of the Court. The plaintiff obtained a declaration of his reversionary right, and the deeds of sale were, on certain conditions, declared void as against him. The intervenors appealed to the High Court.

Held, on appeal, that, notwithstanding the provisions of s. 42† of the Specific Relief Act (I of 1877), the plaintiff was not entitled to the relief sought, and that the defendants who claimed as reversioners should not have been made parties to the suit.

*Appeal from Original Decree. No. 61 of 1880, against the decree of Babu Grish Chunder Chowdhry, Subordinate Judge of Sarun, dated the 31st December 1879.

Discretion of Court as to any right as to any property, may institute a suit against any declarations of status of person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief :

Bar to such declaration.

Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Explanation.—A trustee of property is a 'person interested to deny' a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee.]

Section 42 * of the Specific Relief Act refers only to existing and vested rights, and not to contingent rights.

THIS was a suit brought by Wahari Lall Singh, a minor, by his father and next friend, for a declaration of his right as [13] reversioner to certain property. The plaintiff stated that the property in question had belonged to one Balgobind Singh, who had died in Bhadro 1271 (September—October 1864), leaving him surviving two widows, Sustî Koer and Pharichha Koer, a daughter Bhuttu Koer (since deceased) by his wife Sustî Koer, and the plaintiff (who is the son of Bhuttu); that, upon the death of Balgobind, the widows entered into possession of his property, which finally became vested in Pharichha Koer on the death of Sustî Koer in 1284 (1877-78); and that Pharichha Koer and Sustî Koer had alienated portions of their husband's property by two bills of sale, dated the 8th and 18th of May 1874 respectively. The plaintiff claimed to be entitled to the property on the death of Pharichha Koer, and prayed for a declaration of his right thereto, for a declaration that the bills of sale should be declared void as against him, and for an injunction.

The defence was, that the plaintiff was not the grandson of Balgobind, and the property affected by the bills of sale had never been the property of Balgobind from whom the plaintiff claimed.

When the suit was first instituted, the only parties made defendants were the surviving widow, and Rajkishori Koer, the purchaser under the bills of sale of the 8th and 18th of May 1874; but subsequently certain parties (who claimed to be the real reversioners to the property of Balgobind on the death of the widow Pharichha) intervened in the suit, and were made parties thereto by an order of the Court.

The Subordinate Judge found that the plaintiff was the grandson by the daughter of Balgobind, and that the property alienated by the widows had been their deceased husband's property; but that Rs. 5,835-11 of the purchase-money had been applied in paying off debts incurred by Balgobind; and he considered that s. 42 of the Specific Relief Act (I of 1877) entitled the plaintiff to the declaration which he sought.

The following decree was made: "That this case be decreed to the plaintiff in the manner following:—That Wahari Lall, the plaintiff, in the capacity of grandson of Balgobind Singh, is entitled to the property left by his maternal grandfather after [14] the death of Mussamat Pharichha Koer, in case he remains alive after Pharichha Koer; that it is held, that the transfer of Mouza Jugutpur made by the widows of Balgobind Singh will be declared null and void after the death of Mussamat Pharichha Koer, in case the plaintiff pays Rs. 5,835-11 to Mussamat Rajkishori." The intervening defendants appealed to the High Court.

Mr. Branson, Baboo Chunder Madhub Ghose, Baboo Durga Pershad, and Baboo Hurry Mohan Chuckerbutty for the Appellants.

Baboo Mohesh Chunder Chowdry, Baboo Jogesh Chunder Dey, and Baboo Aubinash Chunder Banerjee for the Respondent.

The Judgment of the Court (MITTER and MACLEAN, JJ.) was delivered by

Mitter, J.—This suit was brought by one Wahari Lall Singh, for a declaration that certain deeds of sale, dated the 8th and 18th May 1874, executed by two Hindu widows, Pharichha Koer and Sustî Koer, widows of

*[q. v. *supra*, 8 Cal. 12.]

one Balgobind, are void and inoperative as against the plaintiff, he being the presumptive heir to the estate of Balgobind after the death of the last surviving widow, Pharichha Koer. The object of the suit was, further, to have a declaration that the plaintiff, according to Hindu law, is the next reversionary heir to the estate left by the aforesaid Balgobind. The plaintiff alleges that he is the daughter's son of the aforesaid Balgobind by Sustī Koer. The suit was brought after the death of Sustī Koer against Pharichha Koer, the other widow, and the person in whose favour the aforesaid deeds were executed. It appears, that while this suit was pending, the appellants before us, Greeman Singh and others, intervened, and alleged that, upon the death of Pharichha Koer, they would be entitled to succeed to the estate of Balgobind, and not the plaintiff, as he was not his daughter's son, but of his brother Abhiman. They were made defendants by an order of the Court dated the 20th April 1879. It also appears that the widow Pharichha Koer denied [15] the relationship of the plaintiff as alleged by him. The lower Court raised an issue upon this point, —*viz.*, was the mother of the plaintiff a daughter of Balgobind Singh? The lower Court having decided this issue in favour of the plaintiff, as well as the other issues raised in the case, awarded a decree to the following effect in favour of the plaintiff,—"That this case be decreed to the plaintiff in the manner following, to wit: that Wahari Lall, the plaintiff, in the capacity of grandson of Balgobind Singh, is entitled to the property left by his maternal grandfather after the death of Mussamut Pharichha Koor, in case he remains alive after Pharichha Koer; that it is held, that the transfer of Mouza Jugutpore made by the widows of Balgobind Singh will be declared null and void after the death of Mussamut Pharichha Koer, in case the plaintiff pays Rs. 5,835-11 to the defendant Mussamut Rajkishori; and that the prayer for issue of prohibitory orders is rejected with costs."

Now it appears to us, that the first declaration, which has been made in this decree, is erroneous. It is abundantly clear upon the authorities, that a person who stands in the position of presumptive heir upon the death of a Hindu widow is not entitled to maintain a suit for a declaration of his so-called reversionary right. We may here cite only one case, which is exactly in point—*Dooli Chand v. Burj Bhokun Lal Arastī* (6 C. L. R., 528). Some of these cases were decided before the Specific Relief Act came into operation; but in our opinion the aforesaid Act has made no alteration in the law. Section 42^{*} refers only to existing and vested rights, and not to contingent rights like those of a person who has only a chance of succeeding to the estate of a Hindu after the death of a female heir in possession of the property. That also appears from a consideration of the difference in the language used by the Legislature in the illus. (d) and (c) of s. 42. Illustration (c) contemplates a case like the present, and the illus. (d) applies to the case of a vested right of reversion. The appellants, therefore, have no sort of interest in the suit which was brought by the plaintiff, because, if the suit was dismissed, they could not have been affected by the result; and if it was decreed, they, after the death of the widow, [16] if they were really persons entitled to succeed to the estate of Balgobind in preference to the plaintiff, would have been entitled to claim this property also. It is only in the event of the plaintiff being entitled to succeed to the declaration which he asks for in the plaint, —*viz.*, that he would be entitled to succeed to the estate of Balgobind after the death of Pharichha Koer, that the appellants before us would have an interest in the result of the suit. But the plaintiff is not entitled to that declaration; the appellants, therefore, should not have been made defendants in the suit. We, accordingly, set aside the order by which they

^{*}[*q. v. supra*, 8 Cal. 12.]

were made defendants, and direct that their names be struck off from the category of defendants. We also set aside that part of the declaration given in the decree by which it is declared, that the plaintiff, as the daughter's son of Balgobind, would be entitled to the property left by his maternal grandfather after the death of Mussamut Pharichha Koor, in case he survives Pharichha Koor. As the appellants themselves intervened and applied to be made defendants, we think that they were rightly made liable for costs in the lower Court; but as to the costs of this appeal we are of opinion that they had reasonable grounds for coming up to this Court in order to have the declaration, which has been made against them, set aside. We are, therefore, of opinion, that they should not be made liable, for the costs of this appeal, and that each party should bear their own costs in this Court.

Decree varied.

NOTES.

[The Allahabad High Court dissented from this ruling in (1901) 27 All., 406—2 A.L.J., 84—(1905) A. W. N. 6 on the ground that the reversionary right was as much a right to property as any other. See also (1886) 10 Mad., 90; 22 All., 291; 30 Mad., 195; 3 C. L. J. 224.]

[17] APPELLATE CIVIL.

The 19th July, 1881.

PRESENT:

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Sunrun Thakoor.....Defendant

versus

Chunder Mun Misser and others.....Plaintiffs.*

Mitakshara Law—Partition—Ancestral Property—Wife's share on Partition.

Under the Mitakshara law, where partition of ancestral property takes place between a father and a son, the wife of the father is entitled to a share.

Mahabeer Persad v. Ramyad Singh (12 B. L. R., 90), *Laljeet Singh v. Rajcoomar Singh* (12 B. L. R., 373), *Jodoonath Dey Sircar v. Brojonath Dey Sircar* (12 B. L. R., 385), and *Pursid Narain Singh v. Honooman Sahay* (I. L. R., 5 Cal., 815) followed.

THIS was a second time on which this case came before the High Court on special appeal. On the former occasion the learned Judges (AINSLIE and McDONELL, JJ.) remanded the case for the trial of certain issues. The order of remand was as follows:—

This is a suit by a member of the joint family against the auction-purchaser of the rights and interests of other members of the family, who executed a bond mortgaging their shares as security for a loan. The auction-purchaser brought a suit on the bond, and having obtained a decree, put the mortgaged property up for sale in execution thereof and purchased it himself. The

* Appeal from Appellate Decree, No. 2070 of 1880, against the decree of H. W. Gordon, Esq., Judge of Tirhoot, dated the 22nd July 1880, modifying the decree of Baboo Ram Pershad, Subordinate Judge of that District, dated the 9th December 1878.

lower Appellate Court has found as a fact that the family was joint, but this is not a matter of any material importance now, because the question of the rights of an auction-purchaser in such a case as this has been determined by a recent judgment of their Lordships of the Judicial Committee of the Privy Council in the case of *Deen Dyal Lal v. Jugdeep Narain Singh* (I. L. R., 3 Cal., 198; 1 C. L. R., 49). Their Lordships, while refraining from expressing any dissent from the decision of a Full Bench of this Court in the case of *Sudabart Prasad Sahu v. Polbash Koer* (3 B. L. R., F. B., 31) in respect of voluntary alienations, have determined that, as regards sales in execution of decree, the rights and interests of a debtor in a joint family property may pass to an auction-purchaser, and that [18] the auction-purchaser has a right to demand a partition of the interests so acquired by him. This being so, it appears to us, that if an auction-purchaser can as a plaintiff come into Court and demand a partition of the interests of the persons whose rights he has acquired, he is equally entitled as a defendant to set up that right of partition against a member of the joint family who seeks to reclaim the property which has come into his possession.

In the case before the Privy Council the order that was made took a peculiar form, because, we apprehend, there was a peculiarity in that case. One of the members of the joint family had not been represented in the suit, and therefore a final declaration as to the rights of the several members of the family could not then be made; and it may be that their Lordships thought that it was unnecessary to re-open that particular case when the same question could be as well tried in a separate suit by the auction-purchaser. In this case, however, we think that as the suit is to go back to the first Court, there is no reason why a final adjudication should not be arrived at. The Court will ascertain from the parties the persons who are admitted or said to have been members of the joint family at the time of the execution-sale, and if all the members are already parties to the present suit, the Court will at once go on and determine any questions which may arise between them. If any person who is said to have been entitled to any share at that time is not on the record as a party, the Court will take proper steps to put him or her on the record. It will then decide what shares would actually have come on partition to the judgment-debtors had a partition taken place on the day of the sale, and the plaintiff's right to recover from the defendant will depend on the amount of shares determined. If those shares amount to the whole 13 annas, 6 gandas, 2 cowries, 2 krants in the possession of the defendant, of course the suit will be dismissed, otherwise the plaintiff will be entitled to recover proportionately.

In accordance with this order of remand the Court below ascertained the parties who were members of the joint family, and the shares of each; amongst other things giving to a lady, on partition, a share equal to that allotted to each of her sons and to her husband. This decree was affirmed by the lower Appellate Court. The defendant appealed to the High Court.

[19] Baboo Mohesh Chunder Chowdhry and Baboo Rajendro Nath Bose for the Appellant.

Baboo Gopal Lall Mitter for the Respondents.

The Judgment of the Court (MITTER and MACLEAN, JJ.) was delivered by

Mitter, J.—The only question which we reserved for consideration is, whether, under the Mitakshara law, a share is allotted to a wife in a partition of an ancestral property between a father and a son.

The question we find is no longer an open one, having been decided on several occasions: see *Mahabeer Persad v. Ramyad Singh* (12 B. L. R., 90), *Laljeet Singh v. Raj Coomar Singh* (12 B. L. R., 373), *Jodoonath Dey Sircar v. Brojonath Dey Sircar* (12 B. L. R., 385), and *Pursid Narain Singh v. Honooman Sahoy* (I. L. R., 5 Cal., 845).

Upon an examination of the Mitakshara itself, we have come to the conclusion that though there is no express text upon the point yet the decisions are in accordance with the principle upon which express texts upon kindred subjects are based. In some of the cases cited above, v. 8, s. 11, chap. I and vv. 1 and 2, s. 7, chap. I are relied upon in support of this proposition of law. But the first text refers to paternal or father's self-acquired property, and the other texts apply to the case of a partition after the death of the father. But if the mother is entitled to a share in the partition of ancestral property after the death of the father, there is no valid reason why, upon the same principle, she should not get a share when the ancestral property is divided between the father and the son. Moreover, v. 2, s. 6, chap. I, which applies to the partition of paternal as well as of ancestral property, shows by implication that the proposition of law laid down in these cases is quite in accordance with the view of the author of the Mitakshara. Speaking of the rights of the posthumous son, he says—"The sons being separated from their father, one who shall be afterwards born of a wife equal in class, shall share the distribution. What is distributed, is distribution, [20] meaning the allotments of the father and mother: he shares that; in other words, he obtains after (the demise of) parents, both their portions: his mother's portion, however, only if there be no daughter; for it is declared, that daughters share the residue of the mother's property after payment of her debts."

It is clear from this text, that, on the distribution of the ancestral property, a share is allotted to the mother also.

The appeal is therefore dismissed with costs.

Appeal dismissed.

NOTES.

[The mother (or grandmother) is entitled (except in the Dravida School) to a share on partition, whenever and however brought about whether at the instance of the sons or grandsons or purchasers of coparcenary shares:—8 Cal., 17; 537; 649; 27 Cal., 551; 77; 31 Cal., 262; 1065; and she is entitled to separate enjoyment thereof:—32 Cal., 234. See also 15 Cal., 292, a case under the Dayabhaga Law. For the rights of the step-mother, see 8 Cal. 537; 16 Cal., 758; 1 C. L. J. 142.]

[8 Cal. 20]

APPELLATE CIVIL.

The 22nd June, 1881.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Narsing Dass.....Plaintiff

versus

Najmooddin Hossein.....Defendant.*

Mahomedan law—Mortgage—Ancestral debt—Money-decree—Purchaser at execution sale—Notice—Alienation by heir.

In execution of a money-decree against the heirs of a deceased Mahomedan for a debt incurred by him, A purchased certain property which had been allotted to the widow of the deceased in lieu of dower and of her share of the inheritance. Previously to the purchase, however, the widow had mortgaged the same property to B, who, at the time of the mortgage, knew of the debt for which the decree was obtained. In a suit by B against A, on the mortgage, it was not shown that there were not assets in the hands of the heirs-at-law to satisfy the debt due to A's vendor.

Held, that B was entitled to recover.

Syed Bazarjet Hossein v. Dooli Chund (L. R., 5 L. A., 211) followed.

IN this case it appeared that, on the 18th of October 1866, one Eftakharuddin executed a money-bond in favour of one Lalla Jha for the sum of Rs. 546. Eftakharuddin died some time afterwards, and on the 20th November 1872, Lalla Jha, in a suit against the heirs of Eftakharuddin, obtained a decree on his bond. This decree was reversed on appeal by the Additional Judge of Tirhoot, on the 8th of April 1873, but was restored [21] by the High Court on Special Appeal on the 20th of April 1874. On the 26th of February 1876, Lalla Jha sold his decree to the defendant Chowdhry Najmooddin Hossein, who, at a sale in execution of this decree, purchased the share of Eftakharuddin's widow in Mouza Jhurja, a property which had belonged to Eftakharuddin, and which, at a partition amongst the heirs of Eftakharuddin, had been allotted to the widow, partly as her share of the inheritance and partly in lieu of dower. Previously, however, and on the 28th of March 1874, the widow had mortgaged to the plaintiff her share in Mouza Jhurja, and on the 16th of March 1878, he brought the present suit against the widow and Najmooddin Hossein to recover the mortgaged-money. The defence was, that the bond of 1874 was fraudulent and void; and that, even if it were not so, under Mahomedan law the title of the defendant was superior to that of the plaintiff.

The Subordinate Judge found that the bond of 1874 had been executed *bona fide* for valuable consideration, and without notice of Lalla Jha's claim; and he decreed the plaintiff's claim with costs. The District Judge on appeal said,—that “if the mortgage was a *bona fide* transaction, and the mortgagee

* Appeal from Appellate Decree, No. 2847 of 1879, against the decree of T. M. Kirkwood, Esq., Judge of Muzafferpore, dated the 14th June 1879, reversing the decree of Baboo Aghore Nath Ghose, Subordinate Judge of that District, dated the 2nd August 1878.

exercised due care and caution, and was without notice of any prior claim on the estate," then the decree of the lower Court was right. But he found that "the plaintiff has failed to prove that consideration really passed under the mortgage-bond on which he sues, or that he was acting *bona fide*, or, if consideration did pass, that he exercised due caution, and was reasonably satisfied of the necessity of the loan for the purposes of the estate." The Judge then reversed the decree of the lower Court, and dismissed the plaintiff's suit with costs.

The plaintiff appealed.

Baboo Mohesh Chunder Chowdhry for the Appellant.

Mr. M. L. Sandel for the Respondent.

The **Judgment** of the Court (MITTER and MACLEAN, JJ.) was delivered by

Mitter, J.—This was a suit on a bond for Rs. 1,800, [22] executed by Fahtemul Zohra, widow of Sheikh Eftakharuddin, hypothecating, amongst other properties, one anna fifteen gandas of Jhurja, of which the respondent is in possession under an auction-purchase of the rights of the aforesaid widow made on the 15th August 1877. The mortgage-bond is dated the 28th March 1874.

It appears that Sheikh Eftakharuddin died between 1868 and 1872, leaving him surviving the aforesaid widow and two sons as his heirs. In the year 1866 he borrowed Rs. 546 by a bond, dated the 18th of October, from a person named Lalla Jha, who obtained a decree for the loan against the aforesaid heirs on the 20th November 1872.

This decree was reversed by the Judge on the 8th April 1873, but was restored by this Court in Special Appeal on the 20th April 1874.

It appears that Sheikh Eftakharuddin was possessed of four annas of this mouza, *viz.*, Jhurja. After his death, by a Tukseemnamah, dated the 20th January 1871, executed between his heirs, one anna fifteen gandas was allotted to the widow, fifteen gandas in lieu of her dower, and the residue as her share by right of inheritance. Lalla Jha sold the decree obtained by him to the respondent, who, in execution of it, first of all attached the whole four annas; but by a petition subsequently made, proceeded only against one anna fifteen gandas, the share hypothecated in the plaintiff's bond. The plaintiff thereupon put in an application in the execution Court, notifying his mortgage, and the property was sold with the notice of his mortgage, and purchased by the respondent himself on the 15th August 1877.

The defence of the respondent is substantially based upon two grounds, namely,—1st, that he having purchased the property in execution of a decree passed for the debts due from the ancestor, must be deemed to have acquired it under the Mahomedan law free from the incumbrance created by one of the heirs; and 2nd, that the bond was a collusive instrument brought about to defeat the claim of his vendor. The Subordinate Judge overruled both these pleas and awarded a decree, directing, that that part of the mortgaged premises which is [23] still in possession of the original mortgagor, should be sold first, and that if, after such sale, the decree be not satisfied, one anna fifteen gandas of Mouza Jhurja in the possession of the respondent should then be sold. On appeal the District Judge has reversed this decree so far as the respondent is concerned. He finds (i) that the plaintiff had notice of the debt of Lalla Jha,

still remaining unpaid when the bond was executed in his favour; and (ii), that the "plaintiff has failed to prove that consideration really passed under the mortgage-bond on which he sues."

If this last finding is correct, we cannot interfere. But it seems to us that the bond upon which the suit is brought has been proved by the lower Court to have been executed by Fahtemul Zohra. The respondent acquired her rights in one anna fifteen gandas of this property in the year 1877, the bond having been executed in the year 1874. The recital in the bond that the consideration was received by the executant, is evidence *quantum valeat* against the respondent. Therefore, until the latter can show that this recital is not true, it must be held that the consideration was paid. This has not been shown; therefore, the finding of the lower Appellate Court upon this point cannot stand. Consequently, the position of the plaintiff is this:—He took a mortgage from one of the heirs of a deceased Mahomedan having notice of an outstanding debt due from her ancestor. Is the mortgage under the Mahomedan law absolutely void? I do not think that there is any authority for holding the affirmative. In *Syud Bazayet Hossein v. Dooli Chund* (L.R. 5 I.A., 222), the Judicial Committee of the Privy Council, after reviewing many decided cases on the point, laid down the law thus:—"A creditor of a deceased Mahomedan cannot follow his estate into the hands of a *bonâ fide* purchaser for value to whom it has been alienated by his heir-at-law." But it does not follow from this that such a creditor, under all circumstances, can follow the estate in the hands of a purchaser who had notice of his claim. The purchase with notice is not absolutely void, but the purchaser takes the property subject to the rights [24] of the creditor whatever they are. The Mahomedan law on this subject is, that, out of the assets of a deceased person, funeral expenses should be defrayed first, then the debts, and then the legacies. The residue is to be distributed amongst the heirs. Therefore, if the assets in the hands of an executor or the heirs-at-law are not sufficient to discharge a particular debt, the creditor may follow any property in the hands of a purchaser from the executor or heirs-at-law with notice of his claim. In this case it is not shown that the assets in the hands of the heirs-at-law were not sufficient to satisfy the debt due to the respondent's vendor. On the other hand the fact is, that the debt was satisfied by the sale of a portion of the assets in the hands of one of the heirs, *viz.*, the equity of redemption of Musst. Fahtemul Zohra in one anna fifteen gandas of Mouza Jhurja.

The decree of the lower Appellate Court is therefore erroneous, and we accordingly set it aside and restore that of the first Court with costs.

Appeal allowed.

NOTES.

[See the Notes to 4 Cal., 402 in the LAW REPORTS REPRINTS, CAL. Vol. 2.]

[8 Cal. 24]

APPELLATE CIVIL.

The 16th August, 1881.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE FIELD.

Rajkristo Moitro and others.....Defendants

versus

Koylash Chunder Bhattacharjee.....Plaintiff.*

Unlawful agreement—Void consideration—Public policy—Agreement to suppress Criminal proceedings.

The plaintiff sued the defendant for possession of a house and premises, which he had bought from the latter. The defence was, that the sale was made for the purpose of raising money to be given to certain third parties as a bribe to induce them to withdraw a charge of criminal breach of trust, which they had preferred against the defendant. The lower Appellate Court held, that the defence was bad, on the ground that there was no evidence to show that the plaintiff was a party to, or in any way concerned in, the unlawful agreement, and gave the plaintiff a decree.

[25] *Held*, that the decree was correct, as there was no evidence to show either that the plaintiff knew of the agreement to suppress the criminal prosecution, or that any money had been paid in pursuance of such unlawful agreement.

THIS was a suit for possession of certain land and buildings, brought by Koylash Chunder Bhattacharjee against Rajkristo Moitro and two persons named Chuckerbutty. The plaintiff alleged that the premises had, in the first instance, belonged to the Chuckerbutty defendants; that they had been purchased by Rajkristo at a sale held in execution of a money-decree obtained against the Chuckerbuttys by some third party; and that, on the 4th of September 1878, Rajkristo had sold them to the plaintiff for Rs. 320, but had since refused to give up possession to the plaintiff. Rajkristo's defence was, that the Chuckerbuttys had brought a charge of criminal breach of trust against him; that they agreed to withdraw the charge in consideration of his conveying to them the premises which he had bought at the execution-sale; and that he did so convey by executing a kobala in the name of the plaintiff who was a mere *benamidar* for the Chuckerbuttys.

The Court of First Instance decreed the plaintiffs claim. On appeal, the defendant shifted his case, and contended that the suit must be dismissed even if it were proved that the consideration-money had been paid, as it was paid for the purpose of being handed over by the defendant to the Chuckerbuttys as a bribe to them to withdraw from the criminal proceedings. In reference to this the Judge said:—"The plea taken in the written statement, and in regard to which the issues were framed, was, whether the appellant had been induced to sell the property to the plaintiff by intimidation or undue influence; that ground has been abandoned as untenable, and the appellant now seeks to repudiate the sale on the ground that the consideration he received was to enable him to refund some money he had embezzled and so to compromise certain criminal proceedings that had been commenced against him. The agreement to repay the money embezzled, in consideration of the withdrawal of the criminal case, was no doubt opposed to public

*Appeal from Appellate Decree, No. 691 of 1880, against the decree of H. Beverley, Esq., Additional Judge of the 24-Parganas, dated the 24th January 1880, affirming the decree of Babu Dwarknath Mitter, Munsif of Scaldah, dated the 19th May 1879.

policy and unlawful. But the question is, whether [26] a totally different agreement by which the appellant raised money from a third party is an unlawful agreement. The decision of this question must depend, I think, upon the answer to be given to another question, *viz.*, whether the third party, the present plaintiff, was a party to, or in any way concerned in, the other agreement. Of this there is no evidence whatever. It is alleged that he is merely the *benamidar* for the Chuckerbuttys; but the allegation is improbable on the face of it. And though possibly the plaintiff may have guessed or even heard of the reason why the appellant was parting with his property, still I do not think that the Court can go so far as to presume privity therefrom, and to hold that the plaintiff was bound to follow the purchase-money and see to its application." The Judge then affirmed the decree of the Court of First Instance and dismissed the appeal with costs. The defendants appealed to the High Court.

Babu Rash Behary Ghose and Babu Shoshee Bhoosun Dutt for the Appellants.

Babu Bhowany Churn Dutt and Babu Nolit Chunder Bose for the Respondent.

The following **Judgments** were delivered :—

Field, J.—The plaintiff in this case is the purchaser of certain immoveable property under a registered conveyance, and he brings this suit to obtain a declaration of his title to the property, his possession and quiet enjoyment having been disturbed by certain acts of the defendants.

The only point we have to decide is, whether the consideration for the conveyance is an unlawful consideration. The contention is, that the money for which the property was sold was used for the purpose of suppressing a criminal prosecution; that this was an unlawful object; and that the plaintiff being well aware of the unlawful purpose to which the money was about to be applied, is affected with this knowledge, and cannot enforce the contract which was made for this unlawful consideration.

We think that this contention is not tenable. The plaintiff [27] was no party to the criminal prosecution. His contract for the purchase of the property was entirely separate; and there is not sufficient evidence upon the record to show, first, that the money was paid over to the person who instituted the criminal prosecution under circumstances which would make this payment a breach of the law; and secondly, that the plaintiff was well aware of the whole of these facts. Having regard to the provisions of the exception to s. 214* of the Indian Penal Code, it is clear that it is not every compromise of

* [Sec. 214 :—Whoever gives or causes, or offers or agrees to give or cause, any gratification to any person, or to restore or cause the restoration of any property to any person, in consideration of that person's concealing an offence, or of his screening any person from legal punishment for any offence, or of his not proceeding against any person for the purpose of bringing him to legal punishment, shall, if the offence is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and if the offence is punishable with transportation for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and if the offence is punishable with imprisonment not extending to ten years, shall be punished with imprisonment of the description* provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.]

Offering gift or restoration of property in consideration of screening offender.

If a capital offence.

If punishable with transportation for life, or with imprisonment.

Exception.—The provisions of sections 213 and 214 do not extend to any case in which the offence consists only of an act irrespective of the intention of the offender and for which act the person injured may bring a civil action.]

a criminal prosecution out of Court which is a breach of the positive law. In this particular instance the prosecution was for a criminal breach of trust, and there is probably no class of criminal cases between which and matters of purely civil remedy it is more difficult to draw the line accurately. Under those circumstances, we think that, as the contract in this case was not made with the prosecutor in the criminal case, but was a wholly separate contract, and as the facts are not sufficiently well proved to show that that compromise was a breach of the positive law, and that the plaintiff was well aware of this, and that those facts constituted a breach of the law, we think that the contention of the appellant cannot succeed. The appeal must, therefore, be dismissed with costs.

Prinsep, J.—I concur in dismissing this appeal. The law on this point, supposing that the agreement had been made directly with the plaintiff, is thus summed up by Mr. Pollock in his *Principles of Contract* (p. 342, 2nd ed):—
“A makes an agreement with B, who intends, by means of something to be obtained or done under it, to effect an unlawful or immoral purpose. If A does not know of this purpose, there is a contract voidable at his option when he discovers it. If he does know of it, the agreement is void.” In the present instance, the District Judge finds that there is no evidence to show that the plaintiff was aware of the object to be attained by this agreement, supposing it to be immoral; and on that ground, in my opinion, the case was rightly decided.

Appeal dismissed.

[28] PRIVY COUNCIL.

The 22nd and 23rd June, 1881.

PRESENT :

SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH, AND SIR A. HOBHOUSE.

Polokdhari Rai and others.....Judgment-debtors

versus

Radha Persad Singh.....Decree-holder.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Execution of Decree—Appealable Order—Civil Procedure Code (Act X of 1877), ss. 244 and 588, cls. (j) and (r).

An order for attachment and sale of property in execution of a decree, is an order “of the same nature with” an order made in the course of a suit for attachment of the debtor’s property. The latter order is appealable under s. 588, cl. (r) * of the Code of Civil Procedure. It follows that an order for attachment and sale in execution of a decree is [according to the requirement of s. 588, cl. (j)] “of the same nature with appealable orders made in the course of a suit”; and therefore is appealable under that section.

Orders appealable. * [Sec. 588 :— An appeal shall lie from the following orders under this Code and from no other such orders :—

(i) orders under section 244, as to questions relating to the execution of decrees, of the same nature with appealable orders made in the course of a suit :•

(r) orders under section 479, 480, 481, 485, 492, 493, 496, 503 ;

APPEAL from a decree of the High Court (1st April 1879, I. L. R., 5 Cal., 51), dismissing an appeal from an order of the Subordinate Judge of Shahabad (31st August 1878).

The question arising on this appeal was, whether, under the Code of Civil Procedure, s. 588, an appeal would lie from an order of a Court disallowing objections made to the execution of a decree, and in effect granting an application for the attachment and sale of certain property belonging to the judgment-debtor. The decree had been obtained by the father of the present respondent in 1856, in the Court of the Judge of Ghazipore, for the possession, with mesne profits, of lands then situate in that district. Having been modified by the High Court of the North-Western Provinces, the decree was affirmed on appeal to Her Majesty's Council in 1867. While the appeal was pending, the Government of India, in January 1867, issued an order, whereby the boundary between the districts of Shahabad and of Ghazipore was altered, and the lands in suit were thenceforth within the Shahabad district.

[29] In consequence of this change, the execution record was, on the 11th November 1867, sent by the Court of the Principal Sadr Amin of Ghazipore, where it was then pending, to the Court of the District Judge of Shahabad, by whom it was transferred to the Subordinate Judge of the same district. On an application to have the amount of mesne profits ascertained, the Subordinate Judge found upwards of eleven lakhs of Rupees to be due; and after proceedings taken by the judgment-debtors in order to get the case back to Ghazipore, the record was, by order of the High Court of the North-Western Provinces, finally taken away from that jurisdiction, and remained with the Subordinate Judge of Shahabad. In this Court the decree-holder, on the 26th June 1878, applied for execution of his decree for mesne profits against certain lands of the judgment-debtors situate in the Shahabad district, by sale of their right, title, and interest therein. The judgment-debtors filed objections, to the effect that the execution-proceedings had been carried on in a Court not having jurisdiction, and that the application was barred by limitation under art. 179^a of the Limitation Act (XV of 1877). On the 31st August 1878, an order was made by the Subordinate Judge of Shahabad, disallowing these objections, referring, on the question of jurisdiction, to *Kallee Dos Neogy v. Huronath Chowdhry* (3 W. R., Civ. Rul., 5).

* [Art. 179 :—

Description of application.	Period of limitation.	Time from which period begins to run.
For the execution of a decree or order of any Civil Court not provided for by No. 180 or by the Code of Civil Procedure, section 230.	Three years : or where a certified copy of the decree or order has been registered, six years.	(1) The date of the decree or order, or (2) (where there has been an appeal) the date of the final decree or order of the Appellate Court, or (3) (where there has been a review of judgment) the date of the decision passed on the review, or (4) (where the application next hereinafter mentioned has been made) the date of applying, in accordance with law, to the proper Court for execution, or to take some step in aid of execution, of the decree or order, or

Against this order the judgment-debtors appealed to the High Court, which held, that no appeal against that order would lie under s. 588 of the Code of Civil Procedure; and therefore did not dispose of the questions of limitation and jurisdiction forming the grounds of appeal. The Judgment is reported in the Indian Law Reports, 5 Calcutta Series, p. 51.

On this appeal.

Mr. T. H. Cowie, Q.C., and Mr. Herbert Cowell for the Appellants.

Mr. J. F. Leith, Q.C., and Mr. R. V. Doyne for the Respondent.

Description of application.	Period of limitation.	Time from which period begins to run.
		<p>(5) (where the notice next herein-after mentioned has been issued) the date of issuing a notice under the Code of Civil Procedure, section 248, or</p> <p>(6) (where the application is to enforce any payment which the decree or order directs to be made at a specified date) the date so specified.</p> <p><i>Explanation I.</i>—Where the decree or order has been passed severally in favour of more persons than one, distinguishing portions of the subject-matter as payable or deliverable to each, the application mentioned in clause 4 of this number shall take effect in favour only of such of the said persons or their representatives as it may be made by. But when the decree or order has been passed jointly in favour of more persons than one, such application, if made by any one or more of them, or by his or their representatives, shall take effect in favour of them all.</p> <p>Where the decree or order has been passed severally against more persons than one, distinguishing portions of the subject-matter as payable or deliverable by each, the application shall take effect against only such of the said persons or their representatives as it may be made against. But where the decree or order has been passed jointly against more persons than one, the application if made against only one or more of them, or against his or their representatives, shall take effect against them all.</p> <p><i>Explanation II.</i>—“Proper Court” means the Court whose duty it is (whether under sections 226 or 227 of the Code of Civil Procedure or otherwise) to execute the decree or order.]</p>

[30] On the question, whether the proceeding of 31st August 1878 was an appealable order, it was contended that it fell within the language of s. 588, cl. (j) of the Code of Civil Procedure. The dispute of jurisdiction was cognizable also, according to the general principle mentioned in the judgment in *Allaf Hossein v. Grish Chunder Roy* (15 W. R., Civ. Rul., 556).

For the respondent it was argued, that the decision of the Subordinate Judge only disallowed objections, and was not a general order for attachment and sale. But even if dealt with as equivalent to an order for attachment and sale, it was an order upon a question relating to the execution of a decree under s. 244* of the Code of Civil Procedure; but was not "of the same nature with" any of the appealable orders enumerated in s. 588.

SIR B. PEACOCK having stated that their Lordships held the order to be appealable within the meaning of s. 588, counsel for the appellants were heard on the grounds of appeal taken in the High Court, *viz.*, limitation, and the alleged absence of jurisdiction. Reference was made to *Rajeeb Ram Doss v. Mahomed Haseem* (6 W. R., Mis., 51).

On this part of the case the respondent's counsel were not called upon.

Their Lordships' **Judgment** was delivered by

Sir B. Peacock.—The appeal to the High Court in this case was from an order of the Subordinate Judge of Shahabad made upon an application for execution of a decree, praying that an attachment and sale of the judgment-debtors' property specified in the application should be held for the purpose of satisfying the decree. A question arose as to whether the Statute of Limitation was a bar to that application, and the Subordinate Judge held, that the debtors' plea of limitation should be disallowed with costs. He did not go on to say that the attachment be issued; but their Lordships treat the order as substantially an order that the debtors' plea of limitation should [31] be disallowed, and that the application should be granted. The case was appealed to the High Court, and that Court dismissed the appeal upon the ground that the order was not an appealable order within the meaning of the 588th section of Act X of 1877. The section says:—"An appeal shall lie from the following orders under this Code, and from no other such orders"; and then a number of orders are enumerated, and amongst them are the orders specified in cls. (j) and (r). Clause (j) is:—"Orders under s. 244 as to questions relating to the execution of decrees of the same nature with appealable orders made in the course of the suit"; and one of the orders in cl. (r) is an order under s. 485, by which property of the defendant sufficient to satisfy any decree which may be passed in the suit may, under certain circumstances, be attached in the course of a suit, and need not, according to the provisions of s. 490, be

Question to be decided by Court executing decree.

* [Sec. 244:—The following questions shall be determined by order of the Court executing a decree and not by separate suit (namely):—

- (a) questions regarding the amount of any mesne profits as to which the decree has directed inquiry;
- (b) questions regarding the amount of any mesne profits or interest which the decree has made payable in respect of the subject-matter of a suit between the date of its institution and the execution of the decree, or the expiration of three years from the date of the decree;
- (c) any other questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution of the decree. Nothing in this section shall be deemed to bar a separate suit for mesne profits accruing between the institution of the first suit and the execution of the decree therein, where such profits are not dealt with by such decree.]

re-attached in execution of such decree. The question then is, whether an order for attachment and sale in execution of a decree is an order "of the same nature" as an order made in the course of a suit for attachment of the debtor's property. Their Lordships think that the nature of the order in both cases is an order for attachment of property, and that an order for attachment of property in execution of a decree is an order of the same nature as an order for attachment of property in the course of the suit. Indeed, the only appealable order in the course of a suit at all resembling an order for attachment of property in execution of a decree, is an order under s. 485. Their Lordships, therefore, are of opinion that, taking the order under appeal as substantially an order for attachment and sale of the property in execution of the decree, it was an appealable order within s. 588. The learned Judges of the High Court have not very clearly stated their reasons, but the learned Chief Justice, Sir RICHARD GARTH, does state that the order in this case was substantially, and in fact, an order to grant an application for attachment and sale; and in that remark their Lordships concur. They, therefore, think that the order of the High Court ought to be reversed, so far as it says that the order is not appealable.

[The rest of the judgment is not material for the purposes of [32] this report. In the result the judgment of the High Court was affirmed and the appeal dismissed.]

Appeal dismissed.

Solicitors for the Appellants : Messrs. *Barrow and Rogers.*

Solicitors for the Respondents : Messrs. *Barton, Yeates, Hart, and Burton.*

NOTES.

[Under the C.P.C. 1908, all orders falling under section 47 (corresponding to s. 244 of the previous Code) are deemed to be decrees and hence appealable as decrees. Sec. 485 of that Code corresponds to O. 38, r. 6 and the order is made appealable as an order under O. 43, r. 1 cl. (g).]

[8 Cal. 32]
APPELLATE CIVIL.

The 12th August, 1881.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE FIELD.

Jan Ali and another.....Plaintiff

versus

Ram Nath Mundul and others.....Defendants.*

Religious Endowments—Pleading—Form of suit— Civil Procedure Code
(Act X of 1877), ss. 30, 539—Reg. XIX of 1810—Act XX of 1863.

In a suit by two of the worshippers at a certain mosque, instituted after having obtained the sanction of the Advocate-General under s. 539† of the Civil Procedure Code, against the mutawalli of the mosque, and two other persons to whom the mutawalli had mortgaged part of the endowed property to secure the repayment of a loan, it appeared that one of the mortgagees had sold some of the *wuqf* property in execution of a decree which he had obtained upon his mortgage, and the property had been purchased by the other mortgagee. The plaintiffs prayed, that the property purchased might be declared to be *wuqf*; that the sale in execution might be declared to be invalid; that a mutawalli might be appointed by the Court; and that the costs of doing the acts of the *wuqf* might be defrayed from the profits of the property belonging to the endowment.

Held, that so far as regarded that portion of the prayer as fell within the provisions of s. 539 of the Code, the plaintiffs were not entitled to sue, as they were not “persons having a direct interest in the trust” within the meaning of the section, and that the suit should have been instituted under s. 14‡ of Act XX of 1863 after sanction obtained under s. 18.‡

* Appeal from Original Decree, No. 149 of 1880, against the decree of W. H. Verner, Esq., Officiating Judge of East Burdwan, dated the 29th March 1880.

†[Sec. 539 :—In case of any alleged breach of any express or constructive trust created for

When suit relating to public charities may be brought.

public charitable purposes, or whenever the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General acting *ex-officio*, or two or more persons having a direct interest in the trust and having obtained the consent in writing of the Advocate-General, may institute a suit in the High Court or the District Court within the local limits of whose civil jurisdiction the whole or any part of the subject-matter of the trust is situate, to obtain a decree—

- (a) appointing new trustees of the charity ;
- (b) vesting any property in the trustees of the charity ;
- (c) declaring the proportions in which its objects are entitled ;
- (d) authorizing the whole or any part of its property to be let, sold, mortgaged or exchanged ;
- (e) settling a scheme for its management ;

or granting such further or other relief as the nature of the case may require.

The powers conferred by this section on the Advocate-General may (where there is no Advocate-General) be exercised by the Government Advocate, or (where there is no Government Advocate) by such officer as the Local Government may appoint in this behalf.]

‡[Sec. 14 :—Any person or persons interested in any Mosque, Temple, or religious establishment, or in the performance of the worship or of the service thereof, or the trusts relating thereto, may, without joining as plaintiff any of the other persons interested therein, sue before the Civil Court, the Trustee, Manager, or Superintendent of such Mosque, Temple, or religious establishment, or the Member of any Committee appointed under this Act, for any misfeasance, breach of trust, or neglect of duty, committed by such Trustee, Manager, Superintendent, or Member of such Committee, in respect of the Trusts vested in, or confided to, them respectively, and the Civil

Any person interested may sue in case of breach of trust, &c.

member of any Committee appointed under this Act, for any misfeasance, breach of trust, or neglect of duty, committed by such Trustee, Manager, Superintendent, or Member of such Committee, in respect of the Trusts vested in, or confided to, them respectively, and the Civil

[33] *Held* also, that though the plaintiffs might possibly have obtained leave to sue under s. 30* of the Code on behalf of themselves and the other persons attending the mosque, they not having obtained such leave, were not entitled to institute the suit for the purpose of obtaining the relief asked for in the other prayers of the plaint.

The words "trustee, manager or superintendent of a mosque," &c., mentioned in Act XX of 1863, mean the trustee, manager or superintendent of a mosque, &c., to which the provisions of the Act are applicable, not the trustee, &c., of *any* mosque. And such persons are those to whom the provisions of Reg. XIX of 1810 were applicable.

The mosques, &c., to which the provisions of that Regulation were applicable, were mosques for the support of which endowments had been granted in land by the Government of the country or by individuals, and the mosques, &c., to which the provisions of Act XX of 1863 apply are, not any mosques, &c., but any mosques for the support of which endowments in land have been made by the Government or private individuals.

IN this case it appeared, that one Sheikh Meheroolah executed a deed of *wuqf* on the 8th Aghran 1241, or 22nd November 1834; and under it he made an endowment of certain land, directing that the profits thereof should be appropriated to the maintenance of a mosque, and for guests, travellers, and indigent persons. The defendant No. 1 was appointed *mutawalli* under this deed of *wuqf*. The plaintiffs in this suit were, as they stated in the 10th paragraph of their plaint, followers of the Mussulman religion, living in the village of Gopalpore, in which the mosque was situated. They said, that they had, therefore, a right and interest in protecting the masjid. They then alleged that the defendant No. 1, the *mutawalli*, took a loan of Rs. 575 from the defendant No. 2, on the 31st Bysack 1277 (13th May 1870), mortgaging to him the property set out in the schedule annexed to the plaint, which was part of the endowed property; and that he also took a loan of Rs. 650 from the defendant No. 3, on the 20th Cheyet 1278 (1st April 1872), and concluded an *izara*-settlement with the defendant No. 3. The plaint then stated that the defendant No. 2 brought a suit upon the mortgage-bond, obtained a decree, took out execution, and brought to sale the property which was the subject of the mortgage-bond, whereupon the defendant No. 3 purchased this property. They then [34] asked in their plaint—*first*, that the property mentioned in the schedule to the plaint might be declared to be *wuqf* property; *secondly*, that the auction-purchase of the property No. 2, on the 8th January 1878, made by the defendant No. 3, and the *izara* and mortgage in favour of the defendant No. 3, might be declared invalid; *thirdly*, that a competent person might be appointed by the Court as *mutawalli* for performing the work connected with the *wuqf*.

They did not ask that the present *mutawalli* might be removed, but the Court considered that it was intended to ask for his removal, as otherwise another *mutawalli* could not be appointed in his place. *Fourthly* they asked, that an order might be passed to the effect that the costs of doing the acts of the *wuqf* might be defrayed from the profits of the property mentioned in the schedule annexed to the plaint.

Court may direct the specific performance of any act by such Trustee, Manager, Superintendent, or Member of a Committee, and may decree damages and costs against such Trustee, Manager, Superintendent or Member of a Committee, and may also direct the removal of such Trustee, Manager, Superintendent, or Member of a Committee.]

* [Sec. 30 :—Where there are numerous parties having the same interest in one suit, one

One party may sue or defend on behalf of all in same interest.

or more of such parties may, with the permission of the Court, sue or be sued, or may defend in such suit, on behalf of all parties so interested. But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such parties either by personal service or (if from the number of parties or any other cause such service is not reasonably practicable) then by public advertisement, as the Court in each case may direct.]

The plaintiffs had obtained the sanction of the Advocate-General to the institution of the suit under s. 539^a of the Civil Procedure Code.

The learned Judge in the Court below dismissed the suit, mainly on the ground that the plaintiffs had no cause of action against the defendants, under the Code.

The plaintiffs appealed to the High Court.

Munshi *Serajul Islam* for the Appellants.

Babu *Nilmadhub Sen* and Babu *Rashbehary Ghose* for the Respondents.

The **Judgment** of the Court (PRINSEP and FIELD, JJ.) was delivered by

Prinsep, J. (who, after stating the facts of the case as above, continued): Now, the first and indeed the only question which we have to decide is, whether the plaintiffs were competent to institute and maintain this suit. They seem to have thought that the suit was within the provisions of s. 529 of the Code of Civil Procedure; and they made an application to, and obtained the sanction of, the Advocate-General before instituting their suit. Now, the first observation that occurs to us on this point is, that a considerable portion of the prayer of the suit is clearly [35] outside the provisions of s. 539, and that, in so far as regards so much of the prayer as does not fall within the provisions of this section, for reasons to be given hereafter, the plaintiffs were not entitled to institute this suit. But it appears to us that, even so far as regards that portion of the prayer of the plaint which falls directly within the provisions of s. 539, the plaintiffs are not persons to whom the provisions of that section can be held to be applicable. The section provides, that "in case of any alleged breach of any express or constructive trust created for public charitable purposes, or whenever the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General, acting *ex-officio*, or two or more persons having a direct interest in the trust and having obtained the consent in writing of the Advocate-General, may institute a suit in the High Court or the District Court, &c." Now, this suit was not instituted by the Advocate-General. It was instituted by two persons who obtained the sanction of the Advocate-General in writing. Then arises the question—Were these two persons "persons having a direct interest in the trust" within the meaning of this section. We think that this question must be answered in the negative. The only interest which the plaintiffs allege in their plaint is, that they are followers of the Moslem religion; that they live in the village of Gopalporo; and that they had been in the habit of attending prayers in the mosque. We think that, assuming the facts here stated to be correct, they do not constitute a direct interest in the trust. It is scarcely necessary to support this by argument, but we may refer to s. 15 of Act XX of 1863 (The Religious Endowments Act), in which a clear distinction is drawn between persons having a direct or "immediate interest," and persons "having a right of attendance, or having been in the habit of attending, at the performance of the worship or service of any mosque, temple," and so forth. It is quite clear, that, according to the intention of the Legislature as shown in this section, persons who are in the habit of attending prayers at a Mahomedan mosque are not persons who have a direct interest in the endowment. Then arises the question whether the provisions of The Religious [36] Endowments Act XX of 1863, are applicable to the present case. This is a question of some nicety, but we think that if this Act be read with the old Regulation to which it refers, any difficulty that

* [*q. v. supra*, 8 Cal. 32.]

may at first sight suggest itself will disappear. Section 18* of the Act enacts, that no suit shall be entertained under this Act without a preliminary application being first made to the Court for leave to institute such suit. The word 'Court,' according to the definition, means the principal Court of original civil jurisdiction in the district; and it is admitted that no preliminary application was made to the District Judge in the present case for leave to institute this suit. Then what are the suits which may be instituted under the Act? Section 14 provides, that any person or persons interested in any mosque, temple, or religious establishment, &c., may, without joining as plaintiff any of the other persons interested therein, sue before the Civil Court the trustee, manager, &c., &c., for any misfeasance, breach of trust, or neglect of duty, &c., and the Civil Court may direct the specific performance of any act by such trustee, manager, and so forth, and may also direct the removal of such trustee, manager, &c. Now, the only part of the prayer of this plaint which falls within the purview of this section, is so much of it as must be construed to be a request that the defendant No. 1 be removed from his office of mutawalli, and so much of the fourth prayer as asks that the expenses of performing the acts of the *wuqf* be defrayed from the profits of the properties mentioned in the schedule annexed to the plaint. For the present we reserve consideration of the other prayers of the plaint. Now, the words of s. 14 are very general in their terms, and the question arises, what is meant by the trustee, manager, or superintendent of a mosque mentioned in s. 14; does it mean the trustee, manager, or superintendent of *any* mosque, or the trustee, manager, or superintendent of a mosque to which the provisions of Act XX of 1863 are applicable. We think the latter construction is the proper one. Then what are the mosques to which the provisions of Act XX of 1863 are applicable? In order to answer this question, we must examine, not only the Act itself, but the old Regulation, XIX of 1810. The preamble to [37] this Regulation is as follows:—"Whereas considerable endowments have been granted in land by the preceding Governments of this country and by individuals for the support of mosques, Hindu temples, colleges, and for other pious and beneficial purposes; and whereas there are grounds to suppose that the produce of such lands is in many instances appropriated contrary to the intentions of the donors, to the personal use of the individuals in immediate charge and possession of such endowments; and whereas it is an important duty of every Government to provide that all such endowments be applied according to the real intent and will of the grantor," &c. Now, it is clear from this preamble, that the mosques with which the Regulation is concerned, are mosques for the support of which endowments have been granted in land by preceding Governments of this country and by individuals. The Regulation then goes on to vest, by s. 2, the general superintendence of all these lands in the Board of Revenue. Section 3 declares it to be the duty of the Board of Revenue to take care that all endowments made for the maintenance of establishments of the above description be duly appropriated to the

* [Sec. 18 :—No suit shall be entertained under this Act without a preliminary application being first made to the Court for leave to institute such suit. The application may be made upon unstamped paper. The Court, on the perusal of the application, shall determine whether there are sufficient *prima facie* grounds for the institution of a suit, and if in the judgment of the Court there are such grounds, leave shall be given for its institution.]

In calculating the costs at the termination of the suit, the stamp duty on the preliminary application shall be estimated, and shall be added to the costs of the suit. If the Court shall be of opinion that the suit has been for the benefit of the trust, and that no party to the suit

is in fault, the Court may order costs, or such portion as it may consider just, to be paid out of the estate.]

purpose for which they were destined by the Government or the individuals by whom such endowments were granted. Sections 4, 5, and 6 contain provisions as to the mode in which this duty is to be performed. Section 8 enacts that, in order to enable the Board of Revenue to carry into effect the duties entrusted to them by this Regulation, local agents shall be appointed subject to the authority and control of the Board. Section 9 declares the Collectors of districts to be *ex-officio* agents. Section 10 makes it the duty of these local agents to obtain full information, from the public records and by personal enquiries, respecting all endowments. Section 11 makes it the duty of these agents further to ascertain and report the names, together with other particulars, of the present trustees, managers, or superintendents of the several institutions, foundations, or establishments described in the Regulation, whether under the designation of mutawalli or any other, and by whom and under what authority appointed or elected. Section 12 directs the local agents to report to the respective Boards all vacancies or casualties which may occur, with full information as to the [38] pretensions of claimants. Section 13 directs that, in those cases in which the nomination to the office of trustee, manager, or superintendent rests with Government or a public officer, the agents are to recommend fit persons to fill up the vacancies. Section 14 directs the Board of Revenue, on receipt of the report and information required by the above section, to appoint the person or persons nominated for their approval, or make such other provision for the trust, superintendence, and management as to the Board may seem proper. Now it is notorious, that, after the passing of that Regulation, the Collectors of districts furnished to the Board of Revenue information regarding some of those Hindu and Mahomedan endowments with which the Regulation was concerned; and, in some instances, the Board of Revenue took over the management of the land which formed the subject of the endowment; but in the large majority of instances, the Board of Revenue did not take charge of the land which had been granted by individuals for the support of mosques, Hindu temples, &c. Nearly half a century afterwards, the Government, for reasons to which it is unnecessary to advert here, came to the conclusion that they ought to divest themselves of the management of the lands which they had taken under their charge in accordance with the provisions of that Regulation; and it was to effectuate this purpose that Act XX of 1863 was passed by the Legislature. The preamble to this Act is as follows:—“Whereas it is expedient to relieve the Board of Revenue, and the Local Agents in the Presidency of Fort William in Bengal and the Presidency of Fort Saint George, from the duties imposed on them by Reg. XIX of 1810 of the Bengal Code, so far as those duties embrace the superintendence of lands granted for the support of mosques or Hindu temples, and for other religious uses; the appropriation of endowments made for the maintenance of such religious establishments; the repair and preservation of buildings connected therewith, &c., &c. Then s. 3 of the Act deals with the case of every mosque, temple, or other religious establishment to which the provisions of either of the Regulations specified in s. 1 are applicable, and the nomination of the trustee, manager, or superintendent whereof at [39] the time of the passing of the Act is vested in, or may be exercised by, the Government. If this section is read with the sections of the Regulation to which I have already referred, it is perfectly clear that the trustee, manager, or superintendent mentioned in Act XX of 1863 is the trustee, manager, or superintendent of those mosques to which the provisions of Reg. XIX of 1810 were applicable; and, as I have already pointed out, it is clear from the preamble to that Regulation that the mosques to which the provisions of the Regulation are applicable, are mosques for the support of which endowments had been granted

in land by the Government of the country or by individuals. The question then arises—Is the mosque with which we are now concerned a mosque for the support of which an endowment in land has been granted by Government or by individuals? and when we refer to the *wuqfnamah* at page 8 of the paper-book, it is impossible to answer that question otherwise than in the affirmative. But it may be contended that the provisions of Act XX of 1863 ought to be limited merely to those mosques, Hindu temples, &c., the land granted for the endowment of which had actually been taken under the management of the Government. Returning to s. 3, I have already pointed out that the class of cases to which this section is applicable, is that class of cases in which the trustee, manager or superintendent was appointed by Government; and as to this class of cases, the Local Government was to make special provision as provided in the Act. These special provisions are found in ss. 7, 8, 9, 10, 11, and 12; and briefly they are to this effect, that the Government should appoint, once for all, one or more committees in every division or district, and should transfer to those committees all the land or other property which previously had been under the management of the Revenue officers of Government. Then s. 4 deals with another class of cases, the class of cases in which the trustee, manager, or superintendent was not appointed by Government, nor was the appointment subject to the confirmation by Government. As to this class of cases, the provisions applicable are contained in ss. 4, 5, and 6 of the Act. We have already referred to the preamble. Section 1 is merely a [40] repealing section. Section 2 contains general definitions. Section 3 and ss. 7 to 12 inclusive are concerned with that class of cases in which the trustee, manager, or superintendent was appointed by Government. Sections 4, 5, and 6 are concerned with another class of cases in which the trustee, manager, or superintendent was not appointed by Government. Then comes s. 13, which enacts:—"It shall be the duty of every trustee, manager, and superintendent of a mosque, temple, or religious establishment to which the provisions of this Act shall apply, to keep regular accounts," and so forth. Now, who are the trustees, managers, or superintendents of religious establishments to whom the provisions of this Act apply? It appears to us that if we read the language of ss. 3 and 4, it is impossible to come to any other conclusion than that the trustee, manager, or superintendent to whom the provisions of the Act apply is a trustee, manager, or superintendent of a mosque, temple, or other religious establishment to which the provisions of Reg. XIX of 1810 apply; and, as I have already pointed out, the mosque, temple, or other religious establishment to which the provision of Reg. XIX of 1810 applies, is a mosque, temple, or other religious establishment for the support of which endowments have been granted in land by the Government or by individuals. The conclusion, then, to which we are led is, that the same construction must be put upon ss. 13 and 14 of the Act, and that the mosque, temple, or religious establishment there mentioned is, not any mosque, temple, or religious establishment whatever, but any mosque, temple, or religious establishment for the support of which endowments in land have been made by the Government or private individuals. So far then as concerns that portion of the prayer of the plaint which falls within the provisions of s. 11 of Act XX of 1863, we think that this suit could not have been instituted without obtaining the sanction required by s. 18 of the Act.

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We now come to deal with the other prayers in the plaint which do not fall within the provisions of s. 14 of the Religious Endowments Act. These prayers are, that the property mentioned in the schedule to the plaint may be declared to be *wuqf*; that the mortgage and the *izara*, and the sale under the

[41] mortgage, may be set aside, and that a competent person may be appointed by the Court as mutawalli. Now, so far as regards those prayers, we think that the plaintiffs were not authorized to institute this suit merely by reason of their having that interest which is set out in para. 10 in the plaint,—that is, an interest created by their being followers of the Moslem religion, living in the vicinity of the mosque, and being in the habit of attending the musjid. That interest is common to them with a large number of other persons—common to them with, we will not say, all the Mahomedan population of the country, but certainly with all the Mahomedan residents in the vicinity; and we think that this is a case which falls within the provisions of s. 30 of the Code of Civil Procedure. That section enacts, that “where there are numerous parties having the same interest in one suit, one or more of such parties may, with the permission of the Court, sue, or be sued, or may defend in such suit, on behalf of all parties so interested.” It may be quite possible that if these plaintiffs had applied to the Court under the provisions of s. 30, they would have obtained permission to institute this suit; but not having obtained that permission, they certainly were not entitled to institute the suit; and, under these circumstances, we think that the ground of objection taken by the defendants in the second paragraph of their written statement, and which forms the subject of the second issue, was a good objection; and that this suit was properly dismissed by the District Judge. We, therefore, dismiss this appeal with costs in this Court and in the Court below.

Appeal dismissed.

NOTES.

I. APPLICABILITY OF XX OF 1863—

1. The Religious Endowments Act 1863 is applicable only to cases which would have fallen under the provisions of the earlier regulation :—18 All. 227 ; 17 Mad. 95 ; 14 C.W.N. 1104 (1106). See also 22 Mad. 223 at 226 and 227.

II. APPLICABILITY OF C.P.C. 1908, Sec. 92.

A different view was taken in 5 All. 497 ; 7 All. 178 ; 20 Cal. 810, and the right of the worshipper was held to be a private right not falling within sec. 92 C.P.C. ; but see 11 Cal. 33.

III. ‘DIRECT INTEREST’—

The word ‘direct’ was removed from the C. P. C. of 1882 by VII of 1888. See also 7 All. 178 ; 15 Bom. 612 ; 12 Mad. 157 (decisions before the amendment) ; 24 Cal. 418 (427) ; 2 C. L. J. 460 (470) cases after it.]

[42] PRIVY COUNCIL.

The 12th and 13th May, 1881.

PRESENT:

SIR B. PEACOCK, SIR M. E. SMITH, SIR R. COUCH, AND SIR A. HOBHOUSE.

Rajendronath Dutt and others.....Plaintiffs

versus

Shaikh Mahomed Lal and others.....Defendants.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Non-joinder of a necessary party—Alienation of debuttur lands—Trust for religious purposes.

The representatives of three out of four Hindus, who were joint sebaits, managing debuttur property, sued to have an alienation, made by the fourth sebaith alone, set aside. They

did not make the latter a party to the suit; nor did the plaintiffs ask the assistance of the Court to make him one, under s. 73* of Act VIII of 1859.

Held, that he was a necessary party. It was not enough that he was a member of the body of sebaits; and although indirectly he might have gained advantage from the suit brought by the other sebaits, this did not suffice to connect him with the suit as a party to it. No ground of making an exception to the general rule was presented.

APPEAL from a decree of a Divisional Bench of the High Court (18th November 1878), in part affirming, and in part reversing, a decree of the Judge of the District of East Burdwan (8th September 1876), and thereby dismissing the suit.

This suit was brought by the representatives of three out of four members of a Hindu family who were joint sebaits, holding property which had been dedicated for *debseba*. The object of the suit was to set aside an alienation made by the fourth sebit, under which the defendants, the present respondents, claimed to hold the property. The ground of the suit was, that the property, a mouza named Keshabpur, in East Burdwan, was trust property, to be held in trust for the established worship of certain deities, and was debuttur.

The fourth sebit had not joined in the suit as plaintiff, nor had he been made a defendant.

The Court of First Instance decreed in favour of the plaintiffs for part of the land claimed. On appeal, the High Court [43] dismissed the whole claim, on the ground that the fourth sebit, under whom the defendants claimed, was not a party to the suit; and also on the ground of limitation.

In the year 1813 (30th Sraban 1220, Bengali style), five brothers, surnamed Dutt, *viz.*, Manikram Sambhuram, Bissonath, Kashinath, and Gopinath, being a joint family, executed an agreement setting apart joint property for *debseba* in their family-house, and also at Sri Brindaban. First a portion, and afterwards, as it was stated, the whole of mouza Keshabpur was included in this trust.

Down to 1849, when Manikram died, he continued to be sole sebit. Sambhuram, Gopinath, and Kashinath had died before him. Manikram was succeeded in the office of sebit by his widow, Shokhimoni, during whose management proceedings were taken by some of the family to obtain a declaration of the trust. Gopinath's issue had died. Sambhuram had left a son, Brojonath; and Kashinath had left a son, Baikantnath; who afterwards made the alienation, giving rise to the present suit. The surviving brother, Bissonath, died in 1845, leaving his son Harinath, the father of the appellant in the present suit, Rajendronath Dutt.

The proceedings commenced in the time of Shokhimoni, widow of Manikram, resulted in an appeal to Her Majesty in Council; and in 1871, it was determined—see *Juggutmohini Dossee v. Mussumat Sokheemonee Dossee* (14 Moore's I. A., 289)—that the lands mentioned in the schedule to the plaint in the suit on that appeal, were dedicated to the religious purposes specified in two deeds of endowment, dated in 1813, and in 1820, and executed by the five

*[Sec. 73 :—If it appear to the Court, at any hearing of a suit, that all the persons who

Court may adjourn hearing and direct that parties appearing to be interested in a suit shall be made parties to the suit. may be entitled to or who claim some share or interest in the subject-matter of the suit, and who may be likely to be affected by the result, have not been made parties to the suit, the Court may adjourn the hearing of the suit to a future day to be fixed by the Court, and direct that such persons shall be made either plaintiffs or defendants in the suit, as the case may be. In such case the Court shall issue a notice to such persons in the manner provided in this Act for the service of a summons on a defendant.]

brothers abovementioned. On the 23rd August 1873, the parties to that suit registered a deed of settlement for the management of the trust, by which it was agreed that the office of sebaite should be held by the representatives of the four surviving lines of descent (that of Gopinath being extinct) in equal shares. Baikantnath, the son of Kashinath, was thus entitled to a fourth share, and was sebaite with three others. This deed stated that eleven annas of Keshabpur had been included in the *arpannamas*, or original [44] endowments, and that the rest of the mouza had been afterwards purchased out of proceeds of sales of debuttur property.

Meantime, however, in 1871 (26th Falgun 1275 B. S.), Baikantnath had executed a document purporting to convey to his sister's son, Anand Gopal, the mouza Keshabpur, holding himself entitled to it under a family partition. Anand Gopal then conveyed it to the defendants.

Mr. C. W. Arathoon appeared for the Appellants.

Mr. R. V. Dwyne and Mr. J. D. Mayne for the Respondents.

For the appellants it was argued, that the suit had been wrongly dismissed. The property alienated by Baikantnath had remained subject to the trust and no title could have been obtained free from the trust, by those who had taken Keshabpur *pendente lite*. *Metcalfe v. Pulvertoft* (2 V. & B., 200) was cited.

For the respondents it was submitted, that this suit could not be maintained in the absence of Baikantnath Dutt, who was a necessary party; see *Rajaram Tewari v. Lachman Prasad* (4 B. L. R., A. J., 118) and *Gokool Pershad v. Etwarree Mahto* (20 W. R., 138).

Their Lordships' **Judgment** was delivered by

Sir R. Couch.—The suit in this appeal was brought by certain persons to recover a mouza called Keshabpur; and the case stated in the plaint is, that the predecessors of the plaintiffs, being five brothers, had dedicated certain lands to family idols; that Manikram Dutt, the eldest of the brothers, being the sebaite, was managing the *seba* of the idols, out of the proceeds of the consecrated properties and was superintending the debuttur properties; and that, after the death of two of the brothers, he acted improperly with reference to the debuttur properties, and apportioned out of them a lot called Pilkundi as the share of Gopinath Dutt, one of the brothers, and the Mohal Keshabpur, the subject of the present suit, to Baikantnath Dutt, the son of Kashinath Dutt deceased, another of them. The plaintiffs sue for possession of the whole as debuttur.

[45] The property which had been so dedicated was the subject of a suit which was commenced in 1857, and ultimately came by appeal before this Board. The nature of the suit is stated in the judgment which was then delivered. The plaint in it is set forth in the record in this suit. It appears to have been brought by Harmath Dutt, the son of one of the five brothers, against all the other members of the family. Amongst them was Baikantnath Dutt, who is said in the present plaint to have had Keshabpur apportioned to him. The judgment (14 Moore's I. A., 299) states, that the suit was for possession, but not for possession in the ordinary character of proprietor of lands; that the plaintiff made title to the possession on the ground that the lands had been dedicated to the religious service of the family idols by virtue of two instruments of dedication in the years 1813 and 1820, which, still at the time of the suit, impressed on the lands a trust which the plaintiff by the suit sought to have declared. He also asked to be appointed sebaite or manager of the lands so dedicated.

It appears from the judgment that, amongst other matters of defence which were set up by the defendants, was a deed of partition, which was said to have been a deed by which a different arrangement was made of the family property. Certain other property was devoted to the family idols, and the property originally dedicated was divided between the members of the family. Their Lordships, in that case, considered that this was not a genuine deed. They said with regard to it: "The second deed, however, does afford ground for suspicion. It makes no reference whatever to the first deed; it professes to be the ordinary partition of a, till then, joint family property. It appoints as a sebaite one whom no prudent person would appoint a trustee—one an actual insolvent. Such an appointment, independently of its obvious impropriety, would be little likely to be made by a Hindu family having several and more competent members, from the fear of the scrutiny to which it might lead if the creditors of the sebaite traced the property to his possession. Again, as a dedication in fact was to be defeated by it, some difficulty on this ground alone would present itself to the minds of those who might meditate on the [46] change which the deed seeks to effect. All comparison, therefore, supports the deed prior in time, which priority alone, in a balanced state, would establish the first instrument:" and they proceeded to say, "A decision against the plaintiff generally in this suit would be, in substance, deciding against a trust *prima facie* well established on evidence of a subsequent deed of revocation, not only not proved, but on every examination of it discredited." Their Lordships in the result declared, "that the lands specified in the schedule to the plaint,"—which included the Mouza Keshabpur, and also the lot Pilkhundi,— "were and continue dedicated, under the instruments of dedication of 1813, and 1820, to the religious uses specified in those instruments of endowment." And they added a declaration, that the decree was to be without prejudice to any further suit or proceedings, for the enforcement of the religious trusts declared on the appointment of a proper sebaite.

A question has arisen as to whether the whole of Mouza Keshabpur was dedicated. In the deed of dedication only eleven annas were mentioned. Subsequently, five annas seem to have been purchased by Manikram, the sebaite, and it would rather appear to have been assumed that the whole sixteen annas had become subject to the dedication. In the view which their Lordships now take of the case, it is unnecessary to determine whether this judgment must be considered as a binding decision upon the parties as to the dedication of the entire sixteen annas, or only of the eleven. What was contemplated was, that the property being shown to be debuttur property and dedicated to family idols, a proper sebaite should be appointed, who might bring a suit, or take other proceedings, to have the trusts so declared enforced, and so this declaration was added.

This judgment was delivered in 1871. The parties appear not to have done anything immediately; but, on the 22nd of August 1873, they professed to appoint the sebaite. They executed what they call a deed of settlement for management of the *seba* of the gods, by which, after reciting that Gopinath Dutt had died without any heir, and that as heirs of the remaining four brothers they each held a four-anna share, they say:—"We do hereby covenant, that we, being in possession [47] as sebaits of the properties mentioned in the schedules of the two deeds of endowment aforesaid, and besides [the properties mentioned in] the *arpan-namas* of the properties acquired out of the proceeds of the debuttur properties and of the properties which are used to meet the expenses of the *debseba*, and which are embodied in the schedule of the plaint of the former suit, No. 6, and, in addition to these, of those properties which are debuttur for the expenses

of the *debsaba*,— the whole of these being entered in the schedule below,— will manage the duties connected with the *seba* of the Devas, according to fixed arrangement. " They then make a provision for what is to be done with the different moneys, and give particular directions with regard to the appointment of persons to make collections. The result is, that all the members of the family, including Baikantnath, all the persons who had an interest in the property, or would have had an interest in it if there had been no dedication to the idols, are made *sebait*s. The trust is mixed up with the private interest, and there remains outside no person who would have an interest or duty to see that the trusts were properly executed. All the persons interested are themselves made trustees and managers for the execution of the trusts. That certainly does not seem to have been the kind of appointment which was contemplated by their Lordships.

The objection was taken by the defendants in the present suit that Baikantnath, who, by this deed of August 1873, was appointed one of the *sebait*s, and took a fourth share of the property as *sebait*, is not a party to it. The defendants say, he ought to have been joined as a plaintiff, or, if he would not become a plaintiff, he should have been made a defendant. The plaintiffs say, that he would not consent to become a plaintiff with them. If he would not consent to that, they might have made him a defendant. The objection being taken in the first Court, the Judge overruled it. He does not appear to have said much on the subject, but he held that it was not necessary that Baikantnath should be a party. The defendants appealed from that judgment, and in their grounds of appeal they distinctly take the objection. The first is :—" For that [48] the Court below ought to have held that there has been no proper appointment of the plaintiffs as *sebait*s, and that in any event the present suit could not be successfully maintained by the plaintiffs on the record in the absence of Baikantnath." The learned Judge who delivered the judgment of the High Court says with respect to this objection :—" I think that Baikantnath Dutt should certainly be a party to this case. The suit is to do away with a sale effected by him, and for which he received full value of the property in suit. Full justice could scarcely be done without having him before the Court in his personal capacity. The Judge below remarks that Baikantnath is substantially a co-plaintiff, because he is a member of the body of the *sebait*s ; but he ought to be on the record substantially as a defendant in his personal capacity, and answerable for the costs of the proceedings arising out of his alleged misconduct. As it is, he has been allowed to make away with endowed property, appropriate the value of it, and then to be a substantial, but unseen, co-plaintiff in recovering it from the purchaser, to whom, however, the lower Court finds that it can award no compensation, because he should get it, if at all, from the vendor in his private capacity, and not from the plaintiffs, who sue as *sebait*s." The judgment refers to many of the substantial reasons why Baikantnath should have been a party to the suit. Their Lordships will mention presently the transactions which are alluded to. It was evidently the opinion of the High Court that he ought to have been made a party to the suit. The Judges appear to have thought that he might be considered to be a plaintiff, because he was a member of the body of the *sebait*s ; but although he might indirectly gain benefit from the suit, the fact that the other *sebait*s were suing did not make him also a plaintiff. They do not profess to sue on his behalf. He really was not a party to the suit at all ; and no decree could be made in it which would bind him. Whatever might be necessary in order to do complete justice between the parties, so far as it would affect Baikantnath, could not be done. It would

appear that the Judges of the High Court intended to decide the case in favour of the defendants upon this objection as well as upon the [49] bar of limitation. They said:—"we are of opinion, therefore, that under the circumstances of the case, and regard being had to the sort of debuttur which is in question, and to the fact that the family generally were parties to the division of the debuttur property, Baikantnath Dutt should have been personally a party to the suit; and that if the plaintiffs be entitled to recover the property from the defendants, appellants, they should be required to reimburse them the purchase-money, and that Baikantnath should have been saddled with all the costs. And the same consideration would induce us to refuse any decree for mesno profits." They then considered the question of the law of limitation, and held that the defendants were *bona fide* purchasers, and were, therefore, protected by it.

Under those circumstances, the respondents say, in support of the decision of the High Court, and in answer to the present appeal, that the non-joinder of Baikantnath is not an objection of form only,—that the Court ought, in a suit of this kind, to have him before it, so as to be able to bind him and to do complete justice. The appellants have not, on any occasion, sought the assistance of the Court, as they might have done under s. 73 of Act VIII of 1859, to make him a party to the suit. It was not the province either of the High Court or the District Judge to force that course upon them. The objection was clearly taken; and they, from motives of their own, deliberately abstained from making him a party to the suit. It is certainly not a case in which the Court should make an exception to the general rule which would require him to be a party.

That motives for keeping Baikantnath out of the suit existed may be seen from the nature of the previous transactions. He is said in the plaint to have been put in possession of Keshabpur by Manikram, who was at that time the sobait; but it would seem, from the case made in the former suit, that though the deed of partition was discredited in the former appeal, it was under colour of some deed of partition executed between the members of the family that Baikantnath obtained the possession of Keshabpur as early as 1841, and so through the act of the very persons who are plaintiffs in the present [50] suit. Having thus obtained possession, he subsequently made a conveyance to Anand Gopal, his nephew, on the 17th of September 1861. Whether this conveyance was only a benami transaction, and Baikantnath continued to be still the owner of the property, or whether, which is possible, Baikantnath sold it for a sum much under its value, as an advancement to or in order to benefit his nephew, is not clear; nor is it necessary now to say which was the real nature of the transaction. There is evidence that Anand Gopal exercised acts of ownership; that he made leases of and received rent for some portions of the property, and that he was apparently the owner of it. Being apparently the owner, he, on the 8th of March 1869, sold a moiety of it to some of the defendants for Rs. 5,200 and the other moiety to the other defendants, on the 15th of July 1871, for Rs. 6,000. It is clear, and is not disputed, that these prices represented the full value of the property. The defendants gave the full value, and held the property for some time. Then came the appointment of sobaits of the 22nd of August 1873 of the whole family, including Baikantnath, by virtue of which this suit is brought. Now, the defendants having paid the full value to Anand Gopal, and there being this case with regard to Baikantnath, whose acts could not have been unknown to the plaintiffs when they appointed him joint sobait, that he had parted with the property, which was debuttur, and, through his conduct in so parting with it, it had come to be sold to the

defendants, the plaintiffs, the other members of the family, seek to set aside the transaction—to recover back the property, it is true as debuttur, but under circumstances which raise a considerable suspicion whether the object is to treat it when it is recovered as debuttur, or to have the benefit of it for themselves. The whole transaction seems to be of such a character that, if there is a case in which it is just and proper to give effect to the general rule that all the parties interested in the subject-matter of a suit should be joined in it, this appears to their Lordships to be one.

Under these circumstances, their Lordships will humbly advise Her Majesty that the decree of the High Court be affirmed, [51] and the appeal be dismissed; and the appellants will pay the costs of the appeal.

Appeal dismissed.

Solicitor for the Appellants: Mr. T. L. Wilson.

Solicitors for the Respondents: Messrs. Barrow and Rogers.

NOTES.

[To a similar effect are the decisions in 11 Cal. 338; 17 Cal. 906; 14 Mad. 489; 23 Mad. 82; 190; 5 C. L. J. 527; 18 All. 227 at 231.]

[8 Cal. 51]
PRIVY COUNCIL.

The 10th and 11th May, and 13th June, 1881.

PRESENT:

SIR B. PEACOCK, SIR M. E. SMITH, SIR R. COUCH AND SIR A. HOBHOUSE.

Mungul Pershad Dichit and another.....Plaintiffs

versus

Grija Kant Lahiri.....Defendant.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

*Limitation applicable to execution of decree in suit instituted before
1st April 1873—Staying sale of attached property—Striking off—Limitation
Acts (XIV of 1859, s. 20, and Act IX of 1871, s. 1).*

An application for execution of a decree is an application in the suit in which the decree has been obtained. From this, and from the enactment in s. 1 of Act IX of 1871, that nothing contained in s. 2, or in Part II of that Act, shall apply to suits instituted before the 1st April 1873, it follows, that nothing contained in sched. ii of that Act, extended to an application for execution of a decree in a suit instituted before that date. No such application

was barred by s. 20 * of Act XIV of 1859, if made within three years from the date of a proceeding within the meaning of that section. Although the execution of a decree may have been actually barred by time at the date of an application made for its execution, yet, if an order for such execution has been regularly made by a competent Court, having jurisdiction to try whether it was barred by time or not, such order, although erroneous, must, if unreversed, be treated as valid.

Where a sale of attached property is stayed by a Court upon the application of the judgment-debtor, on condition of the attachment remaining in force, the subsequent striking off of such application from the file of the Court does not affect the rights of the decree-holder.

APPEAL from a decree of the High Court (6th January 1879) † dismissing an appeal from an order of the Second [52] Subordinate Judge of Mymensing (9th May 1878), whereby an application for the execution of a decree of the year 1851 was rejected.

The appellants held a decree, dated 8th July 1851, obtained by their father against the respondent's father on a bond of the year 1848.

The amount due on the decree, originally Rs. 9,858, had become, by accumulated interest, Rs. 40,873. Of this decree the appellants applied for execution, which was refused on the 22nd September 1877. The present question was, whether or not the decree-holders' rights to proceed in execution had been barred by limitation.

The proceedings taken by the decree-holders between the 8th July 1851 and the 22nd September 1877, are set forth in order in their Lordships' judgment. The order of the 8th October 1871, made by the Subordinate Judge of Mymensing, was, "that the attachment process do issue, fixing the 12th December next." The list of property attached, comprising the right of the judgment-debtor in certain lands, was filed by order of the same Judge on the 3rd December; and on a subsequent day it was ordered that the sale should take place on the 20th January 1875. That sale was stayed by order on petition, dated the 21st January, in which the debt was admitted. Afterwards, on the 25th January 1875, on a petition, in which both parties joined, the execution of the decree was stayed on the terms that the attachment should continue upon the property attached. On the 9th February 1875, at the request of both parties, the Court ordered that the case be struck off its file.

On the 22nd September 1877, the decree-holders made the application for execution out of which this appeal arose. The defence was, that the decree-holders had not, within due time, taken proceedings *bona fide* for the execution of the decree, and that though certain applications had been made, the period of limitation had elapsed.

The Subordinate Judge held that the execution asked for was barred by limitation. First, because the present application had been made when more than three years had elapsed [53] from the service of notice on this respondent, which was effected on the 10th September 1874. The applicants were not relieved from the bar by the acknowledgment of debt made, as it was ineffectual in regard to a decree. Secondly, because, when the

* [Sec. 20 :—No process of execution shall issue from any Court not established by

Time for enforcing execution of judgment, etc., of a Civil Court not established by Royal Charter.

Royal Charter to enforce any judgment, decree, or order of such Court, unless some proceeding shall have been taken to enforce such judgment, decree, or order, or to keep the same in force, within three years next preceding the application for such execution.]

† See *Mongol Prashad Dicit v. Shama Kanto Lahory Chowdhry*, I.L. R., 4 Cal., 708.

application was made, *viz.*, on the 5th September 1874, the right to execute had been already barred by time; and could not by any application, or order, be revived.

The judgment of the High Court (MORRIS and PRINSEP, JJ.), dismissing an appeal from the above decision, is reported in the Indian Law Rep., 4 Cal., 708.

On this appeal

Mr. J. Graham, Q. C., and Mr. J. T. Woodroffe appeared for the Appellants.

Mr. J. F. Leith, Q. C., and Mr. R. V. Doyne for the Respondent.

For the appellants it was contended, that the Courts had wrongly decided that execution of the decree of 1851 was barred by time. A competent Court had, in 1874, made an order for execution which had not been reversed. The respondent's property had been attached, he obtaining a stay of proceedings on admission of the debt, and on terms that the attachment should continue; whereby the decree had been treated as in force. If it were necessary to look behind the order of the 8th October 1874, it would appear, that the application of the 5th September 1874, on which it was founded, was in substance a continuance of proceedings in execution previously taken by the decree-holders. And the latter was not, as it had been erroneously held to be, an application barred by art. 167 * of sch. ii of Act IX of 1871. It was a 'proceeding' to keep in force a decree, as that term was explained in *Maharajah Dheeraj Mahtab Chund v. Bulram Singh*, (13 Moore's L. A., 479). The same might be said of the subsequent application for execution made on the 22nd September 1877, both applications falling within the 4th clause, column 3, art. 167 of sch. ii of Act IX of 1871. *Gouree Sunkur Tribedee v. Arman Ali Chowdhry* (21 W. R., 309), [54] *Jamna Das v. Lalitaram* (I. L. R., 2 Bom., 294), and *Hurrochunder Roy Chowdhry v. Shoorodhonee Debia* (9 W. R., 402). The respondent had also made repeated acknowledgments of liability; for instance, in a petition of the 30th November 1871, signed by his agent duly authorized for the purpose; and again in an application for stay of sale made in January 1875.

* [Art. 167 :—

Description of application.	Period of Limitation.	Time when period begins to run.
For the execution of a decree or order of any Civil Court not provided for by No. 169.	Three years.	<p>The date of the decree or order, or (where there has been an appeal) the date of the final decree or order of the Appellate Court, or (where there has been a review of judgment) the date of the decision passed on the review, or (where the application next hereinafter mentioned has been made) the date of applying to the Court to enforce, or keep in force, the decree or order, or (where the notice next hereinafter made has been issued) the date of issuing a notice under the Code of Civil Procedure, section two hundred and sixteen, or (where the application is to enforce payment of an instalment which the decree directs to be paid at a specified date) the date so specified.]</p>

To both of which, either s. 4 of Act XIV of 1859, or s. 20* of Act IX of 1871, was applicable. On this point were cited: *Prosunno Coomar Roy v. Kasheekant Bhuttacharjee* (5 W. R., Mis., 31), *Chunderkant Mitter v. Ramnarain Dey Sircar* (8 W. R., 63), *Digamburee Debia v. Sharodapershad Roy* (3 W. R., Mis., 27), and *Joteeram Doss v. Shaikh Huruf* (6 W. R., Mis., 115). With reference to the effect of striking off the file a case in execution, *Chumun Lall Chowdhry v. Doman Lall* (9 W. R., 205) was cited. Such a proceeding did not render necessary a new application for execution; see *Mussamut Zahoorun v. Tayler* (10 W. R., 380), *Jhooboo Sahoo v. Ramchurn Roy* (11 W. R., 517), and *Soondur Singh v. Buhooria Alum Bashee Kooer* (24 W. R., 37). A new notice under s. 216 of the Code (VIII of 1859), ordered by the Court, gave a new starting point under art. 167 of sch. ii of Act IX of 1871; and the new period ran from the date on which such notice was served on the judgment-debtor, not from the date of issue. The notice now in question having been issued on the 10th September 1874, was served on the respondent on the 23rd idem. Reference was also made to *Koonj Beharee Lal v. Girdharee Lall* (22 W. R., 484), *Moheshchunder Sein v. Mussamut Tarinee* (10 W. R., F. B., 27), *Norendernarain Singh v. Dwarka Lal Mundur* (I. L. R., 3 Cal., 397) and *Puddomonee Dossee v. Roy Mothoornath Chowdhry* (20 W. R., 133). As to what constituted a *bond fide* proceeding, *Eshanchunder Bose v. Prannath Nag* (14 B. L. R., 143) was referred to; and also *Booboo Pyaroo Tuhobildarinee v. Syed Nazir Hossein* (23 W. R., 183) was referred to.

For the respondent it was contended, that execution of the decree was barred by time when application for execution was [55] made. At the time when the decree of 1851 was passed, there being then no Legislative enactment of limitation for the execution of decrees, by a rule of analogy derived from Reg. III of 1793, a twelve years' bar had been adopted by the Courts, and no order for execution was granted after the expiration of that period: *Juggunath Pershad Sircar v. Radhanath Sircar* (2 Sel. Rep., (Beng., S. D. A.), 280). Before the expiration of twelve years from the date of the plaintiff's decree, the Limitation Act XIV of 1859, was passed, coming into operation about one year and six months before the decree of 1851 would have expired. The decree-holders had, when the Act came into force, three years within which to make their application for execution; s. 20 of Act XIV of 1859; *Delhi and London Bank v. Orchard* (L. R., 4 I. A., 135). Then followed the decree-holders' different

*[Sec. 20:—(a) No promise or acknowledgment in respect of a debt or legacy shall take the case out of the operation of this Act, unless such promise or acknowledgment is contained in some writing signed, before the expiration of the prescribed period, by the party to be charged therewith or by his agent generally or specially authorized in this behalf.

Effect of acknowledgment in writing.

rized in this behalf.

(b) When such writing exists, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the promise or acknowledgment was signed.

(c) When the writing containing the promise or acknowledgment is undated, oral evidence may be given of the time when it was signed. But when it is alleged to have been destroyed or lost, oral evidence of its contents shall not be received.

Explanation I.—For the purposes of this section, promise or acknowledgment may be sufficient, though it omits to specify the exact amount of the debt or legacy, or avers that the time for payment or delivery has not yet come, or is accompanied by a refusal to pay or deliver, or is coupled with a claim to a set off, or is addressed to any person other than the creditor or legatee;

but it must amount to an express undertaking to pay or deliver, the debt or legacy or to an unqualified admission of the liability as subsisting.

Explanation II.—Nothing in this section renders one of several partners or executors chargeable by reason only of a written promise or acknowledgment signed by another of them.]

applications. Through these, the argument went to show, that no attempt to *bond fide* realize the amount of the decree could be traced. In regard to one of the applications made on 9th February 1863, a petition to restore the case and to realize about Rs. 600, it was contended, that this was so small a part of the decreed amount that it was 'illusory.' The decree-holders had in fact been barred as long ago as 1863, and all their applications since then made had been useless.

SIR B. PEACOCK having pointed out that there was no evidence that the application of 9th February 1863 was 'illusory,' counsel argued that, as a decree, of which the execution was already barred, could not be revived (on which point *Mussumat Zahoorun v. Tayler* (10 W. R., 380) was cited), this decree could not, by the proceedings taken in 1874, have been rendered capable of being executed. SIR B. PEACOCK observed, that the objection that execution had already in 1874 been barred, if tenable, should have been taken before the making of the order of the 8th October 1874. He also called attention to ss. 1 and 2 of Act IX of 1871.

It was then argued for the respondent, that there had been a complete discontinuance of proceedings before 1871; and that, [56] under Act XIV of 1859, the execution was barred. Reference was made to *Bissleshur Mullick v. Maharajah Mahtab Chunder Bahadoor* (10 W. R., F. B., 8).

The appellants' counsel were not called upon to reply.

Their Lordships' **Judgment** was delivered by

Sir B. Peacock. - On the 22nd September 1877, Ishana Debi, the mother and guardian of the appellants, presented a petition to the Subordinate Judge of Mymensingh, in which she stated that her husband instituted a suit, No. 26 of 1851, against Shama Kant Lahiri Chowdhry, deceased, and obtained a decree against him on the 8th of July in that year; that, after application to execute the decree, her husband died, and that she, as guardian of the minors, being substituted in the place of her husband, revived the decree against the defendant, Shama Kant Lahiri, and after his death against his son, who was the owner and possessor of the property left by him, and that the property of the judgment-debtor was attached; that, after the date of the sale had been fixed, the sale was stayed on the application of the judgment-debtor with the attachment continuing, and the execution case struck off on Monday, the 9th of February 1875. She, therefore, prayed that the execution case might be restored, and that notice being first served on Grija Kant Lahiri Chowdhry, the son and heir of the said Shama Kant, the amount due under the decree might be realized, together with interest for the time of the pendency and the costs of execution by sale of the property under attachment.

The facts stated in the petition were correct, and were reported to be so by the Amla to whom the case was referred for report. The judgment-debtor having been served with notice appeared, and contended, amongst other things, that the application was barred by limitation; that the decree was dated the 8th of July 1851, and that no proceedings had been *bond fide* taken from that time to keep the decree alive within the period laid down by Acts XIV of 1859 and IX of 1871, and he alleged that the decree-holders, actuated by *mala fides*, not [57] having realized the money for such a long time, simply with the desire of increasing the interest, were not entitled, according to law and justice, to enforce it.

The dates of the several applications and proceedings to enforce, or keep in force, the decree, are, with one exception, correctly stated in the judgment of the Subordinate Judge. They are as follow:—

The date of the decree, 8th July 1851.

First petition of execution, 3rd May 1861.

Notice served, 25th May 1861.

Struck off for default of payment of costs of attachment, 27th June 1861.

Second petition, 9th February 1863.

Struck off for default of payment of costs, 29th August 1863.

Third petition, 19th December 1864.

Debtor's property attached, 6th June 1866

Struck off at request of parties, 19th June 1866.

Fourth petition against Grija Kant as heir of Shama Kant, now deceased, 8th May 1868.

Notice, attachment, sale-proclamation, &c., served, after which debtor applied for two months' time, and execution struck off, 19th August 1868.

Fifth petition, 26th July 1871.

Notice served on the debtor, 7th August 1871.

Attachment caused, 31st August 1871.

Sale-proclamation issued, 26th September 1871.

Debtor applied for two months' time, 30th November 1871.

Struck off for default of payment of sale-fee, 31st January 1872.

Sixth petition, 5th September 1874.

Notice issued, 10th September 1874.

Notice served, 23rd September 1874.

Decree-holders' petition to attach properties, 8th October 1874

Sale-proclamation issued, 27th Aughran 1281.

Petition of judgment-creditors to stop sale for seven days, and sale stopped, 21st January 1875.

Debtor's petition to stop sale for three months, admitting the debt, and attachment to remain, 25th January 1875.

Seventh, or present petition, 22nd September 1877.

Taking those as the correct dates, he held that the application [58] of the 22nd of September 1877 was barred by limitation, not being within three years from the date of the petition of the 5th of September 1874, or from the date of the issuing of the notice on the 10th of September 1874, under s. 216 of the Code of Civil Procedure (Act VIII of 1859). In arriving at that conclusion, he treated the case as falling within the Indian Limitation Act, 1871 (Act IX of that year), and he held, amongst other things, that, under cl. 5 in the 3rd column of art. 167 of the second schedule, the date of the issuing, and not the date of the service of the notice, was the date referred to; and that, under cl. 4 of the 3rd column of the same article, the date of the sixth petition, and not the dates of the subsequent order or proceedings under it, was the date from which the period of limitation began to run. Both of those dates, it will be observed, were more than three years before the 22nd September 1877, the date of the petition under consideration.

It was urged on behalf of the petitioner before the Subordinate Judge, that the period of limitation ought to be counted from the 8th of October 1874, the date on which the execution-creditors applied to attach other properties of the judgment-debtor; but he held that that application was not in accordance with

the Code of Civil Procedure, and that, consequently, upon the authority of the case of *Gowree Sunkur Tribedee v. Arman Ali Chowdhry* (21 W. R., 309), it was not an application within the meaning of the 4th clause of art. 167. In that case, however, which is not fully reported, it is to be inferred that no order was made upon the application. In the present case, the Subordinate Judge, upon the petition of the 8th of October 1874, made an order on the same day that the attachment process do issue.

The effect of that order will be presently considered.

The Subordinate Judge also observed that the sixth application was barred by limitation on the 5th of September 1874, as it was more than three years even from the 7th of August 1871, the date on which the notice was actually served, and much more so from the date of the fifth application, which was made on the 26th of July 1871. In support of that view he referred to the case of *Bisseshur Mullick v. Maharajah Mahtab Chunder* (10 W. R., F. B., 8). That case, however, is very different [59] from the present. There, there was merely the service of a notice on the judgment-debtor after the decree was barred; but no order was made. Here an order for attachment was made by the Subordinate Judge on the 8th October 1874, after notice served on the judgment-debtor on the 23rd of September 1874, to show cause why the decree should not be executed against him. The order was made by a Court having competent jurisdiction to try and determine whether the decree was barred by limitation. No appeal was preferred against it; it was acted upon, and the property sought to be sold under it was attached, and remained under attachment until the application for the sale now under consideration was made.

The Courts below make no reference to the order, or to the attachment under it; and in the list of dates set out by the Subordinate Judge, the order, and the date of it, are wholly omitted. Admitting, for the sake of argument, but only for the sake of argument, that the decree was barred when the sixth application was made,—when the notice was served on the 23rd of September 1874, and when the petition of the 8th of October 1874 was presented, and that the Subordinate Judge ought to have dismissed the petition upon the ground of limitation, although it was not set up or relied upon by the judgment-debtor, still his order, though erroneous, was valid, not having been reversed.

The applicants appealed to the High Court from the order of the Subordinate Judge rejecting the application now under consideration. The High Court considered it unnecessary to determine the questions arising out of the petition and order of the 8th October 1874, or of any of the proceedings between the 5th of September 1874 and the 22nd of September 1877, inasmuch as they considered and held, that the decree was barred when the petition of the 5th of September 1874 was presented. The Judges said,—“A decree once dead no proceeding by means of an application out of time could revive it.” But, as already observed, the Subordinate Judge had jurisdiction upon the petition of the 8th October 1874 to determine whether the decree was barred on the 8th October 1871, and he made an order that an attachment should issue. He, whether [60] right or wrong, must be considered to have determined that it was not barred. A Judge in a suit upon a cause of action is bound to dismiss the suit, or to decree for the defendant, if it appears that the cause of action is barred by limitation. But if, instead of dismissing the suit, he decrees for the plaintiff, his decree is valid, unless reversed upon appeal; and the defendant cannot, upon an application to execute the decree set up as an answer that the cause of action was barred by limitation. Suppose the order for attach-

ment of the 8th of October 1874 had been affirmed on appeal by the High Court, upon the ground that it was not barred by limitation, it is clear that the Judge of the original Court, when the application for a sale of the property attached under it was made, could not have rejected the application upon the ground that the decree was barred on the 5th of September 1874, or on the 8th of October 1874, when the order was made, upon the ground that the decree was dead when the petition upon which the order was made was presented. Yet the order when affirmed upon appeal could have no greater binding effect than the order itself so long as it remained unreversed. Here the judgment-debtor, so far from appealing against the order for the attachment, acknowledged its validity, and presented the petition of the 25th of January 1875, by which he prayed that the sale under the attachment might be stayed for three months, and the execution case struck off for the present, with the attachment remaining in force. Upon that petition being presented, the creditors agreed to have the execution stayed in accordance with the petition, "the attachment on the property attached continuing." It appears to their Lordships impossible to hold that, if immediately after the expiration of the three months the execution-creditors had made the present application, it could, in the face of the order of the 8th October 1874 and the subsequent proceedings, have been reversed, upon the ground that the decree was dead on the 5th of September 1874, or on the 8th of October 1874. The present application, having been made within three years after the order of the 8th October 1874, is as valid as if it had been made immediately after the expiration of the three months.

[61] Their Lordships think it right to observe that, irrespective of the consideration that the order of the 8th of October 1874 was binding, the decree was not barred on the 22nd September 1877, when the application was made. Both of the Courts below have treated the case as governed by the Indian Limitation Act of 1871, Act IX of that year. But their Lordships are of opinion that the present case does not fall within it. The Act was to come into force on the 1st of July 1871, but it was enacted by s. 1 that nothing contained in s. 2, or in Part II, should apply to suits instituted before the 1st of April 1873. By s. 2, and the 1st schedule referred to therein, Act XIV of 1859 was with one exception, which does not affect this case, repealed. By s. 4 of the Act, which is part of Part II, it was enacted that, subject to the provisions contained in ss. 5 to 26 inclusive, none of which appear to affect this case, every suit instituted, appeal presented, and application made after the period of limitation prescribed therefor by the second schedule shall be dismissed, although limitation has not been set up as a defence. One of the applications for which a period of limitation is prescribed by the second schedule, is an application for the execution of a decree or order of a Civil Court not established by Royal Charter. It appears to their Lordships that a thing which applies to an application in a suit applies to the suit, and that an application for the execution of a decree is an application in the suit in which the decree was obtained, and that, as regards suits instituted before the 1st of April 1873, all applications in it are excluded from the operation of the Act. Nothing, therefore, contained in s. 2, or in s. 4, or in sched. ii of the Act extends to an application for the execution of a decree in a suit instituted before the 1st of April 1873. There are many applications mentioned in sched. ii, and for which a period of limitation is prescribed thereby, which are clearly applications in a suit: such for instance, as those described in numbers 166, 167, and 164. There are also many enactments which show that an application for execution of a decree is an application in the suit in which the decree was obtained. For example, by s. 207, Act VIII of 1859, the application may be made by the

pleader in the suit. By s. 212 [62] the application is to contain "the number of the suit." By s. 216, if the enforcement of the decree is applied for against an heir or representative of "an original party to the suit," a certain notice is to be given. By s. 15, Act XXIII of 1861, the application is to be entered "in the register of the suit," and so forth.

The reasons which may be presumed to have induced the Legislature not to apply the new rules of limitation to suits commenced before the 1st day of April 1873, are of equal force with regard to applications for the execution of decrees.

It cannot be disputed that, in several cases, such as the case reported in 22 Weekly Reporter, Civ. Rul., 155, applications for the execution of decrees in suits instituted before the 1st of April 1873 have been treated as falling within the provisions of sched. ii of Act XIX of 1871, but the point was assumed rather than decided.

It was scarcely contended in the argument before their Lordships, that the application of the 22nd of September 1877 was barred, if the case is governed by s. 20, Act XIV of 1859. It was within three years from the date of the service of the notice on the 23rd September 1874, which was a proceeding within the meaning of the last-mentioned section; also within three years from the date of the petition of the 8th of October 1874, and of the order of the same date made thereon.

In the face of the applications of the judgment-debtor made from time to time to stay the sale of property which had been attached, it cannot be presumed that the decree was ever satisfied, nor was there any finding of either of the Courts below that the several proceedings were not *bona fide* for the purpose of enforcing the decree or of keeping it in force. It appears from the return of the Amila of the 12th of November 1877, that the proceedings under the petition of the 8th of October 1874 were struck off on the 9th of February 1875, on account of the decree-holders not paying the costs of issuing the notification; but as the sale was stayed on the 25th of January 1875 for three months upon the application of the judgment-debtor, and upon the condition that the attachment should remain in force, the striking off of the case from the Judge's file [63] on the 9th of February 1875 did not affect the rights of the decree-holders. Their Lordships have alluded to this fact, as reference was made in the argument to the effect of striking off.

For the reasons above stated, their Lordships will humbly recommend Her Majesty to reverse the decrees and orders of both the lower Courts, and to order the respondent to pay the costs of the appellants in those Courts; and further to order that the prayer of the petition of the 31st of Bhadro 1284, corresponding with the 22nd of September 1877, be granted.

The respondent must pay the costs of this appeal.

Appeal allowed.

Solicitors for the Appellants: Messrs. *Watkins and Lattey*.

Solicitors for the Respondent: Mr. *T. L. Wilson*.

NOTES.

[I. THE PRINCIPLE—

It has been pointed out by the Judicial Committee itself that the bar is not owing to the applicability of any principle of *res judicata*, but arises out of the desire to secure finality in litigation.

The question, if the term "*res judicata*" was intended, as it doubtless was, and was understood by the Full Bench, to refer to a matter decided by a Court of competent jurisdiction in a former suit, was irrelevant and inapplicable to the case. 6 All. 269 at 274 = 11 I. A. 37. "The

matter decided by Mr. Probyn was not decided in a former suit, but in a proceeding of which the application in which the orders reversed by the High Court were made was merely a continuation. It was as binding between the parties and those claiming under them as an interlocutory judgment in a suit is binding upon the parties in every proceeding in that suit, or as a final judgment in a suit is binding upon them in carrying the judgment into execution. The binding force of such a judgment depends not upon sec. 13, Act X of 1877 but upon general principles of law. If it were not binding there would be no end to litigation. 6 All., 269 at 274.

The doctrine rests on the ground that the judgment-debtor, when called on to dispute if he wished or if he could, a certain proposition of right and consequential demand of relief or action by the judgment-creditor, had either failed in his contention to the contrary or at any rate allowed judgment to go by default:—11 Bom., 537. See also (1907) U. B. R. (1907) 1st Qr., C. P. C., sec. 13 : 14 Bur., L. R. 35.

II. ORDERS IN PROCEEDINGS IN EXECUTION ARE BINDING SO AS TO BAR SIMILAR APPLICATIONS

This case decided that a prior order to the effect that the application was not barred by limitation was binding : 8 Cal., 51 ; see also (1895) 23 Cal., 374 ; 25 Cal., 789 (16 All., 443 ; 34 Cal., 13 (not decided) ; 11 Cal., 376 ; 15 Bom., 28, (1901) 4 O. C. 333 ; 3 Bom. L. R. 416 ; (1906) P. R. 47 ; (1906) P. L. R. 86.

"It seems to be a necessary conclusion that the same effect must be given to a decision, that an application is time-barred. If a decision be valid and binding, although it may be erroneous, when it is given in favour of one party, it cannot be less so when it is in favour of the other party (1881) 6 Bom. 54 explaining 3 Cal. 17. See also 9 Cal. 65.

"The decree of the Sadr Court was a written document. Mr. Probyn had jurisdiction to execute that decree, and it was consequently within his jurisdiction and it was his duty to put a construction upon it. He had as much jurisdiction upon examining the terms of the decree, to decide that it did award mesne profits as he would have had to decide that it did not. The High Court assumed jurisdiction to decide that the decree did not award mesne profits, but, whether their construction was right or wrong, they erred in deciding that it did not, because the parties were bound by the decision of Mr. Probyn, who, whether right or wrong, had decided that it did."—(1883) 6 All. 269 P. C. at 275, 276 ; 11 L. A. 37.

Similarly binding is the *construction of decree* ; as to whether it ordered future payments:—(1884) 9 Bom. 328 ; as to relief, 19 Mad. 54 ; as to interest, 7 All. 102 ; (1901) 21 A. W. N. 32 ; (1912) 16 C. L. J. 101 ; 17 C. W. N. 565 ; 17 L. C. (936) ; as to mesne profits, (1883) 6 All. 269.

Similarly, the invalidity of sale certificate cannot be set up after its grant :—6 Bom. 586 ; setting aside sale in execution, 8 C. L. J. 193 ; 10 C. W. N. 209 ; 1 L. C. 284 ; liability to attachment and sale :—31 Cal. 882 ; 8 C. W. N. 672 ; 14 Bom. 206 ; 7 All. 282 ; executability by revivor etc. 20 Cal. 551.

Similarly as to points of law:—sale in contravention of sec. 90 of the Transfer of Property Act:—(1905) 2 C. L. J. 581, see also 21 Mad. 695.

Partial execution having proceeded, one cannot set up anything that would show that it was not in accordance with law:—(1890) 15 Bom. 242.

As to inquiry into mesne profits, see 11 C. L. J. 501 ; 5 L. C. 387. •

But a petition to postpone the sale cannot be treated as an estoppel. They contain no admission, that the decree could be legally executed against the respondent and are not within the description of an estoppel given in the Indian Evidence Act 1872 sec. 115 and following sections:—10 Cal. 196 at 206 ; 10 L. A. 119. Nor is the principle applicable, where the relief is different as in maintenance claims for different periods:—18 Mad. 482.

Review proceedings in consent decree is no bar to suit for impeaching that decree subsequently. --10 C. L. J. 420 ; 13 C. W. N. 1197 ; 2 L. C. 129.

The parties must be the same : See (1890) 13 Mad. 347, (1904) 1 C. L. J. 500.

III. JURISDICTION—

The order should be within jurisdiction though the decision may be wrong.—11 C.W.N. 296 ; 2 C. L. J. 384 ; 9 C. W. N. 956, 10 Cal. 196 at 206; error as to limitation is not jurisdictional calling for the exercise of revisional powers :—(1883) 7 Bom. 341.

IV. ADJUDICATION NECESSARY—

It is not necessary that there should be an order for attachment ; the principle is applicable whenever there should be an adjudication by the Court upon the rights of the parties to the execution proceedings :—(1911) 15 C. L. J. 453 at 456 ; 10 I. C. 359 ; 17 C. W. N. 113 citing 11 C. L. J. 357 ; 24 All. 282 *dissenting* from 15 All. 198.

See also 14 C. W. N. 114 ; 3 I. C. 47 ; 13 Cal. 257 ; 19 Bom. 675.

V. THE PARTY MUST HAVE HAD OPPORTUNITY TO CONTEST THE PROCEEDINGS—

Proceedings without notice under sec. 218 are not binding :—14 C.W.N. 438 ; 11 C.L.J. J. 357 ; 5 I. C. 89 ; 12 C.L.J. 312 ; 13 C. L. J. 26, 9 I.C. 213 ; 7 Bom. 316 ; 27 Cal. 210, because he has not had the opportunity to contest the validity of the proceeding :—28 Mad. 355 ; 30 Mad. 255.

“ A mere order of Court without contest is necessarily *res judicata*. This is especially so in the case of execution proceedings which are primarily executive, though questions may arise in them for judicial decision.”—9 Bom. 328 at 332.

Such an order, *prima facie* only of an executive character, could not possibly have the effect of *res judicata* unless the judgment-debtor being called on to dispute, if he wished or if he could, a certain proposition of right and consequential demand of relief or action by the judgment-creditor had then either failed in his contention to the contrary or at any rate allowed the judgment to go by default :—11 Bom. 537 at 540.

The application had in fact been made for execution against the person of the judgment-debtor but the notice gave him no intimation of this. He had no reason to suppose that the application went beyond the terms of the decree. He did not appear and in his absence an order was made for execution against his person but it was not executed, because the judgment debtor failed to pay the requisite fee.

The order made by the Subordinate Judge was *res judicata* as to the legal possibility of further execution in terms of the decree, but not as to the special construction which the judgment-creditor sought to impose on it :—11 Bom. 537 at 540. Notice under 248 should be followed by an order for execution in order to be binding :—14 C.W.N. 114 ; 8 C.L.J. 193 ; 35 Cal. 1060 ; 12 C.W.N. 216. Notice on transfer of decree does not dispense with notice under 248 for execution as the executability does not come into question on the former stage :—(1910) 15 C.L.J. 123 ; 8 I.C. 22. Notice under O. XXI r. 22 ; order under, r. 23, for execution sale—not open to be set aside :—(1913) 19 I.C. 377.

If a judgment-debtor does not appear on the notice to contest it under O. 21 r. 22, he can avail himself of the provisions of the Code which authorise him to put in objections when his property is attached unless barred by acquiescence :—11 I. C. 216. Specific prayers must be indicated in the notice :—(1904) 28 Mad. 355 ; 15 M. L. J. 247.

Where neither the decree nor order specified the liability to sale of the interests of certain defendants, and there were orders in execution for sale and for publication of proclamation of sale on notice to them, it was held nevertheless that as the notice did not expressly mention them, they had not the effect of *res judicata* :—30 Mad. 255 ; 17 M.L.J., 201 ; 2 M. L. T. 167. Upon the principle of want of opportunity, *inter alia*, attachment before judgment was held not binding :—(1911) 3^d Cal. 448 ; 15 C. W. N. 195 ; 10 I. C. 308.

Notice on oneself as guardian 10 Cal. 196 at 203, 206 (:10 I. A. 119) or fraudulent suppression of notice does not create a bar :—11 C. L. J. 357.

Notice is necessary but appearance is not :—13 All. 564 ; 3 S. L. R., 133 ; 24 Mad. 669 ; 24 Mad., 683.

VI. EFFECT OF ORDER STRIKING OFF APPLICATION, ETC., ON DEFAULT—

If there had been adjudication, whether the judgment-debtor had chosen to appear and defend or not, then the subsequent default of the decree-holder does not affect its binding character. It is otherwise if there had been no adjudication :—

“ When an order is made striking an execution case off the file of pending cases or dismissing it on grounds other than a distinct finding that the decree is incapable of execution, that the decree holder's right to get the decree executed is barred by limitation or by any other rule of law, or on some similar ground on which the application has clearly been dismissed on the merits, whether the word ‘ *dismissed* ’ or the words ‘ *struck off the file* ’ or any other similar words have been used in the order, the decree holder is not barred by the force of any such order from presenting and prosecuting a fresh application for the execution of his decree.”—15 All. 84 F. B. ; (1902) P. R. 90. If after notice, execution proceedings are

struck off for the default of the decree-holder, then the issue of execution remains unadjudicated :—28 Cal., 122 ; 3 C. L. J., 240 ; 10 C. W. N., 209 ; 22 Bom., 83 ; 12 C. L. J., 312. But this does not upset any previous order, 11 C. L. J., 91, as for instance, order under 249 that the decree may be executed :—15 C. L. J., 453 ; 17 C. W. N., 113 ; 10 I. C. 359 ; 24 All. 282 ; 1898 A. W. N. 96 ; 13 O. C. 90 ; 6 I. C. 746 ; 26 M. L. J., 189.

VII. EFFECT OF APPELLATE VARIATION OR AMENDMENT ON AN OTHERWISE BINDING ORDER—

Amendment on merits re-opens the question :—(1911) 39 Cal., 265 ; 14 C. L. J., 481 ; 12 I. C., 151 ; (1910) 12 C. L. J., 312 ; 7 I. C. 55 ; (1902) 6 O. C., 44 ; 10 All., 51 ; *see also* 8 All., 492 ; 6 A. W. N., 156 ; similarly the later order of the appellate Court :—(1911) 35 Bom., 245 ; 13 Bom., L. R. 230 ; 10 I. C. 811.

The order might be attacked in the Appellate Court though no appeal had been preferred therefrom, under the C. P. C. 1882 :—(1894) P. R., 89.

Where the order is final it is binding .—

It was said that a special appeal from that judgment did not lie to the High Court. If so, the judgment was final ; if an appeal did lie and none was preferred, the judgment was equally final and binding upon the parties and those claiming under them. It would be a reproach upon the administration of justice, if, after endeavouring for eleven years to obtain execution for mesne profits in accordance with a judgment of a Court of competent jurisdiction against which no appeal was preferred, the parties could now be told that judgment was erroneous, and that they were not entitled to mesne profits," 6 All., 269 at 275 ; 11 I. A., 37.

VIII. RETROSPECTIVITY OF STATUTES AFFECTING PROCEDURE—

In this case the Limitation Act 1871 was held inapplicable to proceedings prior to its passing, by reason of the express provisions in that behalf therein contained. Followed in 10 Cal., 196 ; 10 I. A., 119 ; 10 Cal., 748 ; 2 A. W. N., 151 ; 9 Cal., 644 doubting 9 Cal., 446.

To this extent therefore this case is an authority that where in a statute affecting procedure (Limitation Act is such statute) there are provisions express (or necessarily implied) depriving the retrospective character, these provisions will prevail. The general question is discussed fully in **16 Cal., 267 F. B.** *See also* 11 Cal., 55 ; 13 Cal., 86 ; 14 Bom., 516 ; 8 Bom. 340 ; 18 Mad., 482 ; 10 Cal. 718 ; 7 Bom., 459 ; 6 Bom., 51 ; 9 Cal. 644 doubting 9 Cal., 446 19 C. L. J., 187.

IX. SUIT—'PROCEEDING' MEANING OF—

As regards the meaning of '*proceeding*', *see also* the following cases. 16 Cal., 457 ; 16 Cal., 405 ; 10 Cal., 718 at 753 ; 7 Bom., 459 at 463 ; 15 Bom., 438 ; 19 I. C., 968 ; 15 Bom., 438 ; 16 Bom., 731 ; 12 All., 581 ; 15 All., 84 at 91.]

[8 Cal. 63]
ORIGINAL CIVIL.

The 7th July, 1881.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE.

In the matter of Abdool Sobhan.

Transfer of trial to another district— Refusal by Judges to hear affidavits in support of application—Application to the Chief Justice to appoint another Bench to hear and determine case Interlocutory Order in Criminal matters, Finality of High Court Charter Act (24 and 25 Vict., c. 104, s. 14).

Where a rule had been obtained on behalf of a prisoner, calling on the prosecution to show cause why the case should not be transferred for trial to some other Court of Session than that in which it was then pending, on the ground that such strong feeling and prejudice existed in the district against the accused as to render it unlikely that he would get a fair trial, a Division Bench of the High Court, duly constituted, consisting of two Judges, refused to allow the affidavits in support of the application to be read, and discharged the rule. Subsequently, an application was made to the Chief Justice to appoint another Bench of the High Court to hear and determine the rule, on the ground that it had not been heard, and that, consequently, the order passed by the Bench discharging it was null and void.

[64] *Held*, that the Chief Justice, having once appointed a Bench under s. 14 of the Charter Act (24 and 25 Vict., c. 104) to hear any particular case, has no power to interfere when the case has been disposed of by that Bench.

Held also, that the refusal of the Bench to hear the affidavits read, if an error at all, was simply one of law in the course of dealing with a matter clearly within their jurisdiction; and that, therefore, the decision could not be treated as a nullity, or its legality questioned by the Chief Justice.

Held further, that whether the judgment had been signed or not, previous to the application being made to the Chief Justice, an interlocutory order of such a nature in a criminal matter is not final, but may be reviewed or reconsidered, or a similar application may be entertained, as often as the Court in its discretion may think proper.

IN this case an application had been made for the transfer of a trial from Patna to the High Court. The grounds for the application were, that a strong local feeling existed against the prisoner and that it was likely, therefore, that he would not be able to get a fair trial. Mr. Jackson and Mr. Gasper, on the 27th June, appeared before a Division Bench, consisting of Mr. Justice CUNNINGHAM and Mr. Justice PRINSEP, in support of a rule which had been obtained, calling upon the Crown to show cause why the case should not be transferred for trial to the High Court in its Original Criminal Jurisdiction, or to some other Court of Session.

Mr. Kilby, Deputy Legal Remembrancer, appeared for the Crown.

Mr. Jackson stated the nature of his application and the grounds upon which it was based. A discussion followed, the result of which was, that the rule was discharged, the learned Judges under the circumstances declining to hear the affidavits read in support of the rule.

An application was then made by Mr. *Branson* to the Chief Justice sitting alone, that another Bench should be appointed to rehear the rule, upon the ground that there had been no valid hearing before the Criminal Bench; and this application was founded upon an affidavit made by Mr. *Warde-Jones*, the attorney for the prisoner, which stated as follows :

" I instructed Mr. *Jackson* and Mr. *Gasper*, Barristers-at-law, to appear before the Divisional Bench, consisting of Mr. [65] Justice CUNNINGHAM and Mr. Justice PRINSEP, in support of a rule which had been issued by the said Bench on the petition of my client, Moulvie Abdul Sobhan.

" 2. The said Mr. *Jackson* and the said Mr. *Gasper* appeared on the 27th instant in support of the said rule.

" 3. The exhibit hereunto annexed, and marked A, is an account of what transpired before the said Divisional Bench on the said 27th instant.

" 4. I was present before the said Divisional Bench without interruption from the beginning to the end of the address of the said Mr. *Jackson*, and heard and saw all that transpired during the said address.

" 5. I believe exhibit A to be a true and faithful representation of all that transpired before the said Divisional Bench on the said occasion.

EXHIBIT A.

" Mr. *Jackson* opened. He said that this was an application for the transfer of a trial from the district of Patna. The petitioner had been charged with bribery, and he was apprehensive of not getting a fair trial at Patna, on account of the strong local feeling existing against him. Mr. *Jackson* stated that the rule had been obtained under the misapprehension that the trial at Patna would be by jury. But this did not affect the application; for assessors are taken from the same class of people as jurors. After discovering his error, Mr. *Jackson* said, that he had at once informed their Lordships of the matter; and their Lordships, after due consideration, had decided that the rule which had been issued on his client's petition should not be withdrawn. After some further remarks from Mr. *Jackson*, Mr. Justice CUNNINGHAM asked Mr. *Kilby*, if Government really objected to the transfer.

" Mr. *Kilby*.—Yes, my Lords. A number of Government officers and others are witnesses in the case, and great inconvenience will be caused to many persons by a transfer.

" Mr. Justice CUNNINGHAM.—But Mr. *Jackson's* point is, that the chances are that he will not get assessors who will fairly try his case. If he makes that out, we would be inclined to interfere in the matter.

[66] " Mr. *Jackson*.—And moreover we say, that the Judge of Patna has himself said that he will be glad if the case is transferred.

" Mr. Justice CUNNINGHAM.—But is not that a reflection on the Judge ?

Mr. *Jackson*.—Not in the least, my Lords. I desire not to make the slightest reflection on the Judge.

" Mr. *Kilby* then read the letter from the Judge, in which he stated that what he meant by saying that he would be glad if the case were removed from his Court was, that it was likely to be a long trial, and that by trying this case the rest of his work would be interfered with.

" Mr. Justice CUNNINGHAM.—Well, Mr. *Jackson*, you have not by any means convinced me that you will not have a fair set of assessors to sit at your client's trial at Patna.

"Mr. *Jackson* said, he had not yet placed any of the facts on which he relied before the Court, and desired to read a petition which had been filed in one of the Courts at Patna by a number of powerful zamindars of the district, who had nothing whatever to do with the matter which was before that Court. This petition, Mr. *Jackson* contended, was a most improper one. It indicated the intense local feeling against his client, and was distinctly intended to prejudice a Court of Justice against his client in a matter which was at the time judicially before that Court.

"Mr. *Jackson* then began to read this petition, when he was interrupted by Mr. Justice PRINSEP, who said—'But the Judge will take care not to have them amongst the assessors.'

"Mr. *Jackson*.—That would not be sufficient, I submit; for these zamindars are men who can influence a large number of people there.

"Mr. *Jackson* then proceeded to read the petition in support of his application. He had read only the first paragraph, and a portion of the second, when

"Mr. Justice CUNNINGHAM, after a short consultation with Mr. Justice PRINSEP, said :—'We cannot interfere, Mr. *Jackson*. The Judge of Patna will, no doubt, try the case with great care.'

[67] "Mr. *Jackson*.—But your Lordships have not yet heard a single word of our affidavits.

"Mr. Justice PRINSEP said, that he had read a portion of the petition.

"Mr. Justice CUNNINGHAM said :—'We have heard you, Mr. *Jackson*. We cannot interfere.' (Mr. *Jackson* had not addressed the Court more than ten minutes).

"Mr. *Jackson* with much warmth said :—'Very well, my Lords. Your Lordships have chosen to dispose of a matter of the last importance to my client without hearing any of the facts in support of my application. Most of our facts are not contradicted by the other side; and I have two long affidavits in support of my contentions, which your Lordships have not allowed me even to read out, and I sit down under protest.'

Mr. *Branson* in support of the application. The facts of this case have never been before their Lordships. They have not heard the counsel engaged in support of the rule, and the order made is null and void. I therefore ask that a fresh Bench may be appointed to hear the application. [GARTH, C. J.—I should be glad to hear some authority on the point. I do not see how I have power to interfere.] In one instance, Sir BARNES PEACOCK adopted this course. The case has not been reported, but the facts were, that a Division Bench, consisting of MARKBY and L. S. JACKSON, JJ., who had been appointed to hear the criminal appeals, divided between themselves a number of appeals in which no one was instructed to appear. • Each Judge read and decided half the cases, the other Judge concurring in and signing the judgments of his colleague*. When Sir BARNES PEACOCK became aware of this course of dealing with the appeals, his Lordship declared the decisions to be null and void, set aside each of the judgments, and directed the cases to be brought before him; and with another

* This statement of the facts is not quite accurate. The learned Judges divided the cases between themselves, considering that they were authorized to do so by a rule of Court passed in January 1865 [see *Queen v. Chundra Jugi* (9 B. L. R., 6)], and each passed independent orders on the cases read by him, but did not concur in or sign the orders passed by his colleague.—ED., I. L. R.

[68] Judge heard the cases again. [GARTH, C.J.—There is this difference between that case and the present one. There the order of the Court was, that the two Judges should sit on the appeals, instead of which the Judges took upon themselves to sit separately, contrary to the orders of the Chief Justice and the rules of the Court. But in the present case the two Judges had heard the case together, and while Mr. Jackson was proceeding to read the affidavit, they stopped him and rejected the application; so that there can be no doubt that the Judges were sitting to hear the case in accordance with the order of the Chief Justice and the practice of the Court.] The Judges must give the parties a hearing. They are appointed to hear and determine cases, and cannot determine them without a hearing. Suppose they had said they would not hear the defence, but would act according to the case for the prosecution, could they be said to be acting according to your Lordship's instructions? [GARTH, C.J.—Suppose I did the same thing, who is to set me in order? Is a Division Bench, consisting of two Puisne Judges in a different position from a Division Bench consisting of myself and another Judge? In such a case the proper course is to appeal to Government.] Your Lordship is, undoubtedly, above the other Judges of the Court. [GARTH, C. J.—As Chief Justice, I have certain functions to perform in constituting Benches, but having done so, have I power to call them to account?] There is a minute by Sir BARNES PEACOCK pointing out how the Chief Justice can interfere in such cases. My case is, that there has been no hearing, and that your Lordship has power to direct the case to be heard. He also referred to *The Queen v. Zuhuruddin* (I. L. R., 1 Cal., 219).

Garth, C. J.—This was an application made to me by Mr. Branson on Tuesday last, in the case of *The Empress v. Moulvie Abdool Sobhan*.

The prisoner is charged with bribery; and his case stands for trial at the next Criminal Sessions at Patna. A rule had been obtained on his behalf in this Court, calling upon the Crown to show cause why his case should not be transferred for [69] trial, either to the High Court in its original criminal jurisdiction, or to any other Court of Sessions where the jury system prevails.

The ground upon which this rule was obtained (stated shortly) was, that there was such a strong feeling and prejudice existing against the prisoner in the Patna district, that he could not secure a trial there by fair and unprejudiced jurors or assessors.

This rule came on to be heard before the Criminal Bench on the 27th instant (last Monday). Mr. Jackson appeared in support of it, and I find from the affidavits that he stated to the Court the nature of his application, and the grounds upon which he relied in support of it; that a discussion then ensued, in which the learned Judges appear to have expressed a view against the application; and upon Mr. Jackson proposing to read his affidavits *in extenso*, they declined to hear them, and informed Mr. Jackson that his application was refused.

Mr. Branson then applied to me on the following morning, as the Chief Justice of this Court, to appoint another Bench to hear the rule, upon the ground that, in point of law, there had been no hearing before the Criminal Bench. He contended that the Judges were bound to allow Mr. Jackson to read his affidavits, and that they could not possibly know the facts without ascertaining what the affidavits contained; and that as they had not done so, the decision ought to be treated as a nullity, and that I, as Chief Justice, had the power to refer the case for trial to another Bench.

In support of this view he cited two precedents, to which I shall presently refer, where, as he contended, a similar power had been exercised by the Chief Justice of this Court.

I was strongly of opinion at the time that I had no power at all to interfere, but having regard to the novelty and importance of the question, I took time to consider my **Judgment**.

Having done so, I am more than ever satisfied that I have no such power, and that the precedents referred to by Mr. *Branson* have no application to the present case.

The first of these occurred in the early part of the year 1869.

A Criminal Bench of this Court, consisting of two Judges, had been appointed by the Chief Justice in the usual way, for [70] the purpose of hearing criminal appeals; instead of sitting together to hear these appeals, the Judges thought proper to hear them separately, that is to say, one Judge sitting alone heard some of them, and the other sitting alone heard the rest; but the judgments in all the cases were signed by both Judges. Upon this being represented to the Chief Justice, he considered that, in point of law, there had been no hearing at all of these appeals, because they had not been heard by a legally constituted Court, and one Judge sitting alone had no jurisdiction to hear them. He, therefore, ordered the same Criminal Bench to hear them again, and upon the Judges of that Bench declining to do so upon the ground that they had been already judicially decided, the Chief Justice sent them to another Division Bench, by whom they were finally determined.

In this view of my learned predecessor I entirely agree. It is the province and duty of the Chief Justice, under s. 14 of the High Courts Act, to determine what Judge or Judges shall decide each case; and if two Judges are appointed by him to hear an appeal, it is quite clear, I think, that no single Judge has any jurisdiction to hear it.

But here there was no question of jurisdiction. The rule was disposed of by a Court of two Judges duly constituted by myself for that purpose; and the only complaint is, that those Judges, having heard the case up to a certain point, decided it without allowing Mr. *Jackson* to read certain affidavits.

If they erred at all in this, their error was simply one of law in the course of dealing with a matter which was clearly within their jurisdiction. There is no pretence for saying, as it seems to me, that their decision was a nullity, or that the Chief Justice of this Court has any right to question its legality.

The other precedent referred to by Mr. *Branson*, is *The Queen v. Zuhiruddin* (I. L. R., 1 Cal., 219). In that case a prisoner was committed to take his trial at Patna. On the application of the District Magistrate by letter to this Court, the Judge in the English Department made a summary order transferring the case for trial to Shahabad.

[71] The prisoner then applied to this Court for a rule calling on the Crown to show cause why the order of transfer should not be rescinded, upon the ground that it had been made without notice to him, and that the Judge in the English Department had no power to make it.

This rule was heard by a Full Bench, of which the Judge of the English Department was a member, and with his entire concurrence the rule was made absolute.

That case, it is clear, has no application at all to the present. It only decides that the transfer of a criminal case from one District Court to another can only be made by the High Court in its judicial capacity.

The reason, as I have already mentioned to Mr. *Branson*, why the learned Judges in the present case declined to hear the affidavits read, was because they were under the impression that Mr. *Jackson* had already explained the reasons upon which his application was founded: and because they were led to believe, from what Mr. *Jackson* himself had stated, that his client's objection was, not to the trial taking place at Patna, but to its being tried before the Sessions Judge there. Mr. *Jackson*, as I understand, had offered to withdraw his rule, if his client could only be tried by another Judge at Patna, Mr. Tweedie. Under these circumstances, it did seem to the Judges an unnecessary waste of time to have the affidavits read. But if the prisoner's counsel think otherwise, and desire now to be re-heard upon the affidavits, they have only to make a proper application for that purpose.

If the Judges were under a wrong impression as to what Mr. *Jackson* said or intended, they are willing to be set right; and I can only say that, in expressing their readiness to hear the case again, they have done, as it seems to me, all that they could reasonably do, and what I certainly should have done myself under similar circumstances.

Then Mr. *Branson* has suggested that I should send the case to be tried by another Bench, on the ground that, before the same Bench the case would not be heard without some bias. But in the first place, I think that I have no power to do this: and in the next place, if I had, I should not exercise it. I find [72] nothing in the case, as it has been presented to me, which would justify either Mr. *Branson* or myself in supposing that the matter, if heard again, would not be dealt with in perfect fairness.

I would observe, in conclusion, that Mr. *Branson* seemed to be under the impression, that a criminal case of this kind cannot be reconsidered. But in point of fact no judgment has yet been signed; and even if it had, in my opinion an interlocutory order in such a matter is not necessarily final. It is clearly not a *res judicata*, but may be reconsidered or reviewed, or a similar application may be entertained, as often as the Court in its discretion may think proper.

NOTES.

[See also the remarks in (1886) 11 Cal. 12 F. B.]

[8 Cal. 72]

APPELLATE CIVIL.

The 15th July, 1881.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE MORRIS,
AND MR. JUSTICE TOTTENHAM.

Obhoy Churn Sircar and others.....Plaintiffs

versus

Huri Nath Roy and others..... Defendants.*

Butwara—Collector's Proceedings—Partition—Private arrangement—Onus.

A and B were joint owners of a mouza. B leased his share in patni to C. By arrangement between A and C, a partition of the lands was made, and each party collected the rents of the lands allotted to him. Forty years afterwards, a butwara of the mouza was made by the Collector between A and B, whereby lands held by C, under the previous arrangement were allotted to A. C was no party to the butwara proceedings. In a suit brought by A against C for possession of the lands so allotted, the plaintiff alleged that the previous division of the lands between A and C was a temporary one, made after the commencement of the butwara proceedings. The lower Appellate Court found, that the plaintiff's allegations had not been proved, and dismissed the suit.

[73] *Held* (TOTTENHAM, J., *dissenting*), that the decree of the lower Court was correct, as it lay on the plaintiff to show that the private partition had come to an end.

THIS was a suit for possession of certain lands in Turuf Peadaha, Parganna Bazuchap, in the district of Rajshahye, brought by the executors under the will of one Gopal Gossain, against Bojoy Gobind Chowdhry and against others, who held a patni lease of the Chowdhry's share in the turuf.

The plaint, which was filed on the 7th of August 1876, stated that Gopal Gossain was the owner of a four-anna share of the turuf, and the Chowdhrys of a twelve-anna share; that the other defendants, the Roys, obtained a patni lease of the Chowdhry's share, after which Gopal Gossain and the patnidars remained in joint possession of the whole turuf; that, afterwards, proceedings were taken for a partition between Gopal Gossain and the Chowdhrys; that, after these proceedings had been in progress for a long time, a temporary partition of the lands was, in the year 1242 (1836), made between Gopal Gossain and the patnidars; and that this partition was had merely for the sake of convenience in collecting the rents, and was intended to continue until the regular butwara, then in progress, had been completed and no longer; that, in the year 1874, after a space of seventy years, the butwara was completed and the shares of Gopal Gossain and the Chowdhrys respectively assigned; and that the defendants refused to give up to the plaintiffs possession of certain lands which were included in Gopal's share. The patnidars in their written statement alleged that their ancestors had obtained the patni lease of the twelve annas share; that, shortly afterwards, the private partition mentioned by the plaintiffs was made; that, in 1241 (1835), the

* Appeal from Appellate Decree, Nos. 432, 433, 434 and 595 of 1879, against the decree of T. T. Allen, Esq., Judge of Rajshahye, dated the 28th November 1878, reversing the decree of Babu Koylash Chunder Mukerji, Subordinate Judge of that District, dated the 26th June 1878.

ancestor of the Chowdhrys, having brought Roghunath Nundi's twelve annas share, at a sale for arrears of revenue, confirmed the patni of 1207 (1801); and that the private partition, which was intended to be permanent, had been completed long before the regular butwara was commenced, and was not affected by the allotment of 1874, as the patnidars were not parties to the butwara proceeding.

The Court of First Instance having made a decree in favour of the plaintiffs, the defendants appealed. The District Judge [74] in his judgment said :—" I find (i) that it is not proved that the private partition in this case was meant to be temporary ; (ii) that it is not proved that butwara proceedings were pending when this partition was made ; (iii) that even were they, the partition might have been independent, and not meant to be subject to the result of such." The judgment of the Court of First Instance was reversed, and the suit dismissed with costs. The plaintiffs appealed to the High Court.

Babu Sreenath Dass and Babu Saroda Churn Mitter, for the Appellants, argued, that the private partition was wholly informal, was made without any writing, and that the subsequent butwara proceedings showed that it was only intended to be temporary. The patnidars, on partition, must take what the Collector has allotted to their zamindar.—*Byjnath Lall v. Ramooddeen Chowdhry* (21 W. R., 233), and *Sharat Chunder Burmon v. Hurgobindo Burmon* [I. L. R., 4 Cal., 510 ; Contract Act X of 1872, s. 23, cl. (j.)]

Babu Doorga Dass Dutt and Babu Rajendro Nath Bose for the Respondents.

The following **Judgments** were delivered :—

Tottenham, J.—I am compelled, with regret, to confess, that I have not succeeded in bringing myself to take the same view of this case as my learned seniors ; and feeling that, under the circumstances, my opinion must be erroneous, I should be glad to let it remain unexpressed. But as s. 576* of the Code of Procedure seems to require me to state in writing the decision which I think should be passed on the appeal, I think it more respectful to the majority of the Court to state my reasons at the same time.

The position of the parties appears to me to be this ; the plaintiffs are *prima facie* entitled to the lands assigned, and this is, I think, sufficient to start their case in seeking to disturb the existing arrangement to them under the butwara. But the defendants plead a special agreement of a permanent nature [75] which entitles them to retain possession as against the plaintiffs of portions of those lands, although admittedly those portions no longer belong to their lessors. It seems to me clear, that it lies upon the defendants to prove their plea to the full ; and that the burden is not shifted from them to the plaintiffs merely because the latter have admitted one portion of the plea, *viz.*, that there was an agreement, which, however, they contend, was not intended to be permanent ; and which, I believe, in the absence of express conditions, would only remain in force so long as both parties wished to abide by it.

The defendants' case depends upon the nature of the agreement, and it is, I think, for them, and not for the plaintiffs, to prove it.

No evidence appears to have been given on this point by either party, and the lower Appellate Court, having laid the onus on the plaintiffs, dismissed the suit, because they had not discharged that onus.

* [Sec. 576 :—When the appeal is heard by more Judges than one, any Judge dissenting from the judgment of the Court shall state in writing the decision or order which he thinks should be passed on the appeal, and he may state his reasons for the same.]

Dissent to be recorded.

I am of opinion, that the onus was wrongly placed, and that the decision of the lower Appellate Court ought to be reversed.

I would add, that this Court, on second appeal, is not, as it seems to me, competent, either upon consideration of the long continuance of the arrangement, or upon any other consideration, to determine what was the nature of the agreement. That is a pure question of fact which cannot legally be decided on a second appeal.

Morris, J.—The real defendants in this suit are the patnidars. When, therefore, the plaintiffs sue to eject them from land of which they are found to have been in possession for the last fifty years, it lies upon them to prove conclusively their right to do so. The plaintiffs claim the right solely on the ground that, under a recent butwara by the Collector, the land in suit falls within the block or 'puttee' assigned to them as constituting their four annas share. The patnidars reply that they were no parties to the butwara, and cannot be bound by it. They allege further, that the land in suit forms part of the estate which, prior to the butwara, was, under a private arrangement between them and the plaintiffs, assigned to them [76] as comprising the twelve annas share of the zamindari, which they took in patni from the proprietor of that share; that they have been and are in possession under this arrangement; and that their possession cannot now be disturbed. The plaintiffs admit the fact of an arrangement of the kind alleged by the defendants, and that possession followed upon it. They, however, assert that this arrangement was necessarily of a temporary character, being liable to come to an end at any moment when the entire estate, as a joint undivided property, became subject to the incident of butwara.

It seems to me, that the onus of proof of the arrangement between the plaintiffs and the patnidars being of a temporary character, and liable to be broken through on the occasion of the butwara, lies entirely upon the plaintiffs. Had the property continued joint,—that is to say, had there been no private arrangement between the four-annas plaintiff-proprietors and the twelve-annas patnidar-defendants, then, doubtless, on the occasion of a butwara at the instance of the plaintiffs and the patnidars' lessor, the patnidars would be bound to follow the share assigned to the latter. But when, admittedly, an independent arrangement was made between the four-annas plaintiff-proprietors and the patnidars of the twelve-annas share, by which, as between them, the whole estate was partitioned, and this arrangement was acted on by possession following according to the partition, then I hold that the plaintiffs cannot set aside this arrangement by simply relying on a butwara to which the patnidars were not consenting parties. They must show that the arrangement was of a limited and conditional character. It was quite within the power of the plaintiffs and of the patnidars to divide the estate between them, and once this division was made and acted on, no conduct of the plaintiffs with a third party can disturb it or affect its validity.

I agree, therefore, in the judgment of the lower Appellate Court, and would dismiss the appeal with costs.

Garth, C.J.—The Judges of the Division Bench having differed in opinion upon a point of law, the matter has been referred to me as a third Judge; and as the parties desired it, the case has been re-argued before us.

[77] The facts are these:—The plaintiffs are the owners of a four-annas share of an estate called 'Turuf Peadaha, and the defendants No. 2 are the owners of the other twelve-annas share.

The defendants No. 1 are the patnidars of the twelve-annas share under a patni, which was confirmed in the year 1241 B.S., but which appears to have been originally granted some thirty years earlier.

The estate at that time being undivided, the patni lease only conveyed to the patnidars the undivided twelve-annas share; but it is an admitted fact in the case, that, after the patni was granted, an amicable partition of the estate was made as between the owners of the four-annas share on the one hand, and the patnidars on the other, by which certain lands were appropriated to the patnidars as representing their twelve-annas share, and the remaining lands were appropriated to the four-annas share-holders as representing their share.

It is also admitted, that, in accordance with this private partition, the lands thus appropriated to the patnidars have been in their possession for upwards of forty years past.

After the patni was granted, the owners of the four annas share took the usual steps to have a butwara of the whole estate made by the Collector. Whether those steps had or had not been taken at the time when the private partition was made, does not appear; but the proceedings before the Collector were, undoubtedly, delayed for a good many years, and the butwara was not finally completed until the year 1871.

The division of the lands effected by the butwara was in many respects different from that effected by the private arrangement with the patnidars; and the consequence was, that some of the lands which were allotted to the plaintiffs (as the four annas shareholders under the butwara) were those which, by the previous arrangement, had been appropriated to, and were in the possession of, the patnidars.

The Collector, in the usual way, gave possession of these lands to the plaintiffs as against the defendant No. 2, but the defendants No. 1 insisted that they were no parties to, and were not bound in any way by, the butwara proceedings; and [78] as they refused to relinquish possession of these lands to the plaintiffs, this suit was brought.

Upon these facts the lower Court has found

1stly—That it is proved, that the private partition (that is, the arrangement between the owners of the four annas shares and the patnidars) was meant to be temporary.

2ndly—That it is not proved, that the butwara proceedings were pending when that partition took place.

3rdly—That even if they were pending, the partition might have been independent, and not intended to be subject to the butwara.

Upon these findings, the lower Court has decided that the plaintiffs were bound to prove that the private partition had come to an end, and that as they had not done so, the suit should be dismissed.

The point of law which has been raised here, and upon which the learned Judges of the Division Bench have differed in opinion, is this—whether, under the circumstances, the onus was upon the plaintiffs to prove that the private partition had come to an end; or whether the onus lay upon the defendants No. 1 to prove that the private partition was still in force.

In order to ascertain on whom the onus lies, I think it is necessary first to see what was proved or admitted on either side.

Now, it is an acknowledged fact on both sides, that the private partition was not only made, but that it has been acted upon by both parties for upwards of forty years. There is no reason, so far as I can see, why the continuance of such an arrangement is not perfectly consistent with the butwara made by the Collector. That butwara was made for revenue purposes, as between the plaintiffs and the defendants No. 2, and the defendants No. 1, the patnidars, were no parties to it.

Moreover, it does not appear that, at the time when the private arrangement was made, any steps had been taken to have the Collector's butwara effected, so that no presumption can arise that the arrangement was only to be in force until the Collector's butwara was completed.

Then, the fact of this private arrangement having admittedly [79] existed, and been acted upon for forty years, raises a presumption, as it seems to me, that it was of a permanent character; or at any rate throws upon the plaintiffs, who seek to disturb the existing state of things, the onus of showing that it has been legally determined.

This is a principle upon which the Courts and the Legislature have generally thought it right to act, as in cases of presumption and in presuming, that a tenancy or a partnership or other state of things continues until the contrary is proved (*see* the Indian Evidence Act, s. 109, and Taylor on Evidence, 1st edn., s. 123).

I think, therefore, that the lower Appellate Court was right, and this appeal will, consequently, be dismissed with the costs of both hearings in this Court.

The same order will be made in the other cases, Nos. 433, 434, and 595 of 1879.

Appeal dismissed.

NOTES.

[See also (1892) 20 Cal. 285 and the cases therein cited; 8 Bom. L. R. 885].

* [Sec. 109;—When the question is whether persons are partners, landlord and tenant, or principal and agent, and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand, to each other in those relationships respectively, is on the person who affirms it.]

Burden of proof as to partnership, tenancy and agency.

[8 Cal. 79]

The 31st May, 1881.

PRESENT :

MR. JUSTICE PONTIFEX AND MR. JUSTICE FIELD.

Kasumunnissa Bibee.....Defendant

versus

Nilratna Bose.....Plaintiff.*

*Mortgage—Patnidar—Adverse possession—Sheriff's sale—Execution—
Decree for account—Lis pendens—Priority—Redemption—Parties.*

On the 6th of September 1865 *B* obtained a patni lease of certain land from the zamindar, and at an auction-sale by the Sheriff of Calcutta, on the 21st of February 1867, the zamindar's interest was knocked down to *B*, and a conveyance of the property to him was executed by the Sheriff on the 1st of April 1867. On the 13th of March 1879 a suit for khas possession was brought against *B* by *C*, who had bought the property at a sale in execution of a decree made on a mortgage thereof, the date of the mortgage being the 11th of January 1865, and the date of the decree being the 30th of November 1865. *B* pleaded adverse possession.

Held, that *B*'s possession as patnidar only could not be considered as adverse to *C*, who claimed the superior interest; that *B*'s possession as purchaser could not be considered to have commenced before the date of the [80] conveyance to him by the Sheriff,—namely, the 1st of April 1867; and that, therefore, the plea of adverse possession was bad, since the suit had been instituted within twelve years of that date.

In 1855 a decree for an account was passed in the Supreme Court at Calcutta, against *A*, an executor. *A* died in 1856, and the suit, which was revived against his representatives, came on for consideration on further directions on the 29th of August 1866. It was then found that *A*'s estate was liable for Rs. 1,32,406-11-8, and his representatives were ordered to pay this money into Court. The representatives having made default in payment, a writ of *fieri facias* was issued, under which certain property was sold by the Sheriff of Calcutta and conveyed by him to *B* on the 1st of April 1877. Previously to this the representatives of *A* had, on the 11th of January 1865, mortgaged the same property, together with other lands, "for the purpose of paying the Government revenue of certain taluqs belonging to *A* deceased," and the mortgagee having obtained a decree on his mortgage, the property was sold to *C*, in execution of the mortgage-decree, on the 30th of March 1867. In a suit for possession by *C* against *B*, the latter pleaded *lis pendens*.

Held, that the nature of the suit, in which the decree of 1855 and the subsequent order of 1866 were passed, was not such as to warrant the application of the doctrine of *lis pendens* to the mortgage of the 11th of January 1855.

Kailas Chandra Ghose v. Fulchand Jahari (8 B. L. R., 174) followed.

Held also, that though the sale to *B* was made for the express purpose of paying the debts of *A*, *B*'s title was not to be preferred to that of *C*, who claimed under the mortgage of 1865, which was made for the purpose of paying Government revenue; and,

Semle.—The result would be the same even if the mortgage of 1865 had not been made for the purpose of paying Government revenue, as it did not appear that the mortgagee, at the date of the mortgage, knew that there were unpaid creditors of *A*, and that *A*'s representatives intended to misapply the money so advanced to them.

Greender Chunder Ghose v. Mackintosh (1 L. R., 4 Cal., 897) followed.

Where the mortgagee of a zamindari brings a suit on his mortgage against a mortgagor who previously to the mortgage has granted a patni lease of the zamindari to a third party, the latter should be made a defendant in order to give him an opportunity to redeem.

Terms upon which a patnidar was let in to redeem* stated.

*Appeal from Original Decree, No. 68 of 1880, against the decree of Baboo Kristo Chunder Chatterjee, Subordinate Judge of Nuddea, dated the 5th of February 1880.

THIS was a suit for khas possession of certain property situate in the district of Nuddea. The facts were as follows :—On the 20th January 1855 a decree of the Supreme Court at Calcutta was passed in a suit brought by the heirs of one Promothonath [81] Dey against Ashutosh Dey, the brother of Promothonath and the executor of his last will. The decree established the will of Promothonath; declared that an amicable partition previously made was binding on Ashutosh and the heirs of Promothonath; directed an account of the moveable and immoveable estate of Promothonath come to the hands of Ashutosh; appointed Ashutosh receiver of the rents and profits of the immoveable estate of Promothonath on his own personal security; and reserved the consideration of all further directions and subsequent costs with liberty to apply. Ashutosh Dey died in 1865, and the suit, which was revived against his representatives, came on for further directions, on the Master's report, on the 29th of August 1866. It was then declared that the estate of Ashutosh Dey was liable for Rs. 1,32,406-11-8; and the representatives of Ashutosh were ordered to pay that sum into Court. This order having been disobeyed, a writ of *perpetuam* was issued to the Sheriff, by virtue of which he, on the 21st of February 1867, sold the disputed property to the defendant Kasumunnissa, who had previously obtained a patni lease thereof from the representatives of Ashutosh on the 6th of September 1865. The conveyance from the Sheriff to Kasumunnissa was executed on, and bore date the 1st of April 1867.

The plaintiff claimed title in this way. On the 11th of January 1865 the representatives of Ashutosh Dey borrowed Rs. 2,000 from Modun Mohun Haldar, in consideration of which they gave an equitable mortgage of certain properties, including the property in dispute, as security for the loan. The memorandum of mortgage recited, that the money was borrowed "for the purpose of payment of the Government revenue of certain taluks belonging to the estate of Ashutosh Dey, deceased." In August 1865 Modun Mohun instituted a suit on this mortgage in the Calcutta High Court against the mortgagor and a subsequent equitable mortgagee; and, on the 30th of November 1865, obtained the usual decree for an account and sale in default of redemption. Under this decree the property in dispute was sold by the Registrar of the High Court to Nil Madhub Bose on the 30th of March 1867, and a conveyance to him was executed on the 6th of November 1868.

[82] The plaintiff now brought the present suit against the representatives and against Kasumunnissa for khas possession of the property in dispute. The plaint was filed on the 13th of March 1879. The Subordinate Judge found that the suit was not barred by limitation; that the right of Kasumunnissa was not affected by Modun Mohun's decree; and, citing *Gopee Bundhoo Shantha Mohapattur v. Kallee Pudo Bauerjee* (23 W. R., 338) and *Byjnath Singh v. Gobardhan Lall Mohasohree* (24 W. R., 210), he gave the plaintiff a decree for khas possession, allowing Kasumunnissa to come in and redeem.

Kasumunnissa appealed to the High Court, on the grounds—(i) that the suit was barred by limitation; (ii) that the lower Court was wrong in not holding that the possession of the defendant was not adverse to the rights of the persons whom the plaintiff represented; (iii) that the plaintiff, having derived his title from the residuary devise under the will of Ashutosh Dey, did not possess any rights superior to those of the defendant, who had *bona fide*, without notice of the mortgages in question, purchased the disputed property for the satisfaction of debts due by the said Ashutosh Dey; (iv) that the suit should have been dismissed when the defendant was no party to the proceedings from which the plaintiff derived his title; (v) that the Court below should have held that the plaintiff and the persons whom he represented had always full

knowledge of the existence of the debt of Ashutosh Dey for which the property was ultimately sold by the Sheriff under the writ of *ieri facias*; (vi) that the learned Subordinate Judge should have held that the decree for sale, made in the High Court of Calcutta, of property situated in the mofussil, and the sale thereof by the Registrar of the said Court, could have no operation whatever upon the title of the defendant; (vii) that, under the circumstances of the case and the evidence on the record, the suit should have been dismissed with costs as against Kasumunnissa.

Bahoo Sreenath Dass and Bahoo Saroda Churn Mitter for the Appellant.

[83] Bahoo Doorga Dass Dutt and Bahoo Rajendra Nath Bose for the Respondent.

The **Judgment** of the Court (PONTIFEX and FIELD, JJ.) was delivered by **Pontifex, J.**—In this appeal both the parties claim under the representatives of one Ashutosh Dey. The plaintiff claims under a mortgage made by Ashutosh's representatives on the 11th January 1865. The mortgagee instituted a suit upon that mortgage, making a second mortgagee, whose mortgage was dated the 12th January 1865, a defendant in that suit. He also made the representatives of Ashutosh Dey defendants. And on the 13th November 1865, he obtained a decree on the Original Side of this Court, directing that, unless the defendant paid his mortgage-debt within a time therein named, the property should be sold. Under that decree the property was sold on the 30th March 1867, and purchased by the present plaintiff. A conveyance was made to the present plaintiff on the 6th November 1868; and on the 13th March 1879, he instituted this suit against the defendant, claiming khas possession of the property which he purchased.

The defendant's title, also under the representatives of Ashutosh, is as follows:—On the 6th September 1865 she obtained a patni of the disputed property, for which she paid a considerable premium; and on the 21st February 1867 she contracted, in a certain suit to which I shall presently refer, to purchase the property in dispute; and under that contract, on the 1st April 1867, a conveyance was made to her of the property in dispute. Now, the suit in which the sale was made to the defendant was a suit of this nature. Ashutosh Dey had a brother, Promothonath Dey; and apparently during the lives of the brothers, Ashutosh had been the managing member of the family. Promothonath Dey having died, his representatives instituted a suit against Ashutosh, asking that accounts might be taken of the management of the joint estate, and that a partition might be effected between the parties. By the decree in that suit accounts were directed, and Ashutosh Dey himself was appointed the receiver without security. The decree was dated the 28th [84] February 1855, and was in the usual form, declaring that Promothonath Dey's will was established, and directing that a receiver should be appointed with usual powers, and that accounts should be taken, reserving further consideration. By a subsequent order in that suit, dated the 29th August 1866, it was found, upon the Master's report, that a sum of Rs. 1,32,406 was due from the estate of Ashutosh Dey (who had died subsequently to the first decree); and it was also found that the representatives of Ashutosh Dey, who had been made parties by revivor to that suit, admitted assets of Ashutosh Dey; and there was an order that the representatives of Ashutosh Dey should pay the sum of Rs. 1,32,406 into Court to the credit of that suit. That last order was, as I have said, made on the 29th August 1866; but the representatives of Ashutosh Dey, being unable to pay into Court the sum of Rs. 1,32,406 as directed by that order, an order was subsequently made by the Court that part of Ashutosh Dey's estate should be sold; and it was under this last order that the defendant, on the 21st February 1867, contracted to purchase this property, and on the 1st April

1867 obtained a conveyance of it. Now, the plaintiff being a purchaser under the mortgage-decree, has sued, as I have said, for khas possession. The first objection taken by the defendant is, that the suit is barred by limitation, on the following ground, —namely, that inasmuch as she, the defendant, has been in possession as patnidar since the 6th September 1865, and as this suit was not commenced until the 13th March 1879, and moreover as she, the defendant, contracted to purchase on the 21st February 1867, her possession must be taken to have been adverse for twelve years before suit. We do not think, however, that the defendant is entitled to rely on her possession as patnidar, as adverse possession against the plaintiff's claim to the superior interest; and although the defendant contracted to purchase the superior interest on the 21st February 1867, which would be more than twelve years before suit, yet, inasmuch as the conveyance was not made to her until the 1st April 1867, we are of opinion that she cannot be considered to have been in possession of the superior interest as purchaser until the date of that conveyance, and as that date was within twelve years of suit, she is not now [86] entitled to contend that the plaintiff's claim is barred by adverse possession. The defendant next contends, that her purchase on the 21st February 1867 is entitled to priority over the plaintiff's purchase in the mortgage-suit for the following reasons,—that the defendant's purchase was made in a suit which was depending long before the date of the mortgage under which the plaintiff claims, and that the sale to the defendant was made in order to pay a debt of Ashutosh Dey himself, and which had been found to be owing from Ashutosh to the plaintiff in that first suit: and that such suit as a *lis pendens* affected the plaintiff and the mortgagee under whom the plaintiff claims. That, however, depends entirely upon the nature of the suit. The order that I have referred to in that suit dated the 28th February 1855, which was the only order precedent to the mortgage, gave no notice whatever that this particular property of Ashutosh Dey could be in any way affected by the result of that suit. In the case of *Kulus Chandra Ghose v. Fulchand Jaharri* (8 B.L.R., 474), a question of *lis pendens*, very similar to this, had to be considered, and at page 489, SIR RICHARD COUCH, who was then the Chief Justice, makes these observations:—“With regard to the question of *lis pendens*, the doctrine appears to be this, that the alienee is bound by the proceedings in the suit after the alienation and before he becomes a party. Then the question is, by what proceedings in the suit is he bound? Is he bound by the proceedings which arose from the nature of the suit, and from the case set up, and the relief prayed in the bill, or is he to be bound by any order which the Court may be induced by the parties to make in the course of the suit? I can find no authority which goes to the extent of saying, that because he does not think fit to become a party to the suit, he is to be bound by any order whatever that may be made. It seems to me, that he ought only to be bound by proceedings which, from the nature of the suit and the relief prayed, he might expect would take place; and if there had been no notice in this case, it might have been necessary for us to determine what is the precise effect of *lis pendens*. But this need not now be determined. Practically there is no substantial difference [86] between *lis pendens* and having notice of the suit. He would be equally bound by them, and not more by one than by the other. Looking at the decree of the 2nd February 1864, I am of opinion that Fulchand Jaharri cannot be taken to have anticipated that such an order as this would have been made in the suit, and it is not a proceeding by which he is bound.” Applying these observations to the case before us, it seems to us, that the mortgagee, who claimed under the mortgage of the 11th January 1865, could not at that time have anticipated that the order of the 29th

August 1866, or the subsequent order in that suit directing this particular property to be sold, would be made; and therefore neither the mortgagee, nor the plaintiff claiming under him, would be bound by the subsequent order for sale in that suit; and his mortgage, therefore, would be entitled to take precedence of the defendant's purchase in that suit. But then it is argued, that as the sale to the defendant was made for the express purpose of paying the debts of Ashutosh, it ought to have priority over a mortgage made by the representatives of Ashutosh, the money secured by which was avowedly not to be applied in payment of the debts of Ashutosh. But the avowed purpose for which the mortgage was made was to raise money for payment of Government revenue, the payment of which would be in the nature of an insurance of Ashutosh's property for the claim of his creditors, and such a mortgage would, therefore, be entitled to priority, and if the mortgage had not in fact been made to provide for payment of Government revenue, still there is nothing in this record to show that the mortgagee was aware that there were unpaid creditors of Ashutosh, or even if aware of that fact, that Ashutosh's representatives intended to misapply the money advanced to them. And unless he was proved to have notice of both these circumstances, he would be entitled to insist on the validity of his mortgage as against the creditors of Ashutosh—*Greender Chunder Ghose v. Mackintosh* (I.L.R. 4 Cal. 897).

We are, therefore, of opinion that the plaintiff's title as claiming through the mortgagee prevails over the defendant's title. But inasmuch as the defendant was a patnidar, and so far as [87] appears from this record and according to the finding of the Judge of the Court below, her patni was dated before the time the mortgage-suit was instituted, we are of opinion that she, as patnidar, ought to have been made a defendant in the mortgage-suit, so as to have the opportunity afforded her of redeeming the mortgages. In this country patnis, zuripeshgi leases, and interests of that nature are very considerable interests in the land, and cannot be looked upon as mere leases for a term of years which a mortgagee might have the right to disregard. They are in fact substantial proprietary interests, on the grant of which, as in this case, considerable premiums are paid; and it is only equitable, that persons in that position should be allowed the opportunity of preserving their interests by redeeming any mortgages made by the superior holder. In this case the patnidar was not made a party to the mortgage-suit; and therefore any decree in that suit would not affect her, and the plaintiff having purchased under that decree, can have no higher right against her than the mortgagee would have had if he had made her a defendant to the suit on the mortgage. What then are the plaintiff's rights against the defendant in this suit? It has been urged, that inasmuch as he instituted this suit for khas possession, the suit ought to have been simply dismissed, and certain authorities have been referred to as showing that that was the proper course to be followed. But in this case the Subordinate Judge has in fact treated the suit as a redemption-suit, and has given a decree to the plaintiff, subject to the defendant's right whatever that may be, to redeem. We think, therefore, it would be improper, under the circumstances, to dismiss the suit without giving the plaintiff any relief. Moreover, it has been brought to our notice, that although the learned Judge in the Court below has, in his judgment, found that the mortgage-suit was instituted after the date of the patni, as a matter of fact, the mortgage-suit was instituted before the date of the patni. This is an additional reason why we should not dismiss the suit, merely because it was wrongly conceived in asking for khas possession. But inasmuch as the plaintiff has not appealed from the decree of the Subordinate

Judge, we cannot now interfere with his finding, and we must deal [88] with the case as if the mortgage-suit had in fact been instituted after the date of the patni. Then what are the equitable terms upon which the defendant should be permitted to redeem the plaintiff? It has been stated, that the mortgage under which the plaintiff claims comprised additional property as well as that which the defendant purchased on the 1st of April 1867. If the defendant had been a party to the mortgage-suit, she could not have redeemed without paying the aggregate amount of the principal and interest—moneys due upon both the mortgages at the date of the mortgage-decree, but she would have been let in to redeem on paying that amount. Now the price paid by the plaintiff for the land in dispute when he purchased on the 30th of November 1867, may have been either more or less than that aggregate amount. If it was more, we think the defendant is entitled to redeem on paying that aggregate amount (with interest as hereinafter mentioned) and no more; because it was not her fault that she was not made a party to the mortgage-suit, and she has not received the excess. If, on the other hand, it was less, we think the defendant is entitled to redeem on paying the amount paid by the plaintiff as purchase-money on the 30th November 1867 (with interest as hereinafter mentioned). The defendant having the alternative of paying either of the amounts referred to, must also pay interest at the rate of six per cent. per annum for three years preceding the date of the decree of the lower Court upon the capital sum so to be paid until the date of payment. The defendant will be allowed six months within which she must pay these sums, and the decree will be, that unless she pays the smaller of the capital sums before indicated, together with interest thereon as before mentioned, within the said six months, she will be foreclosed, and the plaintiff will be entitled to a decree for khas possession. If, on the other hand, she makes the payments directed within the six months, then the plaintiff, upon such payment, must convey to the defendant all the interests of the plaintiff in the property. We think that the costs of the suit should follow the usual course in a mortgage-decree, *viz.*, if the defendant redeems under the liberty which we have given her, she must do so on the terms of paying all the costs of the suit. If, on the other [89] hand, she does not avail herself of that privilege, then there will be no order for costs, and the plaintiff will be entitled to a decree for khas possession.

NOTES.

I. ['LIS PENDENS '—

Applicable to compromise decrees : 16 M. L. J. 372 ; 1 M. L. T. 145 F.B. overruling 12 Mad. 439 ; also when appeal not then actually preferred, 28 Cal. 23 ; 4 C. W. N. 740 ; See also 18 Cal. 188. As to purchase from executors, see also 8 Cal. 690 ; 25 Bom. 202.

II. WHO MAY REDEEM—

Those who have an interest in the equity of redemption or *part thereof*, whether in full right or as lessees or sub-mortgagees : —12 Cal. 414 P. C. ; 21 Cal. 116 ; 29 All. 679 ; (1907) A. W. N. 227 ; 4 A. L. J. 703 ; 19 All. 379 ; 13 All. 432 ; 1 O. C. 105.

III. AMOUNT PAYABLE BY HIM WHO REDEEMS—

See the criticism of Dr. Rash Behari Ghose, *Mortgages* (1911) Vol. I, pp. 625, 626 ; 5 C. L. J. 315 ; 33 Cal. 590 ; 10 C. W. N. 592 ; 26 All. 185 ; 21 Cal. 366 ; 21 Mad. 64 ; 19 All. 527.

IV. CONVERSION OF SUIT OF ONE CHARACTER INTO SUIT OF ANOTHER—

See 5 C. L. J. 527 ; 65 $\frac{1}{2}$; 6 C. L. J. 609 ; 19 All. 541 ; 6 M. L. J. 51 ; 20 Bom. 196.

V. PATNI LEASE—

See 24 Cal. 575 ; 1 C. W. N. 406 as to its nature.]

[8 Cal. 89]

APPELLATE CIVIL.

The 2nd August, 1881.

PRESENT :

MR. JUSTICE MORRIS AND MR. JUSTICE TOTTENHAM.

Hem Chunder Chowdhry.....Decree-holder

versus

Brojo Soondury Debee.....Judgment-debtor.*

Application in aid of execution—Possession Wasiat—Limitation Act (XV of 1877), sched. ii, art. 179, cl. 4.

Where a decree is one for possession, with wasilat from the date of dispossession to the date of suit, an application for wasilat, if not made within three years from the first application in execution, is barred.

An application made by a judgment-creditor to take out of Court certain moneys there deposited by his judgment-debtor, cannot be considered to be an application to the Court to take a step "in aid of execution," and is not, therefore, within the meaning of cl. 4 of art. 179†, sched. ii of Act XV of 1877.

Bunsee Singh v. Mirza Nazuf Ali Beg (22 W. R., 328) distinguished.

THE plaintiff, one Hem Chunder Chowdhry, on the 10th February 1877, obtained a decree against the defendant for possession of certain properties, with mesne profits from the date of dispossession to the date of suit. On the 4th April 1877 he applied to the Court for execution and for the assessment of mesne profits, and obtained formal possession through the Court on the 14th June 1877; wasilat, however, remained unascertained. And on the 28th June 1877, he applied to take out of Court certain moneys deposited by the judgment-debtor. On the 17th May 1880 he made another application for costs and wasilat. To this, however, one of the judgment-debtors objected, on the ground that the application was barred by limitation.

[90] The Subordinate Judge held, that the application for wasilat had been made within three years from the date of the delivery of possession, and that, therefore, it was not barred, there being nothing to show that the decree-holder had made any unnecessary delay in taking out execution; but he held that the application for costs was barred.

The judgment-debtor appealed to the District Judge against the finding of the lower Court, that the application for wasilat was not barred. The District Judge, following the ruling in the case of *Bunsee Singh v. Mirza Nazuf Ali Beg* (22 W. R., 328), found, that although the application was not barred, yet it was right that the Court should consider whether or not the proceedings for assessing wasilat had been instituted promptly and pursued with sufficient diligence: and that, inasmuch as the decree-holder, in the present suit had allowed a period of two years, eleven months and three days to elapse between the date of taking possession and the last proceedings in execution on the 28th June 1877, he held, that such a delay was incompatible with promptitude and diligence, and therefore allowed the appeal.

*Appeal from Appellate Order, No. 59 of 1881, against the order of T. M. Kirkwood, Esq., Judge of Mynensingh, dated the 16th December 1880, reversing the order of Baboo Nobin Chunder Ghose, First Subordinate Judge of that district, dated the 27th September 1880.

† [q. v. *supra*, 8 Cal. 29.]

The decree-holder appealed to the High Court.

Baboo *Gurudass Banerjee* and Baboo *Jogesh Chunder Roy* for the Appellant.

Baboo *Umbica Churn Bose* for the Respondent.

The **Judgment** of the Court (MORRIS and TOTTENHAM, JJ.) was delivered by

Morris, J. It seems to us that there is some difference between this case and the case referred to by the Judge, - viz., *Bunsee Singh v. Mirza Nuzuf Ali Beg* (22 W. R., 328). In the latter case, the decree was a decree for possession and a direction was given therein that the plaintiff do recover wasilat from the date of suit to the date of recovery of possession. In the present case, the decree was a decree for possession with wasilat from the date of dispossession to the date of suit. It is, therefore, argued that the award of wasilat is part of the decree. Admitting this for the moment, and without going to the length [91] of the decision in the case of *M. S. Inzeelun v. Syud Keramat Hossein* (21 W. R., 212), it seems to us, that even on this assumption the judgment of the lower Court must be upheld, and that the application for execution in the shape of determination of mesne profits is barred by limitation. The decree bears date the 10th February 1877, and the first application, which appears to us to be the only application for execution, was made on the 4th April 1877. The application for determination of wasilat was made on the 17th May 1880, which is more than three years from the date of the first application. It has been argued that the application made on the 28th June 1877, by the judgment-creditor, to receive a certain sum of money deposited by the judgment-debtor, is an application within the meaning of cl. 4, art. 179^{*} of sched. ii of the Limitation Act, XV of 1877. But it seems to us, in spite of certain rulings of the Madras and Allahabad High Courts, which have been quoted to the contrary, that we cannot treat an application for money deposited by the judgment-debtor as an application to the Court "to take a step in aid of execution." In no sense can an application to the Court for an order for payment of the money deposited in satisfaction of the decree be said to constitute a step taken by the Court "in aid of the execution." The money so deposited can be taken out by the judgment-creditor years after the date of deposit, and therefore the order of payment by the Court in no way affects the question of execution. The appeal is dismissed with costs.

Appeal dismissed.

NOTES.

I. MESNE PROFITS, ASCERTAINMENT OF—LIMITATION --

See also 19 Cal. 132 F. B. overruling 14 Cal. 50; 26 All. 623; 14 All. 531.

II. STEP IN AID OF EXECUTION—APPLICATION TO WITHDRAW MONEY DEPOSITED IN COURT--

The Calcutta High Court has adhered to this ruling in 10 C.W.N. 354 (358); 10 Cal. 549; 11 Cal. 227; 23 Cal. 196. It draws a distinction when something more has to be done towards realisation:—8 C.W.N. 382; 10 C. W. N. 28; 3 C. L. J. 95; 10 C. W. N. 354 (359); 27 Cal. 709. For the Punjab view see (1881) P. R. 107; (1882) P. R. 190; (1884) P. R. 88; (1885) P. R. 27; (1912) P. W. R. 80.

A Different view has been taken by the other High Courts:—**Madras**: 16 Mad. 452; 17 Mad. 165; 2 Mad. 174; **Allahabad**: 6 All. 366; 12 All. 399; 19 All. 477; **Bombay**: 22 Bom. 340; *contra* 19 Bom. 261 (267) **Central Provinces**: 11 C. P. L. R. 161.]

* [q. v. *supra*, 8 Cal. 29.]

[8 Cal. 91]
ORIGINAL CIVIL.

The 8th September, 1861.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE WILSON.

Balkissen Dass.....Plaintiff
versus
LuchmEEPOT Singh.....Defendant.

Appeal—Costs —Appealable order.

If an order is itself appealable as affecting the jurisdiction of the Court or the merits of the case, an appeal will lie from that part of the order which relates to costs ; but, as in the case of decrees, in those cases, and those [92] cases only where the order is appealable, will an appeal lie against the direction as to costs, which is ancillary to the order.

APPEAL from the decision of BROUGHTON, J.

This was a suit to have a mortgage, dated the 7th September 1875, declared fraudulent and void, and to have a decree upon it, dated the 1st May 1876, set aside ; such decree having been obtained by consent, in a suit in which Roy LutchmEEPOT Singh Bahadoor was plaintiff, and Gopinath Dobay and Sibnath Dobay were the defendants. They were made defendants in the present suit, which was originally brought by Byjonath Persad ; but while it was pending, the latter died, and his sons, Balkissen and Ojoodia Persad, were substituted as plaintiffs. At the hearing in the original Court, on an objection being taken on behalf of the defendant, that other members of Byjonath's families were interested in the subject-matter of the suit, and should therefore be made parties, an order was made on the 25th February 1880, adjourning the further hearing of the case, with liberty to the plaintiffs to have the additional parties added in the meanwhile, and ordering the costs of such adjournment to be borne by the plaintiffs.

When the case came on subsequently, it was heard out, and the plaintiffs' suit was dismissed with costs.

The plaintiffs then appealed, and amongst other grounds of appeal, they objected to being saddled with the costs of the adjournment.

Mr. *Bonnerjee* and Mr. *Salc* for the Appellant.

Mr. *T. A. Apcar* and Mr. *Trevelyan* for the Respondent.*

The **Judgment** of the Court (GARTH, C.J., and WILSON, J.), so far as it referred to the question of those costs, was as follows :

Garth, C.J.—Certain it is that, on the one hand, the plaintiff was mistaken in supposing that the Dobays owed no money to LuchmEEPOT at the time of the mortgage ; and on the other, LuchmEEPOT was not aware of the true position of the plaintiff's family as regards the banking business. The consequence was, [93] that when the trial had proceeded for some time, it transpired that the plaintiff, Byjonath, although professedly carrying on business in his own name was really doing so on behalf of the other members of his family, who were interested in the bank ; and thereupon Mr. Kennedy took an objection, that all the persons so interested ought to be made parties to the suit.

This was resisted on the part of the plaintiff ; but the learned Judge, after hearing both sides, thought it right to adjourn the case, giving the plaintiff's counsel an opportunity of applying to the Court within one month to add the other members of the firm as plaintiffs, or if he elected not to do so, giving the defendants leave to apply to the Court to dismiss the suit. Meanwhile the costs of the adjournment were ordered to be paid by the plaintiff.

No doubt the plaintiff's counsel were placed in some difficulty by this order. The learned Judge appeared to be of opinion, that the other parties ought to be joined, and if the plaintiff had declined to apply to make them parties within the specified time, he ran great risk of having his case dismissed.

Under these circumstances the plaintiff's counsel made the application to add the other members of the family with a strong protest, that they did so under compulsion, and after some time, during which the additional parties were placed on the record (not as plaintiffs, but defendants), the trial again proceeded.

A large amount of additional costs was thus thrown upon the plaintiff ; and one of the grounds of appeal before us is, that the plaintiff ought not to have been made to pay the costs of the adjournment.

The only point, which remains to be considered, is with regard to the additional parties who were placed upon the record, and the long adjournment which took place in consequence of Mr. Kennedy's objection.

Whatever might have been our view as to the necessity for adding those parties, or the propriety of throwing the costs of the adjournment upon the plaintiff, we think that, in this [94] instance, we have no power to entertain these questions in a Court of appeal.

It is very possible that, under special circumstances, either the addition of a party or the adjournment of a trial might be a matter affecting the merits of the cause. But here there seems no ground for such a contention ; see the observations of PEACOCK, C. J., in *Kumara Upendra Krishna Deb Bahadur v. Nabin Krishna Bose* (3 B. L. R., O. J., 113 ; cf. page 118).

It is said that the plaintiff was unjustly ordered to pay the costs of the adjournment. It is argued, that if the case was adjourned in consequence of Mr. Kennedy's objection, and if that objection was unfounded, then, upon the merits of the question, the plaintiff was right ; and that as the costs of the cause can, undoubtedly, be made the subject of appeal, it is said that the plaintiff has a right to appeal against the order for costs in this instance : *Grudharilall Roy v. Sundar Biby* [B. L. R. (Full Bench), 496] ; *Buldeo Narayan v. Scrymgeour* (6 B. L. R., 581). In both these cases, however, the subject of appeal was the costs of the decree ; and the principle upon which the Full Bench apparently proceeded was this ; that as the costs formed part of the decree, and the decree was appealable, that part of it which related to costs was appealable also, and to the same extent as the decree itself. Thus, in a special appeal, the only objection which could be taken to the decree as regards costs would be one upon some point of law ; whereas in a regular appeal, the objection as to costs might be made either upon a point of law, or upon the ground of discretion.

We see no reason why the same principle should not properly be applied to the costs of appealable orders. If the order is itself appealable, as affecting the jurisdiction of the Court or the merits of the case, there seems no reason why an appeal should not lie from that part of the order which

relates to costs. There must, of course, be some limit to appeals against orders for costs; and it would seem only reasonable, as well as consistent with authority, to apply the same rule to orders, as to decrees, and to hold that, in those cases, and those cases only where the [95] order is appealable, the direction as to costs which is ancillary to the order should be appealable also.

In this case, as the order for adjournment was not appealable, we think we cannot entertain any objection against the order as to the costs.

The appeal will, therefore, be dismissed with costs on scale No. 2.

Appeal dismissed.

Attorney for the Appellant : Mr. Carruthers.

Attorneys for the Respondent : Messrs. Beeby and Rutter.

NOTES.

[See also (1885) 12 Cal. 271 ; (1891) 16 Bom. 241 ; (1905) 2 N. L. R. 49.]

[8 Cal. 95]

PRIVY COUNCIL.

The 23rd, 24th, and 25th June and 9th July, 1881.

PRESENT :

SIR B. PEACOCK, SIR. R. P. COLLIER, SIR. R. COUCH, AND SIR
A. HOBHOUSE.

The Secretary of State for India in Council.....Defendant

versus

Rani Anandomoyi Debi.....Plaintiff.

[On Appeal from the High Court of Judicature at Fort
William in Bengal.]

Assessment of land formerly occupied for Government Salt Works--

Reg. I of 1824.

Upon the relinquishment by the Government of lands, within the ambit of a permanently settled zamindari, continuously used before and since the perpetual settlement of salt-works, from the commencement of salt-making by the Government, until after the passing of Reg. I of 1824, the provisions of that Regulation are applicable to the mutual rights of the zamindar and of the Government.

Such lands were held by the officers of the Salt Department, in terms of cl. 11 of that Regulation, "free of rent" and "under a perpetual title of occupancy," whether belonging to a permanently settled estate or not. The force of the Regulation and the right of the Government to assess such lands, are not affected by 'khalari' payments having been made, among other compensations, by the Government to the zamindar; and cl. 11 appears to contemplate some such payment. On a settlement of the relinquished lands, 'khalari' payments, being "sums remitted to the zamindars and to be allowed in perpetuity," within the meaning

of the 4th clause of s. 9 of [96] Reg. I of 1824, must be continued to the zamindar ; or, if a settlement should be made with others, he should be assessed only for the land retained by him.

APPEAL from a decree of a Divisional Bench of the High Court (15th September 1879) altering a decree of the Officiating Judge of the Midnapore district (7th July 1876), made after a remand order of a Divisional Bench of the High Court (20th January 1875), whereby a decree of the Judge of the Midnapore district (8th August 1873) dismissing the suit, was reversed.

This appeal raised a question of the construction and application of Reg. I of 1824, which declares, as its title states, "in what manner the claims of the zamindars and of the officers in the Salt Department are to be adjusted in certain districts where lands are required for the purposes of salt manufacture." The respondent disputed the right of the Government to assess lands within the ambit of a permanently settled zamindari in Hidgelli in the Midnapore district, in which the manufacture of salt had been carried on by the Government from the year 1780 until 1863, when, as in other parts of Bengal, it was relinquished. This zamindari, containing three parganas, *viz.*, Dakhin Mal, Bahirimutha, and Baitgarh, treated as forming one estate, was settled in 1801 with Raja Narnarain Roy, the ancestor and predecessor in title of Raja Gojendernath Roy, who, with Raja Kuar Narain Roy, held it in 1863. Both the latter Rajas were dead at the time of this appeal, and were represented by their widows, Rani Anandomoyi Debi and Rani Horripria Debi. Within the limits of the parganas above named were about 16,615 bighas, producing only salt, and wood used for fuel in making salt ;—lands locally known as 'chatar' and 'jolpai'. These lands the Government occupied for salt-works before the decennial and the perpetual settlements, having in 1780 undertaken the khas or direct management, through the Salt Department of the Nimak Mehal, or revenue derived from salt ; and having then ceased, generally, to farm out the right of salt making. The zamindar received, *mushuhara* [97] or compensation for the loss of profits on salt-making, at first fluctuating, but afterwards, in the year 1838, fixed at Rs. 618 per annum ; also an allowance of salt and 'khalari khezana'† ; the latter being Rs. 393-11-0 for each of the two Parganas, Dakhin Mal and Bahirimutha, there being none for Pargana Baitgarh. The entries made at settlement in regard to the khalari payment, are described in their Lordships' judgment.

On the 20th July 1865, the Collector of the Midnapore district, under the orders of the Government, issued a notice to the Rajas entitled to these three parganas, calling upon them to enter a settlement for the revenue of the lands in which, on and from the first May 1863, salt-making had been relinquished by the Salt Department. Raja Gojendernarain Roy was then a minor, but after attaining his majority he refused compliance with the above. The Collector, thereupon, made temporary settlements of the land with other engagers for the revenue, who were made co-defendants in this suit, with the Collector on the part of the Government, and the widow of Raja Kuar Narain Roy, then deceased. *

By his suit, commenced in 1872, Raja Gojendernarain sought to obtain a declaration that the lands in which salt-making had been relinquished by the Government were part of the mal, or revenue-paying land of the zamindari (to a moiety thereof he was entitled in possession) and were already

* Chatar (Uriya) the place where the saline earth is collected. Jolpai (Uriya) fuel-land. — *Glossary* H. H. Wilson.

† Khalari (Bengali) a salt-bed, or place where salt is made. — *Glossary*, H. H. Wilson.

subject to the perpetual settlement; so that the temporary settlements were invalid. According to the plaint, the plaintiff's ancestors, before British rule, used to make salt in Parganas Dakhin Mal and Bahirimutha, through molunghis on the lands fitted for the purpose. After 1780, when they no longer had this privilege, they received 'khalari rent' and mushuhara. On the 29th of May 1801, the three parganas were settled with the plaintiff's grand father, the jumma upon them was fixed, and in accordance with a resolution of the Governor-General in Council of the 8th August 1794, an annual sum, as Khalari rent, was granted; the latter representing what the molunghis had formerly paid for rent of the salt lands. The [98] Government also allowed mushuhara, and salt at the rate of four maunds for every hundred maunds made. In Pargana Baitgarh, before the settlement, no lands were used for salt-making, and therefore, in the daol, or estimate of the profits of the land made at the settlement, no khalari rent was mentioned for that pargana. The Salt Department, however, afterwards used such land in Baitgarh, as well as in the other parganas, as was suitable for its purposes; the land reverting, on its becoming exhausted of salt and fit for cultivation, to the mal lands of the zamindari. In this way the quantity of land used in the manufacture of salt varied from time to time, the Government having, between 1801 and 1864, used all such land in the three parganas as was saliferous, and having paid khalari rent accordingly, with the other compensations above mentioned. The defence made by the Collector on behalf of the Government was, that cl. 11 of s. 9 of Reg. I of 1824, authorized assessment of the lands in question; and it was denied that lands once salt-producing were ever made over to the zamindar.

This defence was held good by the District Judge (Mr. C. E. Lance) who dismissed the suit with costs. He held it barred by Reg. I of 1824, whether the khalari payments had been made by way of rent or not. At the same time he was of opinion that the payments in this respect "were not of the nature of rent, and were not calculated upon the lands themselves, or upon their extent." On appeal to the High Court, a Divisional Bench, (AINSLIE and MITTER, JJ.), reversed the decree of the lower Court, and remanded the suit, under s. 351 of Act VIII of 1859, for trial with reference to the question, among others, "whether all the 16,665 bighas had been held from before and continuously since the perpetual settlement down to the 8th of January 1824, the date of the passing of the Regulation in question, in order that it might appear whether any part of the land in suit was exempt from its operation." Thereupon the successor in office of the District Judge observing that it had not been decided by the Appellate Court that cl. 11 governed the case, fixed issues, upon the consent of both parties, opening the whole question. In his judgment (7th February 1876) he found that "the khalari payments were rent paid for the use of the land by the Government:" [99] whence he concluded that, in Parganas Dakhin Mal and Bahirimutha (for which alone these payments were entered at settlement), the disputed lands were included in the perpetual settlement, so as to prevent their being again assessed. The lands used and relinquished in Pargana Baitgarh were not in his opinion, so included, and to them he considered cl. 11 of s. 9 of Reg. I of 1824 to be applicable. He decreed in favour of the plaintiff for a moiety of the former lands, but not for any of the latter, and adjusted the costs accordingly.

The defendant appealed to the High Court, while, as to the lands in Baitgarh, the plaintiff, respondent, filed objections under s. 348 of Act VIII of 1859. The same Divisional Bench which had remanded the suit, dismissed

the appeal on the part of the Government, and allowed the plaintiff's objections. The decree was altered in favour of the plaintiff and the whole of her claim was decreed.

That part of the judgment of the High Court (given by AINSLIE, J., and concurred in by MITTER, J.), which related to cl. 11 of s. 9 of Reg. I of 1824, was as follows:—

"The basis of that clause, as it seems to me, is the notion that, as regards lands held from before the permanent settlement there could not be any collections at the date of that settlement, arising from the occupation of those lands, as Government held their only product, and, therefore, there could have been no assessment; and, as a consequence, there was no bar to an assessment whenever it might suit the Government to cease to take a salt-revenue in lieu of a land-revenue. The zamindar's right of occupation and use seems to have been deemed overridden by the exercise, at an earlier date, of the arbitrary privilege of assumption for the purposes of the salt monopoly; and the subsequent permanent settlement, in which there could be included no assets from this part of the estate, was held not to convey a title to hold without liability to enhancement. The absence of possible assets at the date of the permanent settlement, and the consequent exclusion from assessment of the lands of the profits, of which the salt monopoly deprived the zamindars, is the foundation of the right of Government, asserted in cl. 11, and it is this only that saves it from conflict with Reg. I of 1793.

If, then, as a matter of fact, I find that the lands, which form the subject of the present suit, were otherwise dealt with; that, at the settlement of the estate, the assets were calculated including income [100] from these lands, I am forced to hold that, in spite of the language of cl. 11, s. 9, Reg. I of 1824, the Government has, by its own conduct, precluded itself from now putting forward a claim to assess under that clause. It cannot both have its assessment and a right to assess on the ground of no prior assessment. It has been found by the Judge below, that the item in the assessment shown as khalari rent, is a rent of land, and, in this, I entirely concur. It could not be a profit on salt manufacture, for, excepting so far as compensation for loss of profits under the head of mushuhara was allowed, the rights and interests attaching to the possession of the salt mehal were swept away by the monopoly, and, obviously, Government would not recognize a right to levy a tax on salt manufacturers for licenses to manufacture, unless that tax could be supported on the ground that it was payment for a right of entry on, and use of, the land; or, in other words, that it was rent of land.

The mode of computation seems to me immaterial. Whether a rate per acre, leaving the Salt Agent to get what he could out of defined acres, or a rate per khalari (or centre of manufacture), under which the area was limited only by the average working capacity of a khalari, or a rate per head of manufacturers engaged, leaving them free to work where it suited them, was adopted, it was the use of land and of land only that the zamindar gave. The salt in or on the land was not his to give. Now, when the Government chooses to include a rent of land, arising out of the salt lands, in the assets of the permanent settlement of the estate, it cannot, in virtue of cl. 11, s. 9, Reg. I of 1824, override the provisions of the permanent settlement, by which it has bound itself by its own contract with the zamindar.

The clause deals with lands included in the geographical limits of a permanently-settled estate, but excluded from consideration in valuing that estate for assessment. I cannot understand how the Government can say,—

"we have paid you rent for this land ever since the beginning of the century, and we have taxed you on those payments; but we now intend to declare, that this is a perpetual rent-free occupancy tenure, and to tax it over again."

That there is any separate Government jolpai estate does not seem to be made out. The same question was raised in 1838, and decided against the Government, and it seems to have been made clear then, that the Salt Agent worked at his will without reference to the boundaries he himself gave as limiting the Government and zamindari [101] rights.* It was said that the jolpai chittas were not before Mr. Dick; but, it seems to me, that these chittas do not establish that the jolpai lands mentioned in them are exclusive of the lands for which khalaria rent was paid. On the contrary, the rent of the salt lands given up in 1863, which the Salt Agent, by his notice of 29th July of that year, declined to pay after the first May, then last past, did, as I understand, include the rents shown in the documents at page 8 of Appeal No. 239 of 1873. Reference to the quinquennial registers proves nothing. In estates containing extensive tracts of unreclaimed land, the names of mouzas afford no certain guide. The settlement was of parganas, and there is nothing to show that any parts of these parganas were excluded.

As to parganas Dakhin Mal and Bahirimutha, the settlement records show sums under the head of 'khalaria rent': in pargana Baitgarh, there is no such item. The lower Court has, in consequence, held, that this last pargana must be treated differently from the two former. Against this decision, the plaintiff has taken an objection under s. 348, Act VIII of 1859, and I think it must be allowed. There seems to be no ground for supposing that the Government was, at the same time, treating one part of the estate in one way, and one in another. The reasonable presumption is, that, in all parts of the estate dealt with at the same settlement, it treated lands of the same class in the same way. Thus, when we find, in two parganas, clear proof that the jolpai land was taken into account in making the assessment, we may assume that the same was done in the third. The absence of a rent at that time is not, under the circumstances, sufficient evidence of exclusion from consideration.

Many permanently-settled estates comprise extensive tracts which were not charged with any revenue at the Permanent Settlement, but undoubtedly included in the engagements then made. I would, therefore, dismiss the appeal of the Government, and decree the appeal of the plaintiff with costs of the whole litigation, payable by Government to the plaintiff: the decree of the lower Court being extended to include an award of possession of one-half of bighas 1,208-3-3-3, the disputed lands in pargana Baitgarh."

On this appeal Mr. T. H. Cowie, Q.C., and Mr. J. T. Woodroffe appeared for the Appellant.

[102] The Respondent did not appear.

For the appellant it was argued, that the High Court had misconstrued Reg. I of 1824, s. 9, besides having erred in holding that 'khalaria' payments were rents paid by the Government for the use of the land which it was now sought to assess. It had been concluded, as a consequence of the above, that the tracts in which the making of salt had been relinquished by the Government could not now be assessed. But, due effect had not been given to the words of Reg. I of 1824; which expressly declared that the lands occupied by the Salt Department should be deemed to be held 'rent-free': in other words,

* The case referred to was *Raja Narnarain Roy v. The Collector of Chakla Hidgelli*, in the Civil Court of Midnapore, before Mr. Abercrombie Dick, 1st July 1838.

held as "not being assessed to the land-revenue"; and also declared that such lands, on relinquishment by the Salt Department, should be liable to be assessed. Reg. VIII of 1793, s. 100, exempted from the Perpetual Settlement "such of the salt districts as had been held khas in the past years to facilitate the conduct of the business of the salt manufacture." Further legislation on the subject was supplied in 1824 in the Regulation now in question. The history of the salt-making by the Government, or, as it was termed in Reg. I of 1824, "the monopoly of the salt manufacture under a system established in the years 1780 and 1781," showed that the khalari payments were not rents in the sense of payments for the use of the land in the occupation of the Salt Departments, but were part of the compensation given to the zamindar on account of the loss of profit which he sustained when he ceased to hold, in farm, from the Government, the right to manufacture salt. Until then the zamindars levied a cess calculated on the number of labourers employed in the salt-works on their estates, at the rate of 1-8 per head. The khalari payments were not, in their origin, remissions made from the jumma of the zamindari; nor were they rents adjusted to any area of land; but they were fixed by a capitation. Reference was made to the report on the manufacture and sale of salt in British India by G. A. C. Plowden, Esq., 1856, Part III, Bengal Appendix Note I. Also to the same report, Appendix C, cl. 2, p. 27. The argument also adverted to the mode of paying the 'khalari' rents; and it was contended that, although the [103] payment had been made by a transfer to the Revenue Department from the Salt Department, of a credit on account of the zamindar, authorizing a deduction from the amount of land-revenue payable by him, this did not indicate that the amount credited was in its origin an item of land-revenue. Lastly, on the construction of cl. 11 of Reg. I of 1824, it was argued that its language amounted to a statutory declaration that the lands held by the Salt Department were, notwithstanding the khalari payments, held rent-free.

Their Lordships' **Judgment** was delivered by

Sir R. P. Collier. The present appeal arises thus. The Government of India determined to relinquish the manufacture of salt in the lands the subject-matter of this suit, and, in pursuance of a power which it conceived itself to possess under Reg. I of 1824, offered, in the year 1865, to settle those lands with the plaintiff, within the ambit of whose zamindari they were situated. The plaintiff declined the offer, denying the right of the Government so to deal with them, whereupon they were temporarily settled with two other persons. The plaintiff has brought the present suit for a declaration that a moiety of the lands in question, amounting to 16,665 bighas, are part of the mal lands of his permanently-settled estate, *viz.*, three parganas, Dakhin Mal, Bahirimutha, and Baitgarh, for possession of them, and to set aside the temporary settlements.

The first defendant is the Collector of the Zillah of Midnapore who represents Her Majesty's Government. The defendants Nos. 2 and 3 are the grantees of the temporary settlements. The fourth, the widow of Raja Koar Narain Roy, is described as a *pro forma* defendant, entitled to half of the land suit for.

The Judgment of the High Court was in favour of the plaintiff and from that judgment the Collector has appealed.

The Government of India has always claimed, as indeed the native Governments to which it succeeded had done, the sole right to all salt produced within its territory, and the revenue derived from salt has always been treated as quite

distinct from that derived from land. Before the year 1780, the Government had been in the habit of letting the salt-pro-[104]ducing districts, which were commonly unfit for agricultural purposes, to farmers, who might or might not be the owners of the adjacent lands; and it was only in the latter part of the last century that some preferential claim to a lease of such districts was admitted on behalf of the zamindar within whose zamindari they were situated.

In the year 1780 the Government determined on assuming what is called in the Regulations a monopoly of salt, but which may be more correctly described as the exclusive right to manufacture it. They accordingly took all salt-producing lands into their own hands, working them by agents, commonly called salt agents. The zamindars, who were thus deprived of their lands, were compensated by certain remissions and allowances. To require a zamindar, from whom a portion of his land had been taken, to continue to pay rent for that portion would have been obviously unjust. So much rent, therefore, as he would probably have obtained for the land if he had kept it in his possession, and which was usually estimated on the footing of $1\frac{1}{2}$ anna per head on the men who would probably be employed in the salt manufacture, was remitted to him. The remission was thus carried into effect. He was still assessed on the whole zamindari, but the estimated rent of the 'khalari' or salt land was treated as payable by the Salt Department, and debited to them. This payment or debit was assumed to enure for the benefit of the zamindar, and he was credited with it; the effect of this arrangement being that, although he was nominally charged with the jumma due on all the land geographically within his zamindari, he was in reality charged only with so much of the jumma as appertained to that land which he retained in possession. A further allowance called mushuhara (monthly allowance) was sometimes made to him in respect of profits which he might have derived over and above rent, and sometimes a further allowance of salt itself.

In the present case we have an authenticated extract from the Decennial Settlement in 1801 of the three parganas in suit with the ancestors of the plaintiff.

It will be enough to take the entries relating to the first-named pargana, Dakhin Mal. No. 220 is described as consisting [105] of certain farms, Harripore, &c., "engaged for by the proprietor in perpetuity," and a sudder jumma of Rs. 3,012-1-19 is assessed upon them. No. 221 is described as 'khas,' without any statement that it was engaged for in perpetuity, probably in conformity with Reg. VIII of 1793, s. 100, which declares that the rules for settling with proprietors do not apply to salt districts held khas by Government, which are to continue khas and be assessed from year to year. Under the head of 'farms, &c., mohals,' there is entered 'khalari rents,' and the sudder jumma is stated as Rs. 393-11-7, which, added to the former figure, makes a total jumma of Rs. 3,405-13-6-1.

The manner in which the Rs. 393-11-7 is dealt with, appears from several purwannahs to the same effect as the following, of the 14th February 1856 relating to a portion of it.

"C.B., Salt Agent.

"To Raja Gojendro Narain Roy (minor), and Bahoo Koar Narain Roy, Zamindars.

"You are hereby informed, that this purwannah is given to you as a certificate of the fact that the rent of the khalari for the year 1262 B. S., as given below, has been duly debited in the office of this agency, and credited to your

account under the Collectorate head of Zillah Midnapore, and that a statement of the same has been forwarded to the Collector of the said district. Dated 14th February 1856, corresponding with the 4th Falgoun 1263 Willaity.

Description.	Amount.		
	R.	A.	P.
"Khalari rent for kist Magh 1262, for 3 annas share of Pargana Dakhin Mal and others	232	13	5
"Total two hundred and thirty-two rupees thirteen annas and five pios only.			
"Jodoonath Bose, Mohurrir."			

It thus appears that the zamindar, who was treated as liable for the gross jumma, was relieved from the payment of the khalari portion of it, that portion being debited to the salt agency and credited to him. Bahirimutha is settled in exactly the same form as Dakhin Mal, but in the case of Baitgarh no khalari rent is mentioned.

[106] These being the main facts, it is convenient now to refer to Reg. I of 1824, s. 9, by the construction of which the rights of the parties are determined.

Clause 2 refers to the rules and regulations following for the Government of the officers of the Salt Department.

Clause 3 of the section is in these terms :—

"The principle upon which remissions were originally made from the jumma of zamindars, on account of khalari rents, or the like, upon the assumption of the salt mehal, is hereby declared to have been to relieve those to whom they were granted from an assessment upon assets which were transferred to Government on the establishment of the system of exclusive manufacture, with the rights and interests attached to the possession of the mehal."

The 4th is as follows :—

"All zamindars and others, whose claims to remission were allowed in the first instance that is, on account of rents collected by them previously to the year 1188 B.S., shall be considered to fall within the class of land renters who received an abatement of what they then ceased to collect, upon the principle above laid down; consequently, it is hereby declared that the sums remitted to them will be allowed in perpetuity."

Clause 7 :—

"The remission allowed on account of rents collected previously to 1188, will still be retained in the revenue books, and will be carried to the debit of the Salt Department."

But the further levy of such rents is discontinued.

The 11th clause, on which the Government mainly relies, is in these terms :—

"Salt-works worked by the Salt Department from the time of the assumption of the monopoly to the present day, or otherwise assumed and held before and since the perpetual settlement (although originally belonging to an estate for which a permanent settlement has been formed), shall be considered to be held by the officers of the Salt Department, free of rent, under a perpetual title of occupancy, and shall be considered to be, and to have been, liable to assessment by the Revenue Authorities, when relinquished by the officers of the Salt Department in the same manner as if they had been farmed by an individual from Government, and had been open to re-settlement on the expiration of his lease."

[107] Clause 12 runs thus :—

"Salt lands, upon which salt-works have been established, whether before or after the perpetual settlement, shall, provided they have been worked for twelve years without claim on the part of any one to receive rent or compensation for the use of the same, be deemed to be the absolute property of the Government."

The short history of the litigation is as follows :--

The case first came before Mr. Lance, the Judge of Midnapore, who dismissed the plaintiff's suit, on the ground that Reg. I of 1824, s. 9, cl. 11, gave to the Government the power which they claimed.

On appeal to the High Court, the case was remanded in order that it might be tried whether or not some portion of the land claimed was 'jolpai,' that is to say, land on which the right of the Government was to collect fuel, not to manufacture salt, and which consequently was not affected by cl. 11.

Mr. Justice AINSLIE, the Senior Judge, seems then not to have dissented from the view of the Regulation taken by Mr. Lance, and to have remanded the case only on this ground. Mr. Justice MITTER, indeed, took a different view of the clause, appearing to think that the words in parenthesis, "although originally belonging to an estate for which a permanent settlement has been formed," narrowed the meaning of the previous words, limiting it to such an estate only, and that the estate in question was not such an estate.

Their Lordships are of opinion that the words have no restricting effect, but are intended to prevent restriction, and mean that whether the salt lands worked did or did not belong to a permanently-settled estate, the same consequences would follow.

The case, on being remanded, came before Mr. Tottenham, who had succeeded Mr. Lance, and instead of confining himself to the comparatively simple question on which the case had been remanded, he re-tried it from the beginning on a number of issues, which, in their Lordships' judgment, tended rather to obscure than to elucidate it.

He gave judgment for the plaintiff with respect to the two first-mentioned parganas, mainly on the ground, as their [108] Lordships understand, that the khalari payment was, properly speaking, rent paid to the plaintiff for the land, a subject on which there had been much controversy. He gave judgment for the defendant with respect to the third, Baitgarh, mainly on the ground that the Government had not paid rent for that.

On cross appeals the High Court affirmed the Judgment so far as it was in favour of the plaintiff, and reversed it so far as it was against him.

In their Lordships' opinion the case is resolved by giving to the words of the Regulation their plain meaning. Clause 3 clearly applies to this case, and was probably drawn with the intention of its being applicable to such cases. A salt mehal was assumed by the Government, a remission was made from the jumma of the zamindar on account of khalari rent, in order to relieve him from assessment on an asset which was transferred to the Government. Clause 7 points to the course which the settlement paper and the purwannahs show to have been followed. The applicability of cl. 11 depends wholly on whether or not the lands in question came within the first words of it, "Salt lands worked by the Salt Department from the time of the assumption of the monopoly to the present day," the alternative which follows need not be considered, nor the parenthetical words.

Their Lordships understand the Court to have found in substance that the lands in suit (including Baitgarh) have been so worked, and they adopt this finding. This being so, the Legislature declares that they shall be considered to be held by the officers of the Salt Department, free of rent, under a perpetual title of occupancy. Their Lordships agree with Mr. Lance that, these being the words of the Regulation, it is quite immaterial whether the

khalari payments are called payments, or rents, or remissions. As has been before intimated, they seem, properly speaking, remissions within the meaning of cl. 3, but their being called or treated as 'rents' would not affect the force of the Regulation, which enacts that the lands shall, in contemplation of law, be hold by the Salt Department rent-free, and when relinquished by that Department shall be liable to assessment just as they would have been if [109] held under a lease which had expired. The effect of the decisions of the Courts is to import limitations into the Regulation which are not to be found in it, and to fritter away its plain words. It may be further observed that, if there had been no 'khalari rent' or compensation, the Government would, under cl. 12, have acquired a title in twelve years. Clause 11, as distinguished from cl. 12, seems to contemplate some such rent, or payment, or remission, and it is not improbable that the words "shall be considered free of rent" were inserted with the intention of rendering impossible the contention which has been raised.

For these reasons, their Lordships are of opinion that the Government have the right which they claim to re-settle these lands. They think it right, however, to refer to the concluding words of the 4th clause,—“It is hereby declared that the sums remitted to them (the zamindars) will be allowed in perpetuity.” Their Lordships assume that the khalari allowance will be continued to the plaintiff, or, what is the same thing, that if the relinquished salt lands be settled with others she will be assessed only for so much of the taluk as was settled with her ancestor as proprietor in perpetuity in 1801, and which she retains; to assess her for land which she can no longer occupy would be clearly unjust.

For these reasons, their Lordships will humbly advise Her Majesty that the decree of the High Court be reversed, and the suit dismissed, each party to pay its own costs in the Court below. Any payment which may have been made in respect of costs to be refunded.

Appeal allowed.

Solicitor for the Appellant: *Mr. H. Treasure.*

[110] APPELLATE CIVIL.

The 23rd August, 1881.

PRESENT :

MR. JUSTICE TOTTENHAM AND MR. JUSTICE MACLEAN.

Ajgur Ali and others.....Defendants

versus

Asmut Ali and another.....Plaintiffs.*

Sale for arrears of Revenue— Under-tenures— Ryots— Act XI of 1859, s. 37, excep. 4.

A person holding land, which is not protected from the operation of s. 37 of Act XI of 1859 † by any of the first three exceptions, is yet entitled to the benefit of the fourth exception in respect of any of the items mentioned therein, which may have been established on the land; and there is nothing in the words of the exception confining the benefit of it to tenure or under-tenure holders, and excluding the ryots from it.

Bhago Bibee v. Ramkaut Roy Chowdhry (1. L. R. 3 Cal., 293) followed.

The benefit of the fourth exception to s. 37, † Act XI of 1859, must be limited to improvements effected *bona fide* and to permanent buildings erected before the revenue-sales, and

* Appeal from Appellate Decree, No. 2634 of 1879, against the decree of Baboo Troilokya Nath Mitter, Officiating First Subordinate Judge of Chittagong, dated the 23rd August 1879, reversing the decree of Moulvi Tofel Ahmed, Second Munsif of Puthab, dated the 30th June 1879.

† [Sec. 37 :—The purchaser of an entire estate in the permanently-settled Districts of Bengal, Behar, and Orissa, sold under this Act for the recovery

Rights of a purchaser of a permanently-settled estate sold for its own arrears.

of arrears due on account of the same shall acquire the estate free from all encumbrances which may have been imposed upon it after the time of settlement; and shall be entitled to avoid and annul all under-tenures and forthwith to eject all under-

tenants, with the following exceptions :—

First.—Istemraee or mokurree tenures which have been held at a fixed rent from the time of the permanent settlement.

Secondly.—Tenures existing at the time of settlement, which have not been held at a fixed rent: Provided always that the rents of such tenures shall be liable to enhancement under any law for the time being in force for the enhancement of the rent of such tenures.

Thirdly.—Talookdaree and other similar tenures created since the time of settlement, and held immediately of the proprietors of estates; and farms for terms of years so held, when such tenures and farms have been duly registered under the provisions of this Act.

Fourthly.—Leases of lands whereon dwelling-houses, manufactories, or other permanent buildings have been erected, or whereon gardens, plantations, tanks, wells, canals, places of worship, or burning or burying grounds have been made, or wherein mines have been sunk.

And such a purchaser as is aforesaid shall be entitled to proceed in the manner prescribed by any law for the time being in force for the enhancement of the rent of any land coming within the fourth class of exceptions above made, if he can prove the same to have been held at what was originally an unfair rent, and if the same shall not have been held at a fixed rent, equal to the rent of good arable land, for a term exceeding twelve years; but not otherwise.

Provided always, that nothing in the section contained shall be construed to entitle any

Proviso.

such purchaser as aforesaid to eject any ryot, having a right of occupancy at fixed rent, or at a rent assessable according to fixed rules under the laws in force, or to enhance the rent of any such ryot otherwise than in the manner prescribed by such laws, or otherwise than the former proprietor, irrespectively of all engagements made since the time of settlement, may have been entitled to do.]

should not be conceded to anything subsequently constructed, or which appears to have been constructed merely for the purpose of defeating the rights of an auction-purchaser. Subject to this reservation, it does not matter whether the improvements have been effected by the present holder or by some previous occupier.

THIS was a suit brought by the plaintiffs, who had, on the 11th of November 1876, purchased a resumed lakhraj taluq at a sale for arrears of revenue, held under the provisions of Act XI of 1859. The suit was to obtain khas possession of certain lands comprised in the taluq, and held, as alleged in the plaint, by the defendants under an *etnami* right, which *etnami* right the plaintiffs claimed to be entitled to set aside. An *etnami* tenure, it should be mentioned, is an intermediate one between the proprietor of the taluq and the ryots. The suit was brought against a number of defendants in respect of a total quantity [111] of land amounting to 1*l.* 5*k.* and 2*g.*, comprised in certain daghs of the Government chitta set out in the plaint.

Three only of the defendants defended the suit. They contested it in respect of 11*k.* of the land in suit comprised in seven of the daghs mentioned in the plaint, which land, they alleged, was their mawasi holding in their possession as khodkast ryots, their title going back to a period anterior to the Decennial Settlement. They further pleaded, that they were at least ryots with a right of occupancy, and a further contention was, that they had upon their land a khamar, a tank, and a garden; they, therefore, claimed the benefit of the four exceptions to s. 37 of Act XI of 1859, on one or other of the grounds set forth in their defence.

The Court of First Instance held, that the defendants had made out a right of occupancy, and also that their land contained a khamar-bari, a garden, and a tank. It thereupon dismissed the plaintiffs' suit. The lower Appellate Court reversed this decision, and decreed the suit, being of opinion that the defendants had failed to show what lands they held within the taluq; and that they also had failed to show a right of occupancy. The Subordinate Judge further remarked, that a "ryot's khamar or garden is not protected by the exceptions to s. 37 of Act XI of 1859. There is also no evidence that the defendants had sunk ponds and planted a garden." The defendants appealed to the High Court.

Baboo Aukhil Chunder Sen for the Appellants.

Baboo Baikant Nath Doss for the Respondents.

The following **Judgments** were delivered :—

Tottenham, J. (His Lordship having stated the facts above set out, continued) :— Regard being had to the findings of fact arrived at by the Subordinate Judge upon the evidence, the appellants' pleader has confessed himself unable to press this appeal upon any but one ground,—*viz.*, that the fourth exception to s. 37,* Act XI of 1859, protects from the operation of the section such portion of the defendants' land as may be occupied by holdings, tank, or garden; and that the lower Court was [112] wrong in supposing that a ryot cannot have the benefit of the exceptions, or that the defendants are bound to prove that they have themselves effected the improvements in question. And for this contention he has referred to the authority of this Court and of the late Sadar Court.

In the case of *Bhagho Bibee v. Ramkant Roy Chowdry* (I. L. R., 3 Cal., 293), the previous decisions bearing upon this point are cited, and the Court was content to follow those decisions as having unquestionably a tendency to

* [q. v. *supra*, 8 Cal., 110.]

encourage improvements on the land, and to mitigate the severity of the Revenue-sale Law. The effect of these decisions seems to be, that a person holding land which is not protected from the operation of s. 37 by any of the first three exceptions, is yet entitled to the benefit of the fourth exception in respect of any of the items specified therein which may have been established on the land, and that there seems to be nothing in the words of the exception conferring the benefit of it on tenure or under-tenure holders, and excluding the ryot from it.

We are not prepared to dissent from the rulings thus laid down, though we are not free from the doubt indicated by WHITE, J., in his judgment in *Bhayo Bibee v. Ramkant Roy Chowdhry* (I. L. R., 3 Cal. 296). We think it clear, however, that the benefit of the fourth exception must be limited to improvements effected *bonâ fide*, and to permanent buildings erected, before the revenue-sale, and should not be conceded to anything subsequently constructed, or which appears to have been constructed merely for the purpose of defeating the rights of an auction-purchaser.

Subject to this reservation, we think that it does not matter whether the improvements have been effected by the present holder or by some previous occupier: and therefore the Subordinate Judge's observation that "there is no evidence that the defendants have sunk ponds and planted a garden" seems to us irrelevant.

In order that these principles may be applied to the present case, it is necessary to send it back to the lower Court. The existence of a khamar-bari, a tank, and a garden being established on the judgment of the first Court, and the fact not [113] having been displaced by the Appellate Court, it will be necessary for that Court to determine whether the khamar-bari is a permanent building; whether it, the tank, and the garden were made before or after the revenue-sale; and if before, what areas they respectively cover. The decision will be in accordance with the findings upon these points.

The present decree of the lower Appellate Court is set aside, and the case will go back for a fresh decision on the points indicated. The costs of this appeal will abide the result.

Maclean, J.—I concur, but not without hesitation, as to the protection claimed by the defendants for the khamar-bari, tank, and garden.

Case remanded.

NOTES.

[See also (1885) 12 Cal. 327 : 1 C. W. N. 412 ; 9 C. W. N. 853 ; 31 Cal. 393.]

[8 Cal. 113]

APPELLATE CIVIL.

The 19th August, 1881.

PRESENT :

MR. JUSTICE MORRIS AND MR. JUSTICE TOTTENHAM.

Futteh Ali.....Plaintiff

versus

Gunganath Roy and others.....Defendants.*

Suit for contribution—Decree against several defendants jointly—Jurisdiction of Small Cause Court—Appeal—Contract Act (IX of 1872), ss. 69, 70.

A suit for contribution not founded upon contract, but in respect of money for which the plaintiff and the defendants in the contribution-suit had been by a former decree made jointly liable, is not within the cognizance of a Court of Small Causes, which cannot deal with questions of equity. A second appeal will, therefore, lie in such a suit.

Ram Bar Chittangeo v. Modhoosoodun Paul Chowdhry (7 W.R., 377) followed.

Nath Prasad v. Baij Nath (1. L. R., 3 All., 66) distinguished.

Quere.—Whether a suit for contribution, where both plaintiff and defendants were liable for the money paid by the plaintiff, falls within the scope of either s. 69 or s. 70 of the Contract Act, which seems rather to contemplate persons who not being themselves bound to pay the money, or to do the act, do it under circumstances which give them a right to recover from the person who has allowed the payment to be made and has benefited by it.

ON the 14th July 1874, certain persons (the defendants No. 2 in the present suit) instituted a suit against one Futteh Ali (the [114] plaintiff) and others (who were the defendants No. 1 in the present suit), and obtained a decree, making Futteh Ali and his co-defendants jointly liable for the sum of Rs. 119. In execution of this decree they attached and obtained an order for the sale of certain property of Futteh Ali, who, thereupon, in order to save his property from sale, satisfied the entire decree.

Futteh Ali then brought the present suit for contribution against all his co-defendants in the former suit.

The Munsif determined the amount due by each of the defendants, and gave the plaintiff a decree, with interest at 6 per cent.

The defendants appealed to the District Judge, alleging that the joint decree against them was bad, each being liable only for his own share. The District Judge held, that, under the decree in the original suit, Futteh Ali was only bound to have paid his own share of the debt, and should have paid such amount into Court, or, if he desired to be in a position to proceed against his co-debtors, he should have obtained an assignment of the decree; but having taken neither of these courses, his payment of the whole debt due under the decree against all the defendants jointly must be taken to have been a voluntary payment, and he, therefore, allowed the appeal, reversing the decision of the Munsif.

The plaintiff appealed to the High Court.

Baboo *Gurudass Banerjee* for the Appellant.

* Appeal from Appellate Decree. No. 2350 of 1879, against the decree of F. J. G. Campbell, Esq., Officiating Judge of Rungpore, dated the 28th June 1879, reversing the decree of Baboo Behary Lall Mookerjee, Officiating Second Munsif of Gaibanda, dated the 27th December 1878.

Bahoo Lall Mohun Dass and Bahoo Taruck Nath Palit, for the Respondents, took the preliminary objection, that the suit was one in the nature of a suit cognizable by a Court of Small Causes, and that the amount involved being less than Rs. 500, no second appeal would lie.

The Judgment of the Court (MORRIS and TOTTENHAM, JJ.) was delivered by

Morris, J.—This was a suit for contribution brought by the plaintiff (appellant) to recover from the defendants collectively [115] the amount due by them as their aggregate quotas under a decree passed against them and the plaintiff jointly, which decree had been satisfied by the plaintiff alone, on the attachment of his property in execution thereof.

The form of the suit was clearly wrong, for the plaintiff had no right to sue for a joint decree against all the defendants, although the decree passed against himself and them had wrongly made them jointly liable for the whole amount of it.

The Munsif, however, determined the amounts of the several liabilities of the defendants, and made a decree in favour of the plaintiff accordingly.

On appeal to the District Judge, the Munsif's decree was reversed, and the suit was dismissed. The findings upon which the decision of the Appellate Court was based were, that, under the decree obtained against him and the defendants jointly, he was legitimately bound for his own share only; and that his payment of the liabilities of his co-debtors must be regarded as voluntary or officious. Hence he was held to be not entitled to recover.

A preliminary objection was taken on the part of the respondents to the hearing of this second appeal against the lower Appellate Court's decision, on the ground that the suit was one in the nature of a suit cognizable by a Court of Small Causes, and that the amount involved being less than Rs. 500, a second appeal is forbidden by s. 586 of the Code of Civil Procedure. It was admitted that there are two Full Bench decisions of this Court, that of *Ram Bux Chittangeo v. Modhoosoodun Paul Chowdhry* (7 W. R., 377) and *Sreeputty Roy v. Loharam Roy* (7 W. R., 384), which were delivered by Sir B. PEACOCK, in which it was held, after a very elaborate exposition of the principle which governs suits for contribution not founded upon contract, that a Court of Small Causes has no jurisdiction in such cases; but we were asked to hold with the High Court of Allahabad that the Contract Act has effected such a change in the law as to render the first cited decision obsolete, and to give to the Small Cause Court jurisdiction in contribution-suits. Reference was made to a Full Bench decision of the High Court of [116] Allahabad—*Nath Prasad v. Baij Nath* (I. L. R., 3 All., 66). The learned Judges in that case considered the Full Bench decision of this Court—*Ram Bux Chittangeo v. Modhoosoodun Paul Chowdhry* (7 W. R., 377); but came to the conclusion that, owing to the Contract Act subsequently passed, that decision was, for practical purposes, to the point under consideration, "obsolete and irrelevant." The case before them was provided for by s. 69 or s. 70 of the Contract Act. The majority of the Judges held, that it came within the scope of s. 70: that the suit was in reality one for damages, and as such, one of the nature cognizable by the Small Cause Court.

Reimbursement of person paying money due by another in payment of which he is interested.

* [Sec. 69:—A person, who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.]

That case, however, was a totally different one from that which is now before us. It was not a suit for contribution, but a suit to recover money paid by the plaintiff under some arrangement for the benefit of the defendants' estate, the plaintiff himself being, apparently, neither interested in, nor liable for, such payment. The High Court of Allahabad may be quite right in holding that such a suit will lie in the Small Cause Court; but it does not follow that a suit for contribution in respect of money for which the plaintiff and defendants had been by a decree made jointly liable, is within the cognizance of a Small Cause Court, which cannot deal with questions of equity such as must frequently arise in suits of this kind, and with which the regular Courts only are competent to deal. We very much doubt whether a suit for contribution, where both plaintiff and defendants were liable for the money paid by the plaintiff, falls within the scope of either s. 69 or s. 70 of the Contract Act, which seem rather to contemplate persons who not being themselves bound to pay the money or to do the act, do it under circumstances which give them a right to recover from the person who has allowed the payment to be made and has benefited by it. The respondents' pleader has suggested that the case falls within s. 43, but clearly it does not, for there is no pretence here that the plaintiff and defendants were joint promisors either by express or implied agreement to pay off the amount of the decree against them.

[117] No sufficient reason having been shown to us for dissenting from the view of the law laid down by Sir B. PEACOCK in *Ram Bux Chittango v. Modhoooodum Paul Chowdhry* (7 W. R., 377), we decide that the present suit was not one of the nature cognizable by a Court of Small Causes, and that the second appeal does lie to this Court.

We are further of opinion that the lower Appellate Court's decree is bad in law, and cannot be sustained.

The course which the Judge suggests the plaintiff should have adopted in the former suit when execution was taken out against him, is clearly untenable. The plaintiff could not limit his payment to a sum proportioned to his particular share. Under the decree which was passed, both he and the judgment-debtors were jointly and severally liable. The fact that no such decree ought to have been passed would not relieve the plaintiff from its operation, and his property having been attached in execution of it, he could not have saved it from sale by depositing in Court what he considered to be his own fair share of the debt. He was thus compelled to satisfy the whole decree, and his payment cannot legally be held to have been voluntary or officious, such as to deprive him of a remedy.

The Judge below is also quite wrong in law when he goes on to suggest, that if the plaintiff desired to be in a position to proceed against his co-debtors, he should have obtained an assignment of the decree. The respondents' pleader properly declined to argue in support of this curious proposition which entirely ignores the last proviso to s. 232 of the Code of Civil Procedure.

* [Sec. 232 :—If a decree be transferred by assignment in writing or by operation of law from the decree-holder to any other person, the transferee may apply for its execution to the Court which passed it; and if that Court thinks fit, the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder:]

Provided that where the decree has been transferred by assignment, notice in writing of such application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections (if any) to such execution:

Provided also that where a decree against several persons has been transferred to one of them, it shall not be executed against the others.]

The Judge, therefore, was wrong in holding that the plaintiff, by his conduct, had disentitled himself to any relief, and he was wrong in his dictum as to the means by which he could have obtained relief. There seems to us in fact to have been no course open to him but that which he adopted, *viz.*, to bring the suit. The Judge was quite right in laying down that not only this suit, but that also which resulted in the decree satisfied by the plaintiff, ought to have been wholly unnecessary, because in the first suit of the series no joint decree should have [118] been passed; but the several liability of each defendant should have been declared, in which case no one of them would have had to pay the share of the others. But we cannot hold the plaintiff responsible for the errors of previous plaintiffs, or of the Court which gave them decrees. All that can now be insisted on is, that the plaintiff should make out the separate liability of each defendant to himself, and the extent of it. This he did to the satisfaction of the first Court, which gave him a decree accordingly. The lower Appellate Court reversed that decree on illegal grounds. We set aside the appellate decree, and restore and affirm that of the first Court, with costs of this Court and of the lower Appellate Court.

Appeal allowed.

NOTES.

[In similar cases it was held that the Indian Contract Act 1872, ss. 69 ; 70 did not apply where *both* the plaintiff and the defendant are liable to pay:—(1880) 6 Bom. 244 ; (1902) 6 C. W. N. 903 ; (1905) 32 Cal. 643 ; (1911) 15 C. W. N. 332. See also (1910) 14 C. W. N. 699.]

[8 Cal. 118]

APPELLATE CIVIL.

The 5th September, 1881.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE MORRIS.

Anarullah Shaikh and another.....Defendants

versus

Koylash Chunder Bose.....Plaintiff.

Fraud—Misrepresentation—Kabuliat Contract of tenancy—Rectification of Contract—Specific Relief Act (1 of 1877), s. 31.

Three plots of land were let to A under one kabuliat. A relinquished two plots, but admitted to being in possession of one, alleging that the kabuliat had been obtained by fraud and misrepresentation.

Held, that as the lease was an entire contract, one portion only could not be repudiated on the ground of fraud: but that, if the tenancy was to be avoided on the ground of fraud, it must be avoided *in toto*.

Where a party to a contract of tenancy desires to have it rectified or altered, the suit should be brought under s. 31 † of the Specific Relief Act.

* Appeal under s. 15 of the Letters Patent against the order of Mr. Justice FIELD, dated the 24th June 1881, in appeal from Appellate Decree, No. 1220 of 1880.

† [Sec. 31 :—When, through fraud or a mutual mistake of the parties, a contract or other

instrument in writing does not truly express their intention, either party, or his representative in interest, may institute a suit to have the instrument rectified; and if the Court find it

clearly proved that there has been fraud or mistake in framing the instrument, and ascertain the real intention of the parties in executing the same, the Court may in its discretion rectify the instrument, so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons, in good faith and for value.]

THIS was a suit brought on a registered kabuliat, dated 4th Aughran 1284 (18th November 1877), for arrears of rent for the year 1284 and 1285 (1877 and 1878).

The defendants alleged that the kabuliat was obtained by fraud and misrepresentation; and that the plaintiff had leased [119] to them by the kabuliat three plots of land, one plot of which the defendants alleged they had for a long period held possession of under a different malik.

They, before suit in the year 1284 (1877), relinquished plots 2 and 3, still, however, retaining possession of plot No. 1. The Munsif held, that, under the kabuliat, the defendants were in possession of the lands let to them by the plaintiff; and that, during the continuance of the tenancy, they could not question the title of their landlord; and that it had not been shown that the kabuliat had been obtained by misrepresentation, and gave the plaintiff a decree.

The defendants appealed to the Subordinate Judge, who held, that the fact that the defendants retained possession of plot No. 1 would render them liable for the rent for the year 1284; but he was of opinion, that the lease was obtained by fraud, and modifying the Munsif's decree, gave the plaintiff a decree for the rent for the year 1284, and disallowed the rest of the plaintiff's claim.

The plaintiff appealed to the High Court.

Field, J., reversed the decree of the Subordinate Judge, and held, that as two of the three plots described in the kabuliat were admitted to be the plots as to which the contract was entered into, there was no fraud as defined in s. 17¹ of the Contract Act and no misrepresentation as defined in s. 18¹ of the same Act; and that as the contention of the defendants was, that the instruments as executed by them did not truly express their intention, and not that they did not execute it, their remedy was to institute a suit to have plot No. 1 removed from the instrument, and to have a plot, which they asserted they had contracted to take, inserted instead; and further, that the defendants were not entitled to relinquish a part only of the land specified in the kabuliat, which they had done.

"Fraud" defined.

¹ [Sec. 17:—Fraud means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party there—

to or his agent, or to induce him to enter into the contract:—

- (1) The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
- (2) The active concealment of a fact by one having knowledge or belief of the fact;
- (3) A promise made without any intention of performing it;
- (4) Any other act fitted to deceive;
- (5) Any such act or omission as the law specially declares to be fraudulent.

Explanation.—Mere silence as to facts, likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is in itself equivalent to speech.]

"Misrepresentation" defined.

¹ [Sec. 18:—Misrepresentation means and includes—(1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though

he believes it to be true;

(2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him;

(3) causing, however innocently, a party to an agreement, to make a mistake as to the substance of the thing, which is the subject of the agreement.]

The defendants appealed under s. 15 of the Letters Patent.

Baboo *Jogesh Chunder Roy* for the Appellants.

Baboo *Bangshidhur Sen* for the Respondent.

[120] The **Judgment** of the Court (GARTH, C.J., and MORRIS, J.) was delivered by

Garth, C.J. --We think that the appeal should be dismissed upon this short ground. Three plots of land were let to the defendants under one kabuliati, two of these, they say, they have relinquished, but one they are now admitted to be in possession of.

Under these circumstances they have clearly no right to set up as a defence to a suit for the whole rent, that they were induced to enter into the kabuliati by the fraud of the plaintiff.

The lease was an entire contract, and the defendants have no right to repudiate one portion of it on the ground of fraud and adhere to the other portion. If the tenancy is to be avoided on the ground of fraud, it must be avoided *in toto*.

If they wished to set up the defence upon which they now rely, they should have relinquished the whole of the land covered by the kabuliati.

If, on the other hand, they wished to have their contract of tenancy rectified or altered, they should have brought a suit for that purpose. They would have their remedy under s. 31 of the Specific Relief Act.

But then it is said by the pleader for the appellants, that the defendants are holding the piece of land which they have retained, not under the lease, but under a different title, but this does not appear upon the record, and the pleader has been unable to show us that he has any real ground for that contention.

We think, therefore, that, as a matter of law, the learned Judge was perfectly right.

The appeal is dismissed with costs.

Appeal dismissed.

[121] APPELLATE CRIMINAL.*The 1st October, 1881.*

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE WILSON.

In the matter of the Petition of Dhunno Kazi and another.

The Empress

versus

Dhunno Kazi and another.*

Evidence—Duty of prosecution—Inferences to be drawn on failure to call witnesses—Misdirection.

It is *prima facie* the duty of the prosecution to call all the witnesses who prove their connection with the transactions connected with the prosecution, and who must be able to give important information.

If such witnesses are not called without sufficient reason being shown, the Court may properly draw an inference adverse to the prosecution.

The only thing that can relieve the prosecutor from calling such witnesses, is the reasonable belief that, if called, they would not speak the truth.

No such corresponding inference can be drawn against an accused.

KHORSHEED KAZI and Dhunno Kazi were charged, the one with knowingly and dishonestly using as genuine a forged document, and the other with abetment.

The document impugned purported to be a deed of gift in favour of the accused by their father.

The facts of the case were, that one Sadarooddeen, the father of the two accused, died, leaving him surviving two sons and one daughter, who was married; that she, on her father's death, succeeded to one-fifth of the family property; and, on the 17th August 1878, sold her share to one Badarooddeen, who was prevented from taking possession of the property by the two accused. Badarooddeen then brought a suit for declaration of his title and for possession, in the Munsif's Court. The accused defended the suit, alleging that their father had executed, during his lifetime, a deed of gift, conveying his whole estate to them. The defendants were committed for trial before the Sessions Court.

In the Sessions Court the evidence relied on by the prosecution as showing that the document was false, was, that it purported **[122]** to be registered before a certain kazi on the 12th April 1854, under No. 32. The books of the Registration Office showed, however, no such conveyance to have been registered under that number; nor was the person purporting to seal the document as kazi, kazi during the year 1854.

Out of ten attesting witnesses to the document seven were dead, two were subpoenaed by the defence (but not called), and the third did not put in any appearance at all.

* Criminal Appeal, No. 530 of 1881, against the order of J. P. Grant, Esq., Sessions Judge of Hooghly, dated the 6th July 1881.

The Sessions Judge, in his charge to the jury, pointed out to them that the Registrar's books showed the registration of no such document as the one alleged to have been registered on the 12th April 1854; and added, that, as regards this point, "the evidence clearly showed that the document was not really attested or registered by any official kazi, and that the certificates of such attestation and registration were clearly forgeries." He thus stated to the jury, that "he thought it right to bring to their notice that the accused's pleader in the civil suit had adopted the extraordinary precaution of requiring his client to endorse on the document itself a statement that he and his brother tendered it for production in evidence, before he, the pleader, would undertake to put it in."

"That the prosecution might please themselves as to the amount of proof that they put forward, but that it was not required that they should put forward exhaustive proof, any omission on their part being a subject for the consideration of the jury."

As regarded the attestation of the document he said, that, "had the three surviving attesting witnesses been called by the defence, they might have given important evidence. If such evidence would have supported the defence, why was it not called? You are entitled to presume from this mere fact, that these witnesses, being cited for the defence, would not, if called, have supported it."

The jury found the first accused guilty under s. 471 of the Penal Code, and the second accused under ss. 191 and 109; and they were sentenced by the Court to rigorous imprisonment for five years and one year respectively.

The prisoners appealed to the High Court.

[123] Baboo *Umbica Churn Bose* for the Appellants.

No one appeared for the Crown.

The **Judgment** of the Court (PRINSEP and WILSON, JJ.) was delivered by

Wilson, J. We think there must be a new trial in this case. The first accused person is charged with knowingly and dishonestly using as genuine a forged document. The second is charged with abetting that offence. The using charged, was a using of the document as evidence in a civil suit. In that suit, which was in respect of certain land, the plaintiff derived his title from the sister of the accused by right of inheritance from her father. The document put in on behalf of the accused and which forms the subject of the present charge, purported to be a conveyance of the property by the father in his lifetime to the accused.

The learned Judge appears to us, looking at his summing up as a whole, to have left the right issues to the jury, which were briefly stated, whether the document was forged, whether it was used with knowledge of that fact, and whether this was done fraudulently or dishonestly.

But in dealing with the evidence bearing upon these issues, the learned Judge seems to us to have directed the jury erroneously upon several material points.

The learned Judge says: "Then I must bring to your notice the circumstance that the accused's pleader in the civil suit adopted the extraordinary precaution of requiring his client to endorse on the document itself a statement that he and his brother tendered it for production in evidence in the suit, before

he, the pleader, would undertake to put it in." Whether this conduct on the part of the pleader be usual or unusual, it is no evidence against the accused in the prosecution.

A more serious error is to be observed in the manner in which the learned Judge has dealt with the fact of the non-production of the survivors among those whose names appear as attesting witnesses to the document in question. The learned Judge points out first,—"Of the ten, only three survivors; of whom [124] two have been cited to this Court by the defence, but have not been called by them, and the third has kept out of the way in rather a marked manner." He then, after stating quite correctly that the burden of proof is on the prosecution, proceeds—"But the prosecution may please itself without dictation from any one as to the extent or amount of proof that they will put forward. If they do not put forward enough to satisfy a jury, they have, of course, only themselves to blame; but they are not required to bring exhaustive proof of their case."

He then points out correctly, as it appears to us, that the weight to be attached to the non-production of material evidence by the prosecution must depend upon the circumstances of the case. And he proceeds:—"Now this present is a very peculiar case. It is practically a sister prosecuting two brothers, and with the serious offence of forgery. You will at once understand how difficult it is for the prosecution to depend upon the evidence of the purporting attesting witnesses, who are still available. One of these has kept out of the way of both sides, the other two have been secured for the defence, and one of them is in the employ of the accused; but others have not after all been called before you by the defence." And he adds,—"You are entitled to presume from this mere fact that these witnesses, being cited for the defence, as they were, would not, if called, have supported it." Later on he says,—"The two attesting witnesses snatched from the prosecution, after it had been declared on the appeal in the previous trial by the accused that the prosecution ought to call them, might and should have been called," *i.e.*, by the defence.

The views expressed in these passages form the foundation for a considerable part of the learned Judge's summing up; and they seem to us to convey erroneous notions of the position of prosecutor and accused in a criminal case.

The only legitimate object of a prosecution is to secure not a conviction, but that justice be done. The prosecutor is not therefore free to choose how much evidence he will bring before the Court. He is bound to produce all the evidence in his favour directly bearing upon the charge. It is *prima facie* his duty, accordingly, to call those witnesses who prove their connection [125] with the transactions in question, and also must be able to give important information. The only thing that can relieve the prosecutor from calling such witnesses is the reasonable belief that, if called, they would not speak the truth. If such witnesses are not called without sufficient reason being shown (and the mere fact of their being summoned for the defence seems to us by no means necessarily a sufficient reason), the Court may properly draw an inference adverse to the prosecution.

There is no corresponding inference against the accused. He is merely on the defensive, and owes no duty to any one but himself. He is at liberty, as to the whole or any part of the case against him, to rely on the witnesses of the case for the prosecution, or to call witnesses, or to meet the charge in any other way he chooses; and no inference unfavourable to him can properly be drawn, because he takes one course rather than another. In the present case,

these considerations apply with peculiar force. If the witnesses referred to by the learned Judge are thought by the prosecution to be trustworthy men, the prosecution was bound to call them. If they are thought not to be so, it seems to us specially unreasonable to reproach the accused with not calling them.

On these grounds, we think that the jury has been misled in a manner that must have prejudiced the accused, and the case must be tried again.

As the case has already been twice tried, it seems to us to be better, and it will, we think, be more satisfactory to the learned Judge whose summing up we have had to consider, that it should not be a third time tried at Hooghly.

We, therefore, direct the new trial to take place at Burdwan.

The Magistrate of Hooghly will make arrangements for the attendance of the witnesses before the Sessions Court at Burdwan, after hearing from the Sessions Judge the date fixed for the trial.

Appeal allowed, and case remanded.

NOTES.

[As to when witnesses may not be called by the prosecution, see also 10 Cal. 1070; 14 Cal. 245; 21 Cal. 642; 14 All. 521; 2 Weir, 378; 16 All. 84; Ratanlal 581. As to adverse inferences against the prosecution (but not against the accused) when material witnesses are not called, see also 10 Cal. 140; 1070; 31 Cal. 325; 7 All. 901; 1 C.W.N. 576; Ratanlal 686, 772; U. B. R. (1892—96) Vol. I, 221.]

[126] APPELLATE CIVIL.

The 19th August, 1881.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Joynath Roy.....Plaintiff

versus

Lall Bahadour Singh and others.....Defendants.

Private partition—Butwara Proceedings under Reg. XIX of 1814—Valuation of Suit—Power of Civil Court to take partition proceedings—Second Appeal—Order returning plaint for presentation to proper Court—Civil Procedure Code (Act X of 1877), ss. 57, 586.

An allottee, under a private partition, sued to stay subsequent partition proceedings brought under Reg. XIX of 1814, and to have his possession confirmed. The defendants objected to the valuation of the suit and to the suit being heard by the Civil Courts, no proceedings having first been instituted before the Revenue authorities.

Held, that such a suit should be considered to be one for a declaratory decree, or for something in the nature of an injunction, and that, therefore, the plaint should not be stamped according to the value of the entire estate.

* Appeal from Appellate Decree, No. 2229 of 1879, against the decree of A. V. Palmer, Esq., Judge of Shahabad, dated the 26th of June 1879, affirming the decree of Babu Lall Gopal Sen, Second Munsif of Arrah, dated the 17th January 1879.

That the question, whether the Collector would have brought the lands to partition, depended upon whether they were held "in common tenancy"; if they were not so held, the Collector would be only competent to make an assignment of the revenue in proportion to the several portions of the land held by the shareholders.

That a private partition is no bar to proceedings in the Revenue Courts under s. 30 of Reg. XIX of 1814.

A Munsif dismissed a suit, on the ground that if it had been properly valued, it would not have come within his jurisdiction. The District Judge affirmed the Munsif's judgment, and directed the plaint to be returned for presentation to the proper Court under s. 57 of the Civil Procedure Code. This was not done.

Held, that a second appeal would lie.

Ajoodhia Lall v. Gumaní Lall (2 C. L. R., 134) approved.

Ajoodhia Pershad v. Kisto Dyal (15 W. R., 165) dissented from.

THE plaintiff was a shareholder in a certain mehal, and had come into possession of his share under a private partition [127] entered into between himself and his other co-sharers. He alleged that, during his minority, some of the defendants commenced butwara proceedings under Reg. XIX of 1814, concealing the fact of the private partition, and that he having attained his majority in October 1876, brought this suit in the Court of the Munsif of Arrah to have the butwara proceedings (which were still being carried on) stayed, and possession of his share in the estate confirmed.

The defendants contended, that the Munsif's Court had no jurisdiction, as the suit had been improperly valued, the real valuation exceeding the jurisdiction of a Munsif's Court; and that a Civil Court was not competent to deal with the questions raised, which ought to have been first brought before the Revenue authorities.

The Munsif held, that the plaint should have been stamped with reference to the value of the whole mehal, and that, as this had not been done, the suit was not cognizable in his Court, and that it was clear from Beng. Act VIII of 1876, that such disputes should be decided by the Revenue authorities, and he therefore dismissed the suit.

The plaintiff appealed to the District Judge, who affirmed the decision of the Munsif on the question of valuation; but ordered the plaint to be returned to the plaintiff under s. 57 of the Civil Procedure Code.

The plaintiff appealed to the High Court.

Baboo *Mohesh Chunder Chowdhry* and Mr. *C. Gregory* for the Appellant.

Baboo *Chunder Mathub Ghose*, Baboo *Hem Chunder Banerjee*, Baboo *Saligram Sugh*, and, Moonshi *Mahomed Yusoo*f, for the Respondents, contended that the District Judge's decision should be considered as an order under s. 57 of the Civil Procedure Code, against which no second appeal would lie. See s. 588 of the Civil Procedure Code.

The **Judgments** of the Court (MACLEAN and MITTER, JJ.) were delivered as follows:—

Maclean, J.—The plaintiff in this suit is a shareholder in [128] Mehal Nowadabin, Pargana Arrah, in the Shahabad District. He alleges that he and his co-sharers, the defendants, 105 in number, are in separate possession of the land of their respective shares under a private partition made 'centuries ago,' but that some of the defendants brought the entire estate under regular partition, according to Reg. XIX of 1814, during his infancy, which terminated in

Assin 1285 F (October 1876), and the proceedings were going on when he brought this suit on the 2nd July 1878. He prays that the partition may be stayed, and his possession of his share in the estate confirmed.

Five of the defendants opposed the suit. They urged that the Munsif's Court, in which the suit was filed, had no jurisdiction, as the suit, on a proper computation, should have been valued at more than Rs. 1,000. They also alleged that the plaintiff himself was one of the applicants for partition, and they raised other objections to the maintenance of the suit.

The Munsif recorded eight issues. The first related to his competence to try the suit, on the ground that, on a proper valuation, it exceeded the jurisdiction of his Court, and he decided that, as the plaint asked that a stop might be put to the partition of the entire estate, the plaintiff should have valued the suit according to the value of the entire estate. On this point I think the Munsif is wrong. I think the suit should either have been considered to be one for a declaratory decree, or for something in the nature of an injunction. The case resembles the case of *Ajoodhia Lall v. Gurnani Lall* (2 C. L. R., 134), in which it was held, that it was unnecessary to value the suit according to the value of the entire estate.

The second and third issues dealt with the competence of the Civil Courts to deal with the matters raised in the suit, and the Munsif considered that s. 149 of Beng. Act VIII of 1876 (the law which has taken the place of Reg. XIX of 1814) was a bar to the suit.

On this point I have to notice, that the partition, having commenced in 1867, would proceed, and be completed, under the Regulation in the same manner as if the Act had not been [129] passed: see s. 2 of the Act. It has not been shown that the provisions of the Act have been applied in accordance with s. 3.

Whether the Collector could have brought the estate under partition depends upon whether it is "held in common tenancy." If it is not, as the plaintiff alleges, then the Collector would only be competent to make an assignment of the revenue in proportion to the several portions of the land held by the different shareholders. The case quoted above is authority for this view, and also for the view that the mere fact of a private partition is not a bar to proceedings in the Revenue Court under s. 30, Reg. XIX of 1814. This, however, seems to be opposed to the case of *Ajoodhya Pershad v. Kristo Dyal* (15 W. R., 165); but it is, I think, correct,—and I think the plaintiff was, therefore, entitled to a declaration, in the event of his establishing his separate possession of the lands comprising his share,—that revenue should be assessed upon those lands without affecting his possession.

The Munsif dismissed the suit on his finding on the first three issues. The District Judge affirmed the judgment on the first issue only, holding that the suit, on a proper valuation, was beyond the Munsif's competence. He directed that the plaint should be returned for presentation to the proper Court under s. 57 of the Code of Civil Procedure. A second appeal has been filed against the decision of the Courts below, and the respondent's pleader has argued that that decision must be considered to be an order under s. 57 of the Civil Procedure Code, against which no second appeal lies. See the last words of s. 588.

But it is clear that whether the Munsif should have returned the plaint to be presented to the proper Court or not, he did not do so, and he is supported by the case of *Shaikh Muzhur Ali v. Mussamut Basoo* (8 W. R., 47) in

the course he adopted, although that case was distinguished by the cases of *Ram Gully v. Goonomonee Debu* (11 W. R., 177), *M. S. Edoe v. Shaikh Hefazut Hossein* (13 W. R., 358), and *Kartick Nath Panday v. Roy Nundeput Bahadoor* (23 W. R., 263). His decree dismissing the suit was a decree within the [130] meaning of the Civil Procedure Code, s. 2. The lower Appellate Court also dismissed the suit,—that is to say, it affirmed the Munsif's judgment dismissing the suit, and directed the return of the plaint under s. 57. This is the course declared to be proper in the case of *Bai Makhor v. Bulakhi Chaku* (I. L. R., 1 Bom., 538).

I have no doubt that an order under s. 57 is not appealable twice; but as this is the first appeal against the only order made under s. 57, I think we are not precluded from dealing with the case, and we are also at liberty to consider whether the rest of the Judge's decision is correct. I have stated my reasons for thinking that the claim was not undervalued, and also that the plaintiff is entitled to ask for some, though not to the exact, relief claimed. I would, therefore, reverse the decisions of the Courts below, and direct the Munsif to deal with the case in the manner laid down in the case of *Ajoodhia Lall v. Guman Lall* (2 C. L. R., 131),—that is to say, to adjudicate upon the plaintiff's claim to be in possession of certain lands as comprising his share in the estate, and on his succeeding in proving his claim, to declare that these lands belong to his divided share. The Revenue authorities will then deal with the partition under the law applicable to the case in accordance with the declaration which the Civil Court may make.

Mitter, J.—I agree to the order of remand. I desire to add that I express no opinion upon the question, whether the Judge was right in directing under s. 87 of the Code of Civil Procedure that the plaint should be returned. But whatever view may be entertained of that question, it is clear that an appeal lies to this Court, and therefore it is not necessary to express any opinion upon that point.

Case remanded.

NOTES.

[As to the further appeal, see also 21 Mad. 234; as to dismissal of suit, see also 8 Cal. 831.]

[131] APPELLATE CIVIL.

The 19th July, 1881.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Gunga Prosad and another.....Plaintiffs

versus

Ajudhia Pershad Singh and othersDefendants.*

Hindu Law—Mitakshara—Alienation of ancestral property—Right of mortgage to sell Managing member.

A Hindu, governed by the Mitakshara law, mortgaged certain property to the plaintiffs. In a suit to recover the money due under the mortgage, and for a sale of the property, brought against the mortgagor, his four sons, and the purchaser of the mortgagor's right and interest at an execution-sale, the lower Court gave the plaintiff a decree against the mortgagor alone, holding that no necessity for the loan had been proved; but did not decide whether the property was the self-acquired property of the mortgagor or ancestral property. The High Court remanded the case for the trial of an issue upon this point. The lower Court found that the property was ancestral, and affirmed the original decree.

Held, that, assuming the property in dispute was ancestral, and that the mortgage was not valid against the sons, the plaintiffs were still entitled to recover the debt by the sale of the property of the father and the sons, because, supposing that the debt was contracted for personal purposes of the father, still the ancestral property in the hands of the sons was liable for the debt, it being not proved to have been contracted for immoral purposes.

Luchman Dass v. Gurudhar Chowdhry (I. L. R., 5 Cal., 855) followed.

THIS was a suit upon a mortgage-bond, dated the 29th of March 1873, made by one Sheodyal Singh, a Hindu governed by the Mitakshara law, alone in favour of the plaintiffs, and by it an eight-anna share in certain landed property was mortgaged to the plaintiffs, who now sued Sheodyal, his four sons, his wife, and one Ajudhia Pershad, who had purchased the right, title and interest of Sheodyal in the property in execution of a decree obtained by the plaintiffs and one Bindabun Pershad. The plaintiffs sought to establish their mortgage-right and for an order to sell the property, and to realize their debt out of the proceeds or from other property of the defendants. The plaintiffs contended, that there was legal necessity for the loan; [132] that it was taken by Sheodyal as karta of the family; and further, that the property mortgaged was the self-acquired property of Sheodyal. The sons of Sheodyal contended, that as he was subject to the Mitakshara law, he could not alienate the ancestral property while he was joint in estate with them, without their consent or without legal necessity, nor could he, as guardian or manager of the family, prejudice their rights.

The Subordinate Judge found, that the plaintiffs had not proved, as they were bound to prove, that the loan was taken for the benefit of the family and under legal necessity, and he gave the plaintiffs a decree for the amount of their claim. He did not decide whether the property was the self-acquired property of Sheodyal or not.

* Appeal from Original Decree, No. 47 of 1880, against the decree of Baboo Matadin, Subordinate Judge of Gaya, dated the 28th January 1880.

On appeal to the High Court, the case was remanded for the trial of the following issue—"Whether the property mortgaged was the self-acquired property of Sheodyal or the ancestral property of the family?"

The Subordinate Judge found that the property was not the self-acquired property of Sheodyal, and affirmed his original decree.

The plaintiffs appealed to the High Court.

Mr. *R. E. Twisdale* for the Appellants.

Baboo *Tarucknath Sen* for the Respondents.

The following **Judgments** of the Court (MITTER and MACLEAN, JJ.) were delivered : --

Mitter, J. --The plaintiffs brought this suit to recover the money due under a mortgage-bond and for an order for the sale of the mortgaged premises for the satisfaction of the mortgage-debt. The bond was executed on the 29th March 1873, by the defendant Sheodyal, and the claim for the sale of the whole of the mortgaged property is resisted by some of the sons of Sheodyal.

The lower Court holding the defence valid, decreed only the sale of Sheodyal's interest. The plaintiffs appealed; and this Court, on the 7th July 1879, decided that the decision of [133] the lower Court would be right if the property mortgaged was not the self-acquired property of Sheodyal. It appears that the plaintiffs alleged that the mortgaged property had been acquired by Sheodyal alone, and therefore the sons of Sheodyal could not claim any share in it. This point was overlooked by the lower Court. Hence the case was remanded to try the issue "whether the property mortgaged was the self-acquired property of Sheodyal or the ancestral property of the family."

The lower Court has decided this issue against the plaintiffs. It was pressed upon us, that we are not bound by the decision of this Court dated the 7th July 1879.

As regards the issue directed to be tried, the facts found are these: Mouza Majhi Ilburporo, eight annas of which was mortgaged in the bond, the basis of this suit, was a lakheraj property. It was resumed by Government, and temporarily settled with one Debee Prosad for twenty years. Debee Prosad was the *minahdar* of the mouza, and in the settlement-proceeding he was treated as its owner. On the 3rd June 1845, Debee Prosad granted it in zurpeshgee to one Teknarain and the mother of Sheodyal, Jeet Koer. The latter, in this transaction, acted as Sheodyal's guardian, Sheodyal being then a minor. For the money due under the zurpeshgee and other mortgage instruments, and also for cash advances received, Debee Prosad again, on the 16th November 1846, conditionally sold to Teknarain and Sheodyal respectively eight-annas of the mouza in question. The equity of redemption of Debee Prosad was brought to sale in execution of a decree; and on the 10th May 1847, was purchased in the same shares by Gunga, son of Teknarain, and Sheodyal. On the expiration of the twenty-year settlement, the property was permanently settled with the purchasers in the year 1859. In this settlement-proceeding also, Sheodyal and Gunga were treated as owners in the place of Debee Prosad. The lower Court, upon these facts, finds that the property was purchased with the income of the ancestral property. In that finding I concur. Originally the zurpeshgee advance was made when Sheodyal was a minor, and the property was purchased when he had just attained majority. It is not [134] shown that Sheodyal at that time was possessed of any separate funds. Under these circum-

stances, it would be but reasonable to draw the inference that the purchase-money and the money advanced upon mortgage came from the income of the ancestral property, which is proved to be pretty large.

Having come to this conclusion, the lower Court holds, that the property in question comes within the category of ancestral property, in which the sons of Sheodyal are co-owners with him. In this opinion I do not concur, because, when the property was acquired out of the income of the ancestral property, none of the sons was born. Bia Singh, one of the witnesses examined by the defendants on the 5th January 1880, says: Rughu Nath Singh, the eldest son of Sheodyal, died last year, when he was twenty-five years of age. The eldest son was, therefore, born in the year 1854. Therefore the question which we have to determine is, whether, under the Mitakshara law, a son on his birth becomes a joint owner with his father in a property purchased by the father before his birth out of the income of the ancestral property. I think this question should be answered in the negative. An examination of the Mitakshara law will show that the son on his birth becomes a co-owner only in a property which was inherited by the father from *his* father or other lineal ancestor within three degrees.

The author of the Mitakshara, treating of the subject of equal rights of father and son, says: "In such property, which was acquired by the paternal grandfather, through acceptance of gifts, or by conquest or other means [as commerce, agriculture, or service (Balam Bhatta)] the ownership of father and son is notorious; and therefore partition does take place. For, or because, the right is equal, or alike, therefore partition is not restricted to be made by the father's choice, nor has he a double share.

"Thus, while the mother is capable of bearing more sons, and the father retains his worldly affections, and does not desire partition, a distribution of the grandfather's estate does, nevertheless take place by the will of the son.

[135] "So, likewise, the grandson has a right of prohibition, if his unseparated father is making a donation, or a sale, of effects inherited from his grandfather; but he has no right of interference, if the effects were acquired by the father. On the contrary, he must acquiesce, because he is dependent.

"Consequently the difference is this, although he has a right by birth in his father's and his grandfather's property, still, since he is dependent on his father in regard to the paternal estate, and since the father has a predominant interest as it was acquired by himself, the son must acquiesce in the father's disposal of his own acquired property; but since both have indiscriminately a right in the grandfather's estate, the son has a power of interdiction if the father be dissipating the property" (Subodhini).

It is quite clear from these passages that a son has the right to interfere with the father's alienation in properties inherited from *his* father; but he has no right of interference if the property is acquired by the father.

That this property was acquired, and not inherited, according to the Mitakshara, will appear from the following passages:—

"An owner is by inheritance, purchase, partition, seizure, or finding," p. 8, chap. 1, s. 1. He then explains these words thus:—

"Unobstructed heritage is here denominated 'inheritance.' 'Purchase' is well known. Partition, intended heritage subject to obstruction," etc., p. 13, chap. 1, s. 1.

'Unobstructed heritage' is defined thus,—“the wealth of the father or of the paternal grandfather becomes the property of his sons or of his grandsons in right of their being his sons or grandsons; and that is an inheritance not liable to obstruction,” p. 3, chap. 1, s. 1.

Speaking of the right of the father to make unequal partition, the author of the *Mitakshara* says: “When a father wishes to make a partition, he may, at his pleasure, separate his children from himself, whether one, two, or more sons.”

“No rule being suggested (for the will is unrestrained), the author adds, by way of restriction, he may separate (for this [136] term is again understood) the eldest with the best shares; the middlemost with a middle share; and the youngest with the worst share.”

“This unequal distribution supposes property by himself acquired. But if the wealth descended to him from his father, an unequal partition at his pleasure is not proper, for equal ownership will be declared.”

These passages show that the father has no right to make unequal distribution in respect of “property descended to him from his father.” But in respect of any other property he can make an unequal distribution.

The result is, that a son becomes co-owner with his father only in a property which was *inherited* from the father of the latter. But a property acquired out of the income of the ancestral property is not a property inherited. It is true that if a property be purchased out of such income after the birth of the son, the latter acquires a joint interest in it. But this is so, not under any especial texts of the *Mitakshara*, but because he is jointly interested in the profits arising out of the ancestral property after his birth. But he has no such interest in the profits of such property before his birth.

This view of the *Mitakshara* law, however, is contrary to the ruling in *Sudanand Mohapattur v. Soorjoomone Dayer* (11 W. R., 436). We cannot, therefore, dispose of this case upon the ground mentioned above without reference to a Full Bench; but this is not necessary, as we arrive at the same conclusion upon another ground.

Assuming that the property in dispute is ancestral, and the mortgage executed by the father is not valid against the sons, the plaintiff is still entitled to recover the debt by the sale of the ancestral joint property of the father and the sons, because, supposing that the debt was contracted for personal purposes of the father, still the ancestral property in the hands of the sons is liable for the debt, it being not proved to have been contracted for immoral purposes—*Luchmun Dass v. Giridhar Chowdhry* (I. L. R., 5 Cal., 855).

But it has been said that this point is no longer open for decision, the remand order of this Court having decided that [137] the plaintiff would be entitled to a decree only in the event of his establishing that the mortgage-property was the self-acquired property of the father. But we find that the learned Judges who remanded the case did not express any final opinion on it. No decree was drawn up, and we are of opinion that, under the circumstances, we can deal with the case as if it came up for decision before us for the first time.

We, therefore, set aside the decree of the lower Court, and direct that the plaintiff shall recover the amount claimed, with interest upon the principal at the rate of 6 per cent. from the date of the suit to this date, and with further interest at the same rate upon the aggregate sum adjudged in favour of the plaintiff from this date to the date of payment, by the sale of the

mortgaged premises or any other joint ancestral property belonging to the defendant. The defendants other than Sheodyal Singh shall not be personally liable. The plaintiff is entitled to recover costs incurred in both Courts from the defendants.

Maclean, J.—Although I am disposed to concur with the Subordinate Judge in thinking that the debt secured by the mortgage of 1873 was not wholly justified by necessity, I think that the answer to the first question in *Luchman Dass v. Giridhur Chowdhry* (I. L. R., 5 Cal., 855) is binding upon us, and governs this case. That decision was passed after the opinion of the Division Bench was pronounced in this case on the 7th July 1879, and, under the circumstances explained in my learned colleague's judgment, we are not bound by that opinion. I therefore concur in the proposed decree rendering the whole estate, ancestral or otherwise, inclusive of the mortgaged property, liable for the debt.

As the conflict between the cases of *Sudanand Mohapattur v. Bonomüller Doss* (6 W. R., 256); and *Sudanand Mohapattur v. Soorjoomonee Dayee* (11 W. R., 436) has reference to a point which is immaterial to the case now before us, I think it unnecessary to express any opinion as to whether property purchased from the income of ancestral property and not alienated before the birth of a son becomes vested in the latter on his birth.

Appeal allowed.

NOTES.

I. MITTER, J.'s views as to ancestral property have not been accepted in their entirety:—(1888) 11 Mad. 246; (1884) 10 Cal. 1017 (1021); (1886) 10 Bom. 528 (581); (1908) 32 Mad. 86.

II. A mortgage debt by the Hindu father, when neither supported by antecedent debt nor executed under justifying circumstances, has been held in Bengal to be enforceable as *secured debt* against the father, and as *unsecured debt* against the son:—20 Cal. 328; 10 Cal. 528; 34 Cal. 735—11 C.W.N. 613—5 C.L.J. 569 dissenting from 34 Cal. 181—11 C.W.N. 294; see also (1901) P.R. 51 F.B. The Allahabad High Court treats both as unsecured:—31 All. 176; 31 All. 507; 33 All. 783; 9 All. 493 was differed from in 24 All. 159.

See also the Notes to 5 Cal. 855 in the LAW REPORTS REPRINTS, CAL. II]

[138] APPELLATE CIVIL.

The 14th September, 1881.

PRESENT:

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Ram Nirunjun Singh.....Defendant

versus

Prayag Singh.....Plaintiff.

Compromise of family disputes—Hindu Law—Agreement as to succession to property—Suit to enforce the agreement—Mistake in law.

In 1859, two brothers, A and B, filed a petition in the Collectorate, by which it was agreed that the family property should be divided in certain shares. B, who had only lately attained his age of majority, acted on his own account and as guardian of his minor brothers. In a suit by A to carry out the terms of the petition, B contended that undue advantage had been taken of his youth and inexperience; that the agreement was invalid; and that there was no consideration. It appeared that, at the time of the agreement, there was a *bonâ fide* dispute as to the rights of the parties, and no evidence of fraud was adduced.

Held, that the plaintiff was entitled to a decree.

* Appeal from Original Decree, No. 114 of 1880, against the decree of Baboo Grish Chunder Chowdhry, Subordinate Judge of Sarun, dated the 27th February 1880.

Principles upon which the Court acts in setting aside compromises considered.

There is nothing in Hindu Law which makes illegal an agreement, entered into by expectants, to divide a particular property in a certain way, on the happening of a particular contingency.

Nor is such an agreement contrary to public policy.

Wethered v. Wethered (2 Sim., 183), *Harwood v. Tooke* (2 Sim., 192), *Hyde v. White* (5 Sim., 524) followed.

IN this case it appeared that one Thakur Singh died in February 1859, leaving him surviving Prayag Singh by his first wife, who predeceased her husband, and by his second wife, who was alive at Thakur's Singh's decease, Ram Nirunjun Singh, Jung Bahadoor Singh, and Dund Singh. On the death of Thakur Singh, a dispute arose between the brothers, Prayag Singh (the present plaintiff) as the sole son of the first wife, claiming an eight-anna share of the estate, whilst Ram Nirunjun Singh (the defendant in this suit), who, according to the plaintiff, had then attained majority, contended that Prayag's [139] share according to law was a four-anna share only. This dispute was compromised by Prayag on the one hand and Nirunjun on the other (the latter also acting as guardian of his two minor brothers), filing a petition on the 28th March 1859 in the Collectorate, setting out that it had been agreed that "Thakur Singh's estate should be divided equally between the four brothers, with the exception of certain trust-land called 'Jethans,' in which Prayag was to be allowed an excess share; and that if any of the brothers should die without issue, then the surviving brothers should succeed to his heritage in equal shares, none of them having any claim or contention against the other on the score of commensality and joint tenancy."

In 1877 Jung Bahadoor died leaving no issue, and in the following year, Dund Bahadoor also died childless; Prayag and Nirunjun thereupon both filed suits for the registration of their names as holders of their brothers' property, and both of them intervened by way of objection in the other's suit. And in 1878, the Revenue Court directed Nirunjun's name to be entered in the book of the Collectorate as the owner of the lands in question, and rejected Prayag's application, and this order was upheld on appeal.

Prayag, therefore, brought the present suit against Nirunjun, claiming a half-share in his deceased brother's estate in accordance with the terms of the agreement filed on the 28th March 1859.

Nirunjun denied the genuineness of the agreement, which he stated was never filed by him; and further stated that, on the alleged date of filing, he and his brothers were minors, and that Prayag, taking advantage of their youth, caused the petition to be fabricated and filed, and that he and his two brothers, on the death of their father, were in separate possession of their three-fourths share, living as members of a joint family. The Subordinate Judge, on the strength of the terms of the agreement, gave the plaintiff a decree.

The defendant appealed to the High Court, contending that though in 1859 he had just attained majority, yet at that time he had not mature understanding, and that an unconscionable advantage was taken of his youth and inexperience, and that the [140] stipulation in the agreement was invalid in law, and was not supported by any consideration.

Baboo *Doorga Pershad* and Baboo *Rash Behary Ghose* for the Appellant.

Baboo *Chunder Madhub Ghose* and Baboo *Hurry Mohan Chuckerbutty* for the Respondent.

The **Judgment** of the Court (MITTER and MACLEAN, JJ.) was delivered by

Mitter, J. (who, after setting out the facts of the case, continued).—This is an appeal against a judgment of the Subordinate Judge of Sarun, awarding a decree in favour of the plaintiff. The claim relates to the estates left by two persons named Dund Bahadoor and Jung Bahadoor. The plaintiff is related to them as half-brother, while the defendant is their uterine brother. Under the Hindu Law of Inheritance, it is clear, therefore, that the defendant's right is superior, but the plaintiff bases his claim on a compromise embodied in two petitions, filed by himself and the defendants respectively to the Collector of the District on the 28th March 1859.

We agree with the lower Court in the findings to which it has come. It appears that, in the year 1870, the defendant and Dund Bahadoor (who had then attained majority) for self and as guardian of Jung Bahadoor, brought a suit to recover possession of the 'Jethans' by setting aside the compromise upon the self-same grounds as are taken in the written statement in this case. That case was dismissed so far as the defendant and Dund Bahadoor were concerned. The claim of the minor Jung Bahadoor was not gone into, as it was held that he was not properly represented in the suit. It was found in that case that, at the time of the compromise, the defendant was of age, and that the petition of the 28th March 1859 was signed and presented by him to the Collector. Therefore on these two points the judgment is conclusive evidence between the parties.

As regards the objection that the agreement is not binding on the defendant because an unconscionable advantage was [141] taken of his youth and inexperience, we do not find any notice of it in the previous judgment alluded to above. If the defendant did not raise it then, it is doubtful whether he is competent to raise it now. But conceding that he can, we are unable to say, on the evidence, that this defence has been substantiated; the evidence of Hiramun and Saligram, uncle and first cousin of the parties, is very clear upon this point. They have been believed by the lower Court, and it appears to us that they are thoroughly reliable in all respects. It is proved by them that, on the death of Thakoor Singh, a dispute broke out between the parties, and that it was settled through their intervention; that advice was taken from a mukhtear, a pleader, and a person who was then employed as Shorishtadar of the Judge's Court. It is evident from the evidence that, however clear the question of the respective rights of the parties appear to us now, the pretensions of the plaintiff were not then considered as wholly unfounded. The dispute appeared to the parties and also to their friends, relatives, and legal advisers as in no way being a doubtful question of law; and the terms of the compromise were considered to be a fair solution of it, and to be conducive to the interests of both. It further appears to us, that the compromise was made on the part of the defendant not with haste and precipitancy, but with due deliberation, caution, and consideration.

Then as regards the objection that the stipulation is not supported by any consideration, we are of opinion that it is not valid. The settlement of the dispute was the mutual consideration between the parties.

It has been further said that the agreement in question ought not to be enforced against the defendant, because he was labouring under a mistake of law regarding the rights of the contending parties. Mistake of law is not a ground for setting aside a contract (*see s. 21^e of the Contract Act*) especially of

* [Sec. 21 :—A contract is not voidable because it was caused by a mistake as to any law in force in British India, but a mistake as to a law not in force in British India has the same effect as a mistake of fact.]

Effect of mistakes as to law.

a family arrangement. This proposition of law is thus laid down in Kerr on Fraud, page 335, as extracted from several decided cases cited in a foot-note at page 336.

"Mistake in law is not a ground for setting aside a compromise, if the parties to the transaction were in difficulty and [142] doubt, and wished to put an end to disputes and to terminate or avoid litigation. If one or more parties having, or supposing they have, claims upon a given subject-matter, or claims against each other, agree to compromise these claims, and the knowledge, or means of knowledge, of each of them with respect to the mode in which, and the circumstances under which, his claim arises, stand upon an equal footing, and there is an absence of fraud or misrepresentation, the transaction is binding, although the conclusion at which the parties may have arrived is not that which a Court of Justice would have arrived at had its decision been sought. The real consideration which each party receives under a compromise being, not the sacrifice of the right, but the settlement of the dispute and the abandonment of the claim. It is no objection to the validity of the transaction that the right was really in one of the parties only, and that the others had no right whatever. If, for instance, two parties claim adversely to each other the inheritance of a deceased person, and, in order to avoid litigation, agree to divide the inheritance, it is no ground for setting aside the agreement that only one was heir, and that the other gave up the right which he really possessed. The fact that the one may have had no claim is immaterial, if he was honestly mistaken as to his claim. It is enough if, at the time of the compromise, he may have believed he had a claim, and that the parties have, by the transaction, avoided the necessity of going to law. To render valid the compromise of a litigation, it is not even necessary that the question in dispute should really be doubtful, if the parties *bona fide* consider it to be so. It is enough to render a compromise valid, that there is a question to be decided between them. A compromise of doubtful rights will not be set aside on any other ground than fraud."

This is the rule of law regarding compromise generally. But that the Courts go still further in favour of upholding compromises by which family disputes are settled, appears from the following passage in the same treatise, p. 364:

"The principles which apply to the case of ordinary compromise between strangers do not equally apply to the case of compromises in the nature of family arrangements. Family [143] arrangements are governed by a special equity peculiar to themselves, and will be enforced if honestly made, although they have not been meant as a compromise, but have proceeded from an error of all parties, originating in mistake or ignorance of fact as to what their rights actually are, or of the points on which their rights actually depend."

The appellant's contention upon this point must therefore fail.

The next point urged before us is, that the stipulation in question is not enforceable in law: 1st, because it lays down a special law of inheritance for the purpose of governing the rights of the parties; and 2ndly, because it is an agreement to convey an expectancy which the law does not permit.

It has been contended on behalf of the appellant that an agreement to convey an expectancy is, according to the law administered by Courts of Equity in England, *ab initio* void. That this proposition is not correct will appear from an examination of the cases collected in White and Tudor's Leading Cases, Vol. I, p. 534. Such contracts are not absolutely void, but are generally closely scrutinized by Courts of Equity. The principle upon which the Courts of Equity act in these cases is thus laid down in the following passages to be found at pages 537 and 538 of the same volume:—

"In the earlier cases it was held necessary to show that undue advantage was actually taken of the situation of such person ; but in more modern times it has been considered not only that those who were dealing for their expectations, but those who were dealing for vested reversions also, were so exposed to imposition and hard terms, and so much in the power of those with whom they contracted, that it was a fit rule of policy to impose upon all who dealt with expectant heirs and reversioners the onus of proving that they had paid a fair price, and otherwise to undo their bargains, and compel a reconveyance of the property purchased.

"The policy of the nation to prevent what was a growing mischief to ancient families that of seducing an heir apparent from dependence on his ancestor, who probably would have supported him, and, by feeding his extravagancies, tempting him, in his father's lifetime, to sell the reversion of that [144] estate which was settled upon him, forasmuch as this tended to the manifest ruin of families."

Then it has been said that whatever might be the rule of law in Courts of Equity in England, the Judicial Committee of the Privy Council in two Indian cases—that of *Massanut Oodey Koowur v. Massanut Ladoo* (13 Moore's I. A., 585 ; s. c., 6 B. L. R., 283) and *Kali Chandra Chowdry v. Sib Chandra Bhaduri* (6 B. L. R., 501)—have laid down the law in accordance with the appellant's contention. A careful examination of these cases will show that this point was not decided. All that the Judicial Committee say is, that it is doubtful whether, under the Hindu law, the sale of an expectancy right is valid. In the most recent case in which the same point was mooted—*Dooli Chund v. Brojo Bhookun Lall* (unreported, decided 4th February 1880)—their Lordships make the following observations :—

"The point on which the lower Court in part proceeded, and which has only been treated as doubtful by the High Court, namely, whether such an interest could be the subject of a sale at all, is of general importance, and one which their Lordships, who do not sit here to determine abstract questions of law, would be unwilling to determine in a case in which no decree in favour of the plaintiffs can be passed. They are certainly not prepared to affirm that such an interest can be made the subject of a sale, still less that it can be made the subject of a sale, highly speculative as any such sale must be, by a guardian acting or purporting to act on behalf of an infant. The decision of this Board, which has been cited by the Judge of the lower Court, is not precisely in point ; but it goes far to show that the principle of English law, which allows a subsequently acquired interest to feed, as it is said, the estoppel, does not apply to Hindu conveyances."

The case referred to here is one of those cited above, and the rule of English law alluded to has been extended to this country by s. 18 of the Specific Relief Act.

But in our opinion the clause in the compromise upon which this suit is based is neither a special rule of succession laid down by the parties, nor a conveyance of an expectant right ; but it [145] is an agreement between expectants to divide a particular property in a certain way on the happening of a particular contingency. That Courts of Equity in England enforce such agreements as the present will appear from the following passage at page 538 of Vol. I of White and Tudor's Leading Cases :—

"It may be here mentioned, that a fair agreement between expectants or their heirs, to divide the property which may be left between them or to any one of them, is not contrary to public policy, and will be enforced in equity. Thus, in the leading case of *Beckley v. Newland* (2 Peere Wins., 182), the plaintiff Beckley and Sir George Newland, who had married two sisters, the

presumptive heirs of Mr. Turgis, a very rich man, entered into articles whereby they agreed, that whatsoever should be by will left to either of them should be equally divided between them. Mr. Turgis, who had made and revoked several wills, at length made a will in favour of Sir George Newland, whereby he left a great personal estate to Sir George. Upon a bill being filed by Beckley for a specific performance of the agreement, it was objected, that the articles to divide a man's estate while he was living, and to share that in which the parties, at the time of making the agreement, had no manner of right, and possibly might never have, were unfair, and not to be encouraged: that it was to disappoint the will of the testator, who, in all probability, would have given nothing to either of the parties to the agreement, in case he could have foreseen that his disposition would be frustrated as soon as ever he should die. However, Lord MACCLESFIELD decreed a division of the personal estate according to the articles. 'Suppose,' he observed, 'there were two daughters, and the father should have given almost all the estate to the eldest, and nothing or very little to the youngest; if there should be such an agreement as in the principal case surely it would have been no more than what every one would have wished for.' See, also *Wethered v. Wethered* (2 Sim., 183), *Harwood v. Tooke* (2 Sim., 192), *Hyde v. White* (5 Sim., 524)."

There is nothing in the Hindu law which makes such agreement void.

[146] From another point of view the agreement in question seems to us to be valid. It is a promise made by each of the four brothers in favour of the others to this effect: "If I die without issue, you will receive my property in equal shares." It was made upon a good consideration as already shown. Is it invalid in law? I see no reason to hold that it is invalid. It is in the nature of contingent contracts treated of in Chapter III of the Contract Act.

Suppose a man agrees to execute a conveyance of his estate in favour of another for value received after ten years if a certain event happens. It will be fully admitted that such a contract is valid, and would be enforceable against his heirs if he dies in the meantime. Is there any difference in principle between this contract and the stipulation mentioned above. The only difference I find is as to the time after which the contract is to be fulfilled; but that is a non-essential difference.

Then it has been said that this promise was made not by Dund Bahadoor and Jung Bahadoor themselves, but by a guardian on their behalf while they were minors. Whatever difficulty there might have been in the solution of the question, if it had not arisen between the plaintiff and the defendant who acted as guardian, it does not admit of any doubt in this case. It does not lie in the mouth of the guardian to say that the contract is not binding, because he exceeded his authority in entering into it.

Upon all these grounds we think that the decision of the lower Court is correct, and we dismiss the appeal with costs.

Appeal dismissed

NOTES.

I. PARTITION.—

The adult members at a partition may make any arrangement as to the shares but not so as to infringe upon the laws of succession or the general laws: (1911) 33 All. 414.

II. COMPROMISE.—

Settlements of family disputes will not be lightly set aside:—See 1 C.L.J. 388 where the cases are collected; (1911) 9 I.C. 297 9 M.L.T. 342; 9 I.C. 530 8 A.L.J. 275.

III. HINDU FATHER'S COMPROMISE—

As regards the father's powers as to compromise, see (1908) 12 C. W. N. 687; but when the compromise is of a suit to which the minor son is a party, the requirements of the Civil Procedure Code should be observed:—(1913) 36 Mad. 295 P. C.

IV. PERFORMANCE OF CONTRACT ON BEING ABLE TO DO SO—

See also (1910) 7 I.C. 218.]

[147] APPELLATE CIVIL.*The 13th September, 1881.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND
MR. JUSTICE MORRIS.

Kalikristo Paul.....Defendant

versus

Ramchunder Nag and others.....Plaintiffs.*

Appeal—Letters Patent, cl. 15—Remand Order.

At the hearing of an appeal before a single Judge of the High Court, the case was remanded to the lower Court for the trial of certain issues of fact, the case being in the meantime retained on the file of the Court.

Held, that the order was not appealable under cl. 15 of the Letters Patent.

IN these cases, the learned Judge before whom the appeal originally came was of opinion, that the facts had not been sufficiently ascertained in the Court below ; and he remanded the cases for the trial of certain issues, retaining them in the meantime on the file of his Court. The defendant appealed under cl. 15 of the Letters Patent.

Baboo *Mohiny Mohun Roy*, for the Respondents, took a preliminary objection that no appeal would lie.

Baboo *Chunder Madhub Ghose* and Baboo *Obinash Chunder Banerjee* for the Appellant.

The **Judgment** of the Court (GARTH, C.J., and MORRIS, J.) was delivered by

Garth, C.J.—We are of opinion that there is no appeal against the order which the learned Judge has made in this case. He has come to no decision upon the merits, nor has he given what we consider to be a judgment within cl. 15 of the Letters Patent. In point of fact he says : "I cannot give a proper judgment in the case as it stands."

He considers that the lower Appellate Court has misunderstood the case and has not tried the proper issues ; and, therefore, professing, as we conceive, to act under the combined operation [148] of ss. 566 and 587 of the Civil Procedure Code, he has framed certain issues, and desired the lower Court to try them, and return its findings to this Court ; meanwhile the case remains on his own file.

How far the learned Judge had power to deal in this way with s. 566 on second appeal, we are not in a position now to decide ; because, in our opinion, the order which was made does not amount to a judgment within the meaning of cl. 15 of the Letters Patent and is therefore not appealable.

* Appeal under cl. 15 of the Letters Patent, against the decree of Mr. Justice FIELD, dated the 19th July 1881, in appeals from Appellate Decrees, Nos. 1126, 1127 and 1128 of 1880.

It has been suggested to us, that the lower Appellate Court will find itself in a difficulty in deciding the issues ~~that~~ have been sent down to be tried, and will be hampered by the observations which have been made by the learned Judge in sending the case back. But we do not see any difficulty in the matter. Certain issues of fact have been framed for trial ; and the lower Court has merely to come to an honest finding upon them, and submit that finding to this Court.

Another objection is, that the now appellant before us will be at a disadvantage when the case comes back to this Court ; because, if the order ought not to have been made, he may still have to contend against the finding on the new issues.

But we do not apprehend any difficulty in that respect. As Mr. Justice FIELD is now seised of the case he will dispose of it alone when the findings are returned to this Court ; and if the present appellant is dissatisfied with the decision at which the learned Judge arrives, he will have an appeal under the Letters Patent, and may then insist, as he does now, that the case should not have been remanded.

If he should prove right in this contention, the case will be decided, I presume, as if the present order had never been made. But this is a question for the future.

This appeal, at any rate, must be dismissed, as we are of opinion that no appeal lies ; and the respondents will have their costs. This decision will govern the two analogous cases.

Appeals dismissed.

NOTES.

[See also 11 All. 375.]

[149] APPELLATE CIVIL.

The 19th July, 1881.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Ram Sahye BhukkutPlaintiff
versus
 Lalla Laljee Sahye and others.....Defendants.*

Hindu Law—Mitakshara—Mortgage by sons of an insane person—Decree and sale—Suit by Committee to recover possession—Insanity—Exclusion from inheritance.

Although a coparcener in a Mitakshara family has a right (in a suit properly framed for that purpose) to recover the whole property from an execution-purchaser, subject to the right of the latter to have the share and interest of the debtor ascertained by partition, yet this rule will not be applicable where the suit is brought by a person who has become insane subsequent to his birth, inasmuch as no decree could be passed in his favour which could contemplate a partition between himself and the purchaser of the interest of his coparceners.

It is not necessary that madness or insanity should be congenital to disqualify a person from inheritance; a coparcener, therefore, who has become insane whilst in possession will lose his share on partition.

IN this suit the plaintiff, one Ram Sahye, a person of unsound mind (adjudged to be so by inquisition), sued through his committee to recover a two-anna share of Mouza Samrahi under the following circumstances:—

The plaintiff and his brother, Sheo Sahye, owned one-fourth or four annas of the village; and in 1846, the plaintiff, being then insane, and his brother dead, the other members of the family,—*viz.*, the plaintiff's sons, Abhilak, Dukhil, and Dilchand (who being an infant was represented by his mother Mussamut Palasee), and Sheo Sahye's sons, Ramprosad and Ramkishwar, minors, through their mother Mussamut Balgobind Kooer,—executed a conditional sale of a portion of the family property, *viz.*, thirteen annas one pie and a fraction of Mouza Tipra, to Lala Birj Behari Sahye and others. These persons foreclosed the mortgage, and having, in 1851, obtained a decree for possession and mesne profits against the sons of the plaintiff and other mortgagors, caused the debtors' rights and interests in Mouza Samrahi to be sold in [150] execution of the decree in 1857. One Bhogwan Lal Sahu became the purchaser. His rights and interests in turn, when in his widow's hands, were seized and sold by auction in 1863, when the defendant Laljee Sahye became the purchaser, and he took possession.

Shortly before the defendant's purchase in 1863, that is in 1861, an attempt had been made to set aside the sale of 1857 by one Kanhai Mahton, self-constituted guardian of the plaintiff, but it failed, presumably on the ground of want of qualification on Kanhai's part. In 1871, the plaintiff's grandsons were appointed his committees under Act XXXV of 1858. From this date no steps were taken to disturb the defendant till 1878, when this present suit was brought by the committee of the lunatic to recover possession of his property.

* Appeal from Original Decree, No. 2 of 1880, against the decree of Baboo Grish Chunder Chowdhry, Subordinate Judge of Sarun, dated the 30th September 1879.

The defendant contended, that the suit for possession without a prayer to set aside the auction-sale would not lie; that the suit was barred, more than twelve years having elapsed since the auction-sale, the purchaser and his representatives having been up to the date of suit in possession; that insanity before partition is sufficient to exclude the insane from succession; and that the plaintiff, consequently, lost what rights he had when he became insane.

The Subordinate Judge held, that it was not necessary for the plaintiff to sue to set aside the auction-sale, as the plaintiff was not a party to the suit under which the execution-sale had been held; that the suit was not barred, but came under s. 7^c of Act XV of 1877; that insanity before partition did not exclude the plaintiff from succession, according to the case of *Balgobind v. Lal Bahadur* (S. D. A. R. for 1854, p. 244), which case, however, was opposed to s. 10, chap. ii of the Mitakshara; but that, inasmuch as the defendant had purchased the property *bonâ fide*, and had no notice of the plaintiff's rights, he dismissed the plaintiff's suit with costs.

The plaintiff appealed to the High Court.

Baboo *Kallykissen Sen* for the Appellant.

Baboo *Durga Pershad* for the Respondents.

[131] The **Judgment** of the Court (MITTER and MACLEAN, JJ.) was delivered by

Maclean, J. (who, after setting out the facts of the case, continued): -There can be no doubt that, at first sight, *Dindyal's case* (L. R., 4 I. A., 247; S.C., I. L. R., 3 Cal., 198) strictly applies. We have the rights and interests of some members of the family seized and sold in execution of a decree against them. The decree resulted from a mortgage of property not covered by the sale, and the sale would, under ordinary circumstances, on the principle of *Dindyal's case* (L. R., 4 I. A., 247; S.C., I. L. R., 3 Cal., 198), pass no more than the rights of the debtors themselves. But we also have twenty-three years' undisturbed possession by the original purchaser and his assignee, the second purchaser, the defendant Laljee Sahye: and we shall, therefore, require

*[Sec 7:—If a person entitled to institute a suit or make an application be, at the time from which the period of limitation is to be reckoned, a minor, or insane, or an idiot, he may institute the suit or make the application within the same period, after the disability has ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the second schedule hereto annexed.

When he is, at the time from which the period of limitation is to be reckoned, affected by two such disabilities, or when before his disability has ceased, he is affected by another disability, he may institute the suit or make the application within the same period after both disabilities have ceased as would otherwise have been allowed from the time so prescribed.

When his disability continues up to his death, his legal representative may institute the suit or make the application within the same period after the death as would otherwise have been allowed from the time so prescribed.

Disability of representative. When such representative is at the date of the death affected by any such disability, the rules contained in the first two paragraphs of this section shall apply.

Nothing in this section applies to suits to enforce rights of pre-emption, or shall be deemed to extend, for more than three years from the cessation of the disability or the death of the person affected thereby, the period within which any suit must be instituted or application made.]

to be satisfied in the strictest manner that the sale is one which can be invalidated after such a lapse of time. Owing to the continuing disability of the plaintiff there can be no question of limitation, but the circumstances of the conditional sale must be very closely looked into.

Turning to the deed of the 18th May 1846, we find that it was executed by all the members of Ram Sahye's family, who described him as insane. It described the property as belonging to the executants themselves, and in fact it was evidently executed under the impression that plaintiff Ram Sahye was civilly dead, or disqualified from owning the property. This position probably could not be maintained now, as it was subsequently decided in 1854 by the Sadr Dewany Adalat in the case of *Balgobind v. Lal Bahadur* (S. D. A., 1854, p. 244) that he was still the owner of his property, and as we find that he was not represented in the suit of 1851, we must, in strictness, hold that the sale in 1857 did not pass his interests.

The present suit is for possession of the entire two-annas share of Mouza Samrahi, which, in 1857, belonged to the plaintiff and his sons, excluding a similar share which belonged to the sons of his brother Shoo Sahye.

It has been contended that as one of the plaintiff's sons, Abhilak Bhagut, has not been made a party to the suit, it must fail for that defect. On the plaintiff's side it is urged that Abhilak [132] has disappeared, but we attach no weight to this mere assertion. There is evidence that he took a part in the institution of the suit; but, under the circumstances, the objection is one to which we should not yield, for there is no question that Abhilak's interest in the property ceased in 1857.

The next point is, that the suit for the whole two-annas share will not lie. But *Dindyal's case* (L. R., 4 I. A., 247; s.c., I. L. R., 3 Cal., 198) is clear authority for the proposition that the co-parcener can recover the whole property from an execution-purchaser, subject to the right of the latter to have the share and interest of the debtor ascertained by partition. Whether this case should be decided on the above principle depends upon the rules of Hindu law applicable to a co-sharer who lies under the disability of insanity.

The law is to be found in the *Mitakshara*, Part II, chap. ii, s. 10.

In verse 1, the author states, that "an impotent person, an out-cast and his issue, one lame, a madman, an idiot, a blind man, and a person afflicted with an incurable disease, as well as others (similarly disqualified) must be maintained, excluding them, however, from participation."

In verse 3, quoting from *Menu*, "Impotent persons and out-casts are excluded from a share of the heritage: and so are persons born blind and deaf, as well as madmen, idiots, the dumb, and those who have lost a sense (or a limb)."

In verse 6, it is said,—“they are debarred of their shares, if their disqualification arose before the division of the property. But one, already separated from his co-heirs, is not deprived of his allotment.”*

* Note, that Sir W. Jones's translation is not quite the same as Colebrooke's. The former renders the text "persons born blind or deaf, madmen, idiots." The latter, "impotent persons are excluded, and so are persons born blind, as well as madmen."

Yajñavalkya—"a madman, an idiot, one born blind."

Bachaspati—ditto.

Narada—"and one insane, blind or lame from his birth."

West and Bühler do not associate "born, or from his birth" with the preceding.

Strange says,—Jagannath makes an exception as to insanity being congenital, but does not approve.

Mayukha, chap. ix, s. 11.

[153] A consideration of these texts and of other authorities quoted in *Murari Gokuldas v. Parvati Bai* (I. L. R., 1 Bom., 177) and of the decisions in this Court in *Dwarkanath Bysak v. Mahandranath Bysak* (9 B. L. R., 198) satisfies us, that it is not necessary that madness or insanity should be congenital to disqualify a person from inheritance. We have been unable to find any reported case in which a person who has become insane while in possession has lost his share on partition; but that he does lose his right to a share seems to us clear on the authority of the 6th verse quoted above. This seems to be Mr. Mayne's opinion: see s. 408, p. 423, 2nd edition of Mayne's Hindu Law.

On this view of the case it seems to us to follow that no decree could be passed in favour of the plaintiff which would contemplate a partition between himself and the purchasers of the interests of his co-parceners. Nor is it necessary to take into consideration the right of the plaintiff's sons or other heirs to be let in, for their interests have of course vested in their creditor now represented by the defendant Laljee Sahye.

The result therefore is, that the plaintiff's suit fails on every point, and we confess that it is a matter of very great satisfaction to us that we are not compelled to disturb a state of things which has lasted for about twenty-four years, and which, but for recent developments in the law as affecting creditors of a Mitakshara family, would never have been questioned.

We dismiss the appeal with costs.

Appeal dismissed.

NOTES.

[I. COMPETENCY OF AN INSANE PERSON TO SUE FOR FAMILY PROPERTY—

This was denied in (1882) 8 Cal. 919, an exactly similar case. But the Allahabad High Court, when the insanity is not congenital would come to a different conclusion:—28 All. 247.

II. EXCLUSION OF THE INSANE COPARCENER FROM INHERITANCE AND PARTITION—

Insanity supervening succession is no ground for divesting property already vested:—22 Cal. 846; (1890) 14 Mad. 289.

As to whether insanity, &c., should be congenital, in these cases it was held that it is a ground of exclusion if present at the time of *succession or partition*:—(1882) 8 Cal. 919; (1893) 4 M. L. J. 88; (1882) 6 Ben. 564; (1884) 10 Cal. 638; 8 C. L. J. 369; (1883) P. R. 149.

The Allahabad High Court, however, held otherwise in (1905) 28 All. 247 on the ground that, where it was not congenital, the property *vested* at the time of birth and could not be *divested* by subsequent insanity, &c.]

[154] APPELLATE CRIMINAL.

The 22nd September, 1881.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE WILSON.

In the matter of the petition of Kali Churn Chunari and others.

The Empress

versus

Kali Churn Chunari and others.

Evidence—Memorandum made by Police-officer—Refreshing witness' memory—Examination of witness—Criminal Procedure Code (Act X of 1872), ss. 119 and 126.

A prisoner on his trial is not entitled to insist that a memorandum made by a Police officer under the provisions of s. 119* of the Code of Criminal Procedure shall, in the course of the examination of such officer, be referred to by the latter for the purpose of refreshing his memory.

Reg. v. Uttamchand Kapurchand (11 Bom. H. C. R., 120) distinguished.

IN this case it appeared that two of the witnesses for the prosecution had made statements before the Deputy Magistrate who tried the case, which, the accused alleged, were in direct contradiction to certain statements which they had previously made to the Police inspector on a preliminary investigation made by the latter into the circumstances of the case. The accused applied to the Magistrate to send for the inspector's memoranda of the statements, in order that they should be used for the purpose of refreshing the inspector's memory as to the statements made to him. The Deputy Magistrate refused, and the accused (who was convicted) appealed to the District Judge, whose judgment, so far as is material for the purposes of this report, was as follows :—

"I think the prisoners in this case were not entitled to have the sub-inspector summoned with the diaries (Police),—that is to say, they were not entitled to have the diaries produced in this way. They were at perfect liberty to summon the sub-inspector and examine him as to statements made before him, [155] and if he had the diaries containing those statements, as noted by him, and could not remember without reference to them, it would have been proper to let him refer to them. I gather, however, that when the sub-inspector was examined, the diaries were not at hand. Subsequently they were sent for and examined by the Deputy Magistrate. and it is to be regretted that they

* Criminal Motion, No. 229 of 1881, against the order of W. Macpherson, Esq., Officiating Sessions Judge of the 24-Parganas, dated the 6th June 1881.

† [Sec. 119 :—An officer in charge of a Police Station, or other Police officer making an investigation, may examine orally any person supposed to be acquainted with the facts and circumstances of the case, and may reduce into writing any statement made by the person so examined.

Such person shall be bound to answer all questions relating to such case put him by such officer other than questions criminating himself.

Provido.

No statement so reduced into writing shall be signed by the person making it, nor shall it be treated as part of the record or used as evidence.]

were not before him at an earlier stage; for it seems that Bangshi and Napher, two important witnesses, made very different statements in his Court to what they are represented as having made before the Police. Appellants apparently tried to prove this by the sub-inspector, but he could not remember what they had said. The evidence of these two witnesses is conflicting on one or two material points, and I think under all the circumstances it cannot be relied on."

The District Judge considered that the other evidence on the record was sufficient to convict the prisoners, and dismissed the appeal. The accused then moved the High Court to reverse this decision, on the grounds that the inspector's memoranda should have been sent for and allowed in evidence; and that the accused had been prejudiced in their defence, because the Magistrate had recorded some of the evidence for the defence before the case for the prosecution had closed.

Mr. H. C. Mendies for the Petitioners.

The **Judgments** of the Court (PRINSEP and WILSON, JJ.) were as follows:

Prinsep, J.—In my opinion there is no ground for our interference in this case. The objection raised is, that the Deputy Magistrate refused to require the Police officer to refresh his memory from a statement of the witness which he had recorded under s. 119 of the Criminal Procedure Code. It does not appear that this Police officer, when examined as a witness, desired so to refresh his memory. I think that the accused was not entitled to insist upon the Police officer refreshing his memory by referring to his notes, because, under s. 126, he was not entitled himself to see these notes or any papers prepared in the course of a Police investigation; and s. 119 declares that [156] such notes shall not be treated as part of the record or be used as evidence. *Reg. v. Uttanchand Kapurchand* (11 Bom. H. C. R., 120) is not in point.

As regards the other objection taken, I have not been shown that, in the procedure taken by the Deputy Magistrate, the accused has been any way materially prejudiced in his defence. It seems to me rather, that the Deputy Magistrate had very good grounds for examining the witnesses for the defence on the day on which they attended, rather than deferring their examination until some of the witnesses for the prosecution, who were not in attendance, had appeared, so that they might be cross-examined. The application is therefore refused.

Wilson, J. I entirely agree with Mr. Justice PRINSEP with regard to the second point. With regard to the first point, I have a very few words to add regarding the question of refreshing the memory. I entirely agree, if I may say so, with what was decided by the Bombay Court in the case cited before us. What was decided in that case was this, that where a witness comes forward at a trial and makes a statement contradicting his statements previously made to the Police, the accused or his pleader is entitled to cross-examine him with respect to his former statement: that if he denies it may be contradicted, and that one of the ways in which he may be contradicted is by calling the Police officer before whom he made the statement, who may refresh his memory from his diary. That seems to me to be the whole of the decision of the Bombay Court. But the question now before us is not, whether the witness can be cross-examined as to his previous statement, nor whether the Police officer may be examined to contradict him, nor whether the officer may refer to his diary; but the question is, whether the prisoner has a right to insist that the diary, if not in Court, shall be sent for, or if it be in Court

shall be referred to for the purpose of refreshing the Police officer's memory. I think the prisoner has no such right. I know of no authority for saying that a witness can be compelled to refresh his memory from any document, unless the [157] document is either in the possession of the party who desires to put it to the witness, or is at least such as he can insist on having produced. This is a document which the law expressly declares that the defence has no right to see. Section 126 says: "Any Criminal Court may send for the Police diaries of a case under enquiry or trial in such Court, and may use such diaries to aid it in such enquiry or trial." That is the right of the Court. "Neither the prisoner nor his agents shall be entitled to call for them, nor shall he or they be entitled to see them, merely because they are referred to by the Court. But if they are used by the Police officer who made them to refresh his memory, or if the Court uses them for the purposes of contradicting such Police officer," in either of these two cases the prisoner is entitled to see them; but until this is done he has no such right. Therefore, it seems to me that the decision of the Deputy Magistrate is correct.

I guard against saying anything as to the mode in which a Court should exercise its discretion in permitting the document to be used as indicated in the section. The question as to whether in this case that discretion has been wisely used or not is not before us.

Application refused.

NOTES.

[STATEMENTS TO POLICE OFFICERS—

See 19 All., 390 F.B. where this subject is fully dealt with; also, 8 Cal. 739 (745); 9 Cal. 455; 16 Cal., 610, 612; 31 Cal., 1050; 33 Cal., 1023 10 C.W.N. 890; 36 Cal., 281 9 C.L.J., 199 13 C.W.N., 197; 16 C.W.N., 145 (179); 35 Mad., 247.]

[8 Cal. 157]

ORIGINAL CIVIL.

The 22nd August, 1881.

PRESENT :

MR. JUSTICE WILSON.

Alangamonjori Dabee

versus

Sonamoni Dabee.

Hindu Law—Hindu Wills Act (XXI of 1870), ss. 2, 3, and 6—Succession Act (X of 1865), ss. 98, 99 and 101—Gift to unborn persons.

A Hindu testator, by his will made in 1872, provided, that should he never have a son, his daughters' sons, when they come to years of discretion, should receive certain properties

in equal shares ; and he directed that, if his daughters have no sons, or not be likely to have sons, then that such of his daughters as should reside in the ancestral family dwelling-house should receive a certain monthly allowance. The testator died in 1873, leaving only his daughters him surviving.

[158] *Held*, that the will being governed by the Hindu Wills Act, the bequest to the daughters' sons was valid.

The rule of construction laid down in the *Tagore case* [*Jatindra Mohun Tagore v. Ganendra Mohun Tagore* (9 B. L. R., 377)] does not apply to wills of Hindus made since the passing of Act XXI of 1871.

The words 'create any interest,' in the last proviso to s. 3 of the Hindu Wills Act, should be read as referring only to the estate or interest which can be given, without reference to the further question to whom it can be given.

IN March 1873, one Chandranath Chowdhry died, leaving him surviving a widow, Alangamonjori Dabee (the plaintiff in this present suit), his mother Sonamoni Dabee (the defendant in the present suit), three unmarried daughters (two of whom subsequently died intestate and unmarried), and three sisters.

Chandranath left a will, dated the 28th September 1872, by which he appointed the defendant and other persons his executrix and executors, and after setting out certain properties of which he was possessed, he provided for the maintenance of his family, setting aside certain Government paper for the marriage expenses of his daughters, subject to which purpose he declared that the Government paper should belong to the plaintiff without power of sale. The material part of the will was, however, as follows : -

" God forbid, but should I never have a son, in that case my daughters sons, when they come to years of discretion, shall receive (the property) in equal shares. If any daughter be childless, or become a widow, she shall receive a monthly allowance of Rs. 10 as long as she lives and resides in my ancestral family dwelling-house, and she will be able to get for her lifetime in lieu of maintenance, property yielding Rs. 120; she will not be able to sell it; and when the daughters' sons get all the said property, my mother Thakooranee and three uterine sisters shall receive property sufficient to yield them each Rs. 10, or a total of Rs. 40, for their lifetime, in lieu of monthly allowances, and they shall be at liberty to reside in the ancestral family dwelling-house; they shall not be competent to sell the properties. My wife Alangamonjori (when my daughters' sons arrive at years of discretion) shall remain sole tenant of the whole property, and according to her own judgment pay either the above-mentioned monthly allowances in cash or give property in lieu [159] thereof, and enjoy the same as long as she lives. God forbid, but should my three daughters have no sons, or not be likely to have sons, then such of those daughters as shall reside in my ancestral family dwelling-house shall receive monthly allowances of Rs. 10 a month from the Sircary estate. When my wife Alangamonjori shall consider that her mother-in-law, sister-in-law, or daughters are above trouble, and that there is no objection, then, if there are no sons of my daughters, she will be able to sell all the said property."

On the death of Chandranath Chowdhry, his mother Sonamoni took possession of the whole of his estate, she alone taking out probate of his will.

The testator's widow brought this present suit charging Sonamoni with mismanagement and misappropriation; and in particular with the pledge of the Government paper belonging to the testator's estate, and the subsequent

expenditure for her own purposes of the sums advanced, and with failure to pay the annuities, submitting that the residuary gift was void and inoperative, and that she as heiress-at-law was entitled to enjoy the estate, subject to the legacies and annuities, during the term of her natural life, and praying for the construction of the will and asking for an account.

The defendant denied the charges brought against her.

Mr. *T. A. Apear* and Mr. *R. Mitra* for the Plaintiff.

Mr. *Bonnerjee* and Mr. *Allen* for the Defendant.

Wilson, J.—This is a suit in which the plaintiff asks to have the will of one Chandranath Chowdhry construed, and to have certain provisions of that will declared invalid, and for other relief.

The will was made in 1872. The testator died in 1873, leaving no sons but the plaintiff, his widow, three unmarried daughters, the defendant his mother, and other female relatives.

By his will he appointed the defendant and others executrix and executors, of whom the defendant alone obtained probate. He gave monthly allowances in money to various female relatives, including Rs. 4 to the plaintiff, his widow, and Rs. 2 to each [160] daughter while unmarried, which, on her marriage, was to go to the plaintiff; or if she lived elsewhere than in the family dwelling-house, Rs. 4 to the plaintiff for life. Certain Government papers he appropriated for the marriage expenses of his daughters, if necessary, and subject to this the plaintiff was to have the papers, but without power of sale, and to provide from the interest for certain poojahs. The plaintiff was also to enjoy the income of accumulations, when invested in Government paper or immoveable property, as directed by the will.

Then follow the most material parts of the will:—"God forbid, but should I never have a son, in that case my daughters' sons, when they come to years of discretion, shall receive the properties in equal shares. If any daughter be childless or become a widow, she shall receive a monthly allowance of Rs. 10 as long as she lives and resides in my ancestral family dwelling-house, and she will be able to get for her lifetime, in lieu of maintenance, property yielding Rs. 120; she will not be able to sell it; and when the daughters' sons get all said property, my mother Thakooranee and three uterine sisters shall receive property sufficient to yield them each Rs. 10, or a total of Rs. 40, for their lifetime, in lieu of monthly allowances, and they shall be at liberty to reside in the ancestral family dwelling-house. They shall not be competent to sell the property. My wife Alangamonjori Dabee, when my daughters' sons arrive at years of discretion, shall remain in sole tenancy of the whole of the property, and according to her own judgment pay either the above mentioned monthly allowances in cash or give property in lieu thereof, and enjoy the same as long as she lives. God forbid, but should my three daughters have no sons, or not be likely to have sons, then such of those daughters as shall reside in my ancestral family dwelling-house shall receive monthly allowances of Rs. 10 a month from the Sircary estate. When my wife, Alangamonjori Dabee, shall consider that her mother-in-law, sister-in-law, or daughters are above trouble, and that there is no objection, then, if there are no sons of my daughters, she will be able to sell all the said property."

The case came on for settlement of issues, and it appeared that the principal controversy was as to the validity of the gift to [161] the daughters' sons. The subsequent gifts were also said to be void as being dependent on this as the principal gift.

The important question is, therefore whether the gift is valid.

Under the Hindu law in force, prior to the Hindu Wills Act, it is clear that such a gift to unborn persons could not take effect. But the will in this case was made after the Hindu Wills Act came into operation, and is governed by it. And the question, whether such a gift is good under that Act, has not, so far as I have been able to ascertain, been the subject of judicial decision.

Section 2 of the Hindu Wills Act (XXI of 1870) applies to the wills of Hindus and others made on or after the 1st September 1870, and a large number of sections of the Succession Act. Amongst these are ss. 98, 99, 100, and 101.

Section 98 is as follows:—"Where a bequest is made simply to a described class of persons, the thing bequeathed shall go only to such as shall be alive at the testator's death. *Exception*.—If property is bequeathed to a class of persons described as standing in a particular degree of kindred to a specified individual, but their possession of it is deferred until a time later than the death of the testator by reason of a prior bequest or otherwise, the property shall at that time go to such of them as shall be then alive, and to the representatives of any of them who have died since the death of the testator."

Section 99 is as follows:—"Where a bequest is made to a person by a particular description, and there is no person in existence at the testator's death who answers the description, the bequest is void. *Exception*.—If property is bequeathed to a person described as standing in a particular degree of kindred to a specified individual, but his possession of it is deferred until a time later than the death of the testator by reason of a prior bequest or otherwise, and if a person answering the description is alive at the death of the testator, or comes into existence between that event and such later time, the property shall at such later time go to that person, or if he be dead, to his representatives."

Then s. 100 says:—"Where a bequest is made to a person not in existence at the time of the testator's death subject to a [162] prior bequest contained in the will, the latter bequest shall be void, unless it comprises the whole of the remaining interest of the testator in the thing bequeathed."

And s. 101:—"No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's decease, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong."

Of these sections, s. 98, which is taken from Part xi ("Of the Construction of Wills") deals, amongst other things, with the construction and operation of a gift to a class, some of whom come into existence between the death of the testator and the time when the gift takes effect. See illustrations (d), (e), (g), and (h).

Sections 99, 100 and 101 are taken from Part xii ("Of Void Bequests").

Section 99, by the exception, deals with gifts to persons described as standing in a particular degree of kindred to a specified individual; and in express terms it declares, that such a gift is to take effect, if any person answering the description comes into existence between the death of the testator and the time to which possession is deferred.

That section further deals with two cases of deferred gift,—one where the gift is deferred by reason of a prior bequest ; the second, when it is deferred otherwise. Illustrations (b), (c), (d) are examples of gifts deferred by reason of a prior gift ; illustration (e) of a gift deferred otherwise.

The section, if it stood alone, would absolutely and without restriction empower a testator to give property to unborn persons standing in any particular degree of kindred, provided those persons come into existence before the gift is to take effect in possession.

The gift now in question falls within this rule. It is a gift to the unborn children of his three daughters, to take effect when those children attain their majority.

Sections 100 and 101 embody restrictions upon the power conferred by s. 99. By s. 100, a gift to an unborn person subject [163] to a prior bequest is void, unless it be an absolute gift of the whole remaining interest of the testator. There is no prior gift in this case, so that this section does not apply.

Section 101, which is general in its terms, invalidates any bequest, which delays the vesting beyond a life or lives in being, and the minority of the donee, who must be living at the close of the last life. •

This section governs such a case as the present. But its requirements are complied with.

If, then, these sections are to take effect, it follows that the Hindu law, as established in the *Tagore case*, has been materially altered, and that the gift now in question is valid.

The difficulty arises from s. 3 of the Hindu Wills Act. The last proviso of that section is as follows :—“ Nothing herein contained shall authorize any Hindu, Jain, or Sikh, or Buddhist to create in property any interest which he could not have created before the 1st day of September 1870.”

It was argued that the interest given to the sons of the testator's daughters is an interest created in property, that it is one which could not have been created before the Hindu Wills Act took effect, and that, therefore, it is still void by reason of the last proviso.

The meaning thus sought to be put upon the words ‘ create any interest ’ is one which, I think, they may fairly bear. But if the construction contended for be correct, then the whole of s. 99, except the first clause, is inoperative. Section 100 is entirely so. Section 101 is inoperative, because it falls far short of the restrictions existing without it. Now all these form parts of s. 2 of the Hindu Wills Act ; therefore, if the argument be sound, the Legislature has in s. 2 enacted an elaborate set of provisions, and in s. 3 it has abolished them all. And in s. 6 it has again referred to them as law, and laid down rules for their construction. If the Legislature has seen fit to legislate in this fashion, I am bound, of course, to accept the fact, and to administer the law accordingly. But I am equally bound to avoid such a conclusion if I can. I am bound to follow the rule adopted and approved by the Queen's Bench Division as a “settled canon of construction,—namely, that a Statute ought to be so construed that, if it can be [164] prevented, no clause, sentence, or word shall be superfluous, void or insignificant. See *Reg. v. Bishop of Oxford*, (L. R., 4 Q. B. D., 261). If, therefore, a meaning can be found for the words ‘ create any interest ’ which will give reasonable effect to those words without overruling the sections embodied in s. 2, that meaning ought to be adopted. In my opinion such

a meaning may well be placed upon the words in question. Amongst the many classes of questions arising upon gifts and wills, there are most prominently questions as to the subject-matter of the gift, questions as to the estate or interest sought to be given, and questions as to the capacity of the donee to take.

Under the first head are all such questions as the power to deal with debutter property, or of a member of a Mitakshara family to take a gift.

Under the second head fall such questions as that of the power to create an estate, such as is dealt with in the *Tagore case*,—namely, an estate-in-tail male, the power to give an estate which shall never be descendible to any one of another gotra, or an absolute estate, but without power of partition, or without power of sale, or gift, or which shall be liable to forfeiture, if any inheritor shall marry a widow or give a widow of his family in marriage. Of some of these there are examples to be found in the books, and of all of them I have more than once met with examples in this Court.

Under the third head, the capacity of the donee, fall such questions as the validity of gifts to unborn persons.

It seems to me that the third head may properly be, and indeed logically ought to be, regarded as quite distinct from the second.

The *Tagore case* had not been before the Privy Council when the Hindu Wills Act was passed. But it had been before the Court of appeal; and the judgment of PEACOCK, C.J., in that case throughout took the question of the estate which may be created by will as an entirely distinct question from that of who may take a gift under a will.

The Legislature, had they intended broadly to say that no disposition by will should be valid after passing of the Hindu [165] Wills Act, which was not so before, could easily have said so in a few words as has been done with the Probate and Administration Act (V of 1881), s. 149.* But they have not done so. They have, in s. 3, dealt with the property which may be bequeathed and with the interest that may be created, but have said nothing about the person to whom a bequest may be made.

These considerations tend to show that the words 'create an interest' are to be read in the narrower sense as referring only to the estate or interest which can be given without reference to the further question to whom it can be given. And as that view of s. 3 gives a meaning to the words of that section at the same time that it allows the sections embodied in s. 2 to take effect, I think it ought to be adopted.

That the objection in the present case is purely to the persons and not to the interest in the narrower sense is plain from this; that if the same gifts had been given in the same terms, but the daughters' sons had been living at the testator's death, the payments would have been good without the aid of the Statute. See the cases of *Sorjemonnee Dassie v. Denobundo Mullick* (9 Moore's I. A., 135), explained in *Tagore v. Tagore* (9 B. L. R., 377).

Saving-clause.

* [Sec. 149 :—Nothing herein contained shall—

- (a) validate any testamentary disposition which would otherwise have been invalid;
- (b) invalidate any such disposition which would otherwise have been valid;
- (c) deprive any person of any right of maintenance to which he would otherwise have been entitled; or
- (d) affect the rights, duties, and privileges of the Administrator-General of Bengal, Madras or Bombay.]

I must, therefore, decide against the plaintiff upon the question of the validity of the gifts to the daughters' sons and the other gifts said to be dependent upon such gift.

She has, however, an interest under the will in respect of her annuity, the Government paper, and the interest accumulations, which is sufficient to entitle her to an account of the testator's estate.

Until the account is taken, none of the other questions as to the present rights of the parties can usefully be dealt with.

Costs of all other questions are reserved.

Attorney for the Plaintiff : Baboo *Abaya Churn Ghose*.

Attorneys for the Defendant : Messrs. *Wheeler and Sowton*.

NOTES.

[This case was reversed on appeal (1882) 8 Cal., 637; see also 9 Bom., 491; 22 Cal. 742.]

[166] APPELLATE CRIMINAL.

The 16th September, 1881.

PRESENT :

MR. JUSTICE TOTTENHAM AND MR. JUSTICE BROUGHTON.

In the matter of the Empress on the prosecution of the
Bank of Bengal.....Petitioners
versus

Dinonath Roy.....Opposite Party.*

Presidency Magistrates' Act (IV of 1877), ss. 167, 170—" Person affected by an Order"—Application for copy of Order and Depositions—Refusal—Specific Relief Act (I of 1887), ss. 7, 45.

All prosecutors whose charges are dismissed by the Presidency Magistrate are affected by the order of discharge, and are, therefore, entitled under s. 170 of the Presidency Magistrates' Act to obtain copies of the order made by, and of the depositions taken before, the Magistrate.

THIS was a rule moved for under the Specific Relief Act and under s. 170 of the Presidency Magistrates' Act, calling upon the Presidency Magistrate to show cause why he should not give to the Bank of Bengal, through their constituted attorney, Mr Macnair, copies of the depositions of the witnesses and the orders recorded in the matter of the Bank's complaint against one Dinonath Roy, who had been discharged by the Magistrate.

Mr. *Bonnerjee* showed cause against the rule.—The Court has no right to issue an order of this sort under the Specific Relief Act. Section 7

* Criminal Miscellaneous Case, No. 27 of 1881, against the order of P. J. Marsden, Esq., Chief Presidency Magistrate, dated the 10th September 1881.

says, that specific relief cannot be granted for the mere purpose of enforcing a penal law. Section 45 does not give power to the Court to compel a Magistrate to give copies. Before an order can be made under chap. viii certain conditions referred to therein must be complied with. The words 'property, franchise,' &c., in section 45 refer to civil, not criminal, matters. Nine chapters out of the ten composing the Specific Relief Act relate to civil matters. The absurdity of such an order as is now asked for is shown by s. 48, which says, that "every order under chap. viii shall be executed, and may be appealed from, as if it were a decree [167] made in the exercise of the ordinary original civil jurisdiction of the High Court." Can it be said that this order, if granted, could be appealed against by the Magistrate? The words "personal right," in s. 45, refer to civil matters. The Bank is clearly not entitled to an order under the Specific Relief Act. Nor can the Bank be said, under s. 170 of the Presidency Magistrates' Act, to be a person affected by an order under the Act, and therefore entitled to be furnished with a copy of the order and depositions. Sections 167—182 deal with the question of appeals. Section 170 allows a person affected by the order to obtain copies of the order and copies of depositions on payment of costs. Taking the position of the sections, "the person affected" is the person who only is affected by the order of the Magistrate. Section 180 says, "that there shall be no appeal from any order of a Presidency Magistrate except in the cases provided for by this Act, or by any law for the time being in force." Here a complaint is made against the Magistrate; he has been asked under s. 170 to give copies, and he has refused: there is no power to appeal against such an order of refusal. Nor is the Bank of Bengal "a person affected by the order"; no order for compensation has been made against the Bank; the right to set the Local Government in motion in order to get an appeal does not make the Bank "a person affected."

[BROUGHTON, J.—If, Mr. Advocate-General, you can show us that the Bank is "a person affected by the orders," we shall have no difficulty in applying the Specific Relief Act.]

The Advocate-General (The Hon. G. C. Paul) in support of the rule.—Comparing s. 170 of the Presidency Magistrates' Act with s. 276 of the Criminal Procedure Code, it appears that, so far as orders of Criminal Courts go, a copy is furnishable to a person affected by the order of the Court. Section 276 of Act XI of 1874 does not apply to Calcutta; but s. 170 of the Presidency Magistrates' Act has evidently been taken from that section. There is no public prosecutor in this country. Section 276 lets in the prosecutor, and therefore s. 170 of the Presidency Magistrates' Act ought to have the same effect. We could move the Local Government under s. 167 to allow us to [168] appeal. How can any person bring a suit for malicious prosecution, unless he can obtain the order of discharge and the depositions? We are, therefore, affected by the refusal to give us copies.

The **Judgment** of the Court (TOTTENHAM and BROUGHTON, JJ.) was delivered by

Broughton, J.—The Chief Presidency Magistrate has been called upon to show cause why he should not give to the Bank of Bengal copies of the depositions of the witnesses and the orders recorded in the matter of their complaint made against Dinonath Roy, who has been discharged by the Magistrate.

This rule is moved for under the Specific Relief Act and under s. 170 of the Presidency Magistrates' Act.

Two questions arise in this matter: *first*, whether, under s. 170 of the Presidency Magistrates' Act, the Bank of Bengal, as the prosecutor in the case, have a right to the copies; and *second*, whether, supposing that they have a right, and this right has not been acceded to by the Magistrate, the High Court can proceed, under s. 45 and the following sections of the Specific Relief Act, to order the Magistrate to fulfil his duty.

Although the rule has been moved for under the Specific Relief Act, it appears to us to be beyond doubt that the provisions of s. 15 of the High Courts Charter Act enable the Court to make the order upon the Magistrate, if it ought to have been made. But we think that s. 45 of the Specific Relief Act is wide enough in its terms to apply to a case like this. Section 7 of the Specific Relief Act has been referred to as showing that "specific relief cannot be granted for the mere purpose of enforcing a penal law." It cannot be said, however, that an application to the Magistrate to grant copies of depositions and orders is an application "for the mere purpose of enforcing a penal law." Copies may be required for many purposes.

Then the application must "be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing (as the case may be) of the said specific act." If the prosecutor has a right to the copies, his personal [169] right would be injured if they were refused. And it does not appear that the applicant has any other specific and adequate legal remedy.

Then the question is, whether, under s. 170 of the Presidency Magistrates' Act, the applicant is entitled to copies of the depositions and order. Section 170 enacts that,—"If any person affected by an order passed under this Act desires to have a copy of such order, or of any deposition or other part of the record, he shall, on applying for such copy, be furnished therewith, provided that he pay for the same, unless the Magistrate, for some special reason, thinks fit to furnish it free of cost." It is contended that this does not apply to a prosecutor, because the Crown is the prosecutor, and not the private individual. There is no doubt that, technically, the Crown is the prosecutor. But supposing we were to say, that on that ground the private individual cannot apply for copies of depositions, the consequences may be very serious. It is said it would be very inconvenient if the Magistrate were to be called upon to furnish those copies in every case. However great the inconvenience may be, it would be a much more serious thing if he were justified in refusing an application for copies. As far as the inconvenience goes, it has not been shown that it would be very great in any case, as the section provides that copies are to be furnished on payment of costs for the same, unless the Magistrate specially directs copies to be furnished without payment. But supposing the prosecutor, having failed in his prosecution, is not allowed to get copies of the depositions, the consequences may be most serious to him. Take for instance the case in which a prosecutor charges the accused with defamation, or with bringing some charge against him which seriously affects his character, and suppose for some reason which left the character of the prosecutor perfectly clear and untainted, the accused person were to be discharged, then, if the prosecutor were unable, under this section, to get copies of the depositions, it might be said that he had prosecuted a man for charging him with an infamous crime, and yet that the accused had been acquitted, and people would conclude that the prosecutor had been guilty of the crime imputed to him. We think this [170] single instance would show that the consequences of refusing copies would be most serious. No distinction can be made between

such a case as this and any other case; the section is perfectly general. A prosecutor who charges another with dishonesty, as in this case, if he cannot sustain the charge, might suffer an unjust imputation, unless by producing a true record of the proceedings he could show that his action was *bonâ fide*. No distinction ought to be made between the prosecutor in one case and in another. All prosecutors whose charges are dismissed by the Magistrate are, in our opinion, affected by the orders dismissing them, and are entitled under s. 170 to copies of the order and depositions.

The rule will be made absolute.

We direct that the copies be given to Mr. *Macnair*, attorney of the prosecutors.

Rule made absolute.

NOTES.

[The jurisdiction conferred by The Specific Relief Act, 1877, sec. 45 has been invoked to compel public officers to discharge their duty :—26 Bom., 396; 27 Bom., 307; 19 Cal., 192; 28 Cal., 479; 12 C. W. N., 873; 16 Bom., 398.]

[8 Cal. 170.]

ORIGINAL CIVIL.

The 15th December, 1881.

PRESENT :

MR. JUSTICE WILSON.

Buddree Doss and another

versus

Hoare, Miller, & Co.

Application to add a defendant Civil Procedure Code (Act X of 1887), ss. 28 & 32—Judicature Act, Order xvi, Rules 3 and 6.

The plaintiffs brought a suit to recover certain sums of money from the defendants, due to them under certain contracts which they alleged had been entered into by themselves, and one *A D*, as agent of the defendants, and asked for an account.

The defendants, in their written statement, contended that there was no privity of contract between themselves and the plaintiffs, and denied the alleged agency of *A D*.

The plaintiffs, before the hearing, applied to the Court to have *A D* added as a party-defendant under ss. 28 and 32 of Act X of 1877, asking to be allowed to amend their plaint so as to pray for relief in the alternative against the original defendants or the said *A D*, or both against the original defendants and the said *A D*.

[171] *Held*, that, under s. 28, they were entitled to the order on the authority of the case of *Child v. Stenning* (L. R. 5 Ch. D., 695).

ONE Buddree Doss, and his son, a minor, through Buddree Doss, instituted a suit against the firm of Hoare, Miller, & Co. to recover the sum of Rs. 8,441, and for an account.

The plaintiffs stated that they carried on business as merchants and bankers under the name of Buddree Doss Bungshidhur, and had business transactions with Hoare, Miller, & Co., in the course of which transactions

they contracted to sell, and sold and delivered to the defendants, various goods, and received various sums of money for such goods, both plaintiffs and defendants agreeing to pay any damage occasioned by any breach of contract on their respective parts; that such transactions were carried out, as far as the defendants were concerned, by and through the instrumentality of one Aushotosh Dutt, who acted as agent in all purchases made by the defendants, and in all matters concerning their contracts, —the last of such transactions being the sale and delivery by the plaintiffs to the defendants of 1,800 tons of Cawnpore wheat at Rs. 2-14 per bazar maund: that the plaintiffs found difficulty in obtaining payment of the balance of the price of the wheat, and also of a sum of Rs. 17,876, the balance of the price of certain other goods sold and delivered to the defendants; and that, in February 1881, the plaintiffs and the defendants, through Aushotosh Dutt, adjusted accounts, and it was found that a sum of Rs. 8,441 was due to the plaintiffs, which amount included a sum of Rs. 1,200, being damages in respect of a contract under which they, the defendants, had, on the 3rd March 1880, agreed to take the delivery of 200 tons of wheat from the plaintiffs, and to pay the sum of Rs. 18,637 to a firm, of which the plaintiffs, together with one Bhingraj, were the only members, and which contract had been transferred by the last-mentioned firm to the plaintiffs' firm.

The plaintiffs, therefore, brought their present suit against Hoare, Miller, & Co., for the purposes above mentioned.

The defendants put in a written statement, alleging that, in the several transactions mentioned by the plaintiffs, Aushotosh [172] Dutt had not acted as their agent, but as principal, there being no privity of contract between the plaintiffs' firm and themselves in respect of such transactions; that the course of business between them had been that the defendants ordered goods, and Aushotosh Dutt supplied them, the latter making such arrangements with bazar dealers as he thought fit; and they further denied the adjustment of account.

Before the suit came on for final hearing, the plaintiffs applied to the Court to make Aushotosh Dutt a party-defendant to the suit, and to amend their plaint by praying for relief in the alternative against the original defendants, or against Aushotosh Dutt, or both against the defendants and Aushotosh Dutt.

At the hearing of the motion, the plaintiffs stated that the transactions mentioned in the plaint had been carried on by themselves and the defendants, through the latter's agent, Aushotosh Dutt, who had been for ten years the head assistant of the native establishment of Hoare, Miller, & Co.

Mr. *Bonnerjee* in support of the Plaintiffs' application.

Mr. *Stokoe* against the application. —This application is made under ss. 28 and 32 of the Code. Now s. 28 of the Code corresponds with rule 3, order xvi of the Judicature Act, with the addition of the words "in respect of the same matter." The case of the *Honduras Railway Co. v. Lefevre* (L. R., 2 Exch. D., 301) points to the fact, that rule 3 relates to the joinder of defendants in the original writ, and although a similar application to the present was in that case granted, it was granted under rule 6 of order xvi. There is no section in the Civil Procedure Code which answers to rule 6. [WILSON, J. —There is the case of *Child v. Stenning* (L. R., 5 Ch. D., 595), which is decided expressly on rule 3.] Section 32 of the Code authorizes the addition of parties whose presence is necessary to enable the Court to adjudicate and settle all questions involved in the suit. Section 28 states who may be joined as

defendants in the original writ. Unless it can be shown that the presence of Aushotosh Dutt is necessary [173] before the suit can be decided, he cannot be added; see *Mahomed Badsha v. Nicol Fleming* (1. L. R., 4 Cal., 355).

Wilson, J.— I think there is no doubt whatever that the order ought to be made. The application is made under ss. 28 and 32 of Act X of 1877.

As a general rule, if the plaintiff applies in proper time, he is entitled to have a person added as a defendant, if he had been entitled to join him originally. But, under s. 28, "all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative, in respect of the same matter." Here the claim is against Hoare, Miller, & Co. If the facts turn out that Hoare, Miller, & Co. were the principals for whom Aushotosh Dutt, whom it is sought to add, was acting, they can claim to have their remedy in the alternative.

I should have said so without authority, but there is express authority in the case of *Child v. Stenning* (L. R., 5 Ch. D., 695).

I think, therefore, that the order should be made as asked for. Costs should be costs in the cause.

Application granted.

Attorney for the Plaintiffs : *M. Camel.*

Attorney for the Defendants : *Bishnauth Dutt.*

NOTES.

[One's own agent has been allowed to be made a co-defendant :—(1905) 29 Mad., 50—16 M. L. J., 39. See (1907) 31 Mad., 352—18 M. L. J., 238 as regards the scope of C. P. C., (1882) sec. 28 where the previous cases are collected. See also (1891) L. B. R., (1893-1900) 61.]

[174] APPELLATE CIVIL.

The 25th August, 1881.

PRESENT:

MR. JUSTICE PRINSEP AND MR. JUSTICE FIELD.

Protap Chunder Doss.....Judgment-Debtor

versus

Peary Chowdhrair.....Decree-Holder.

Execution of decree Mode of execution Civil Procedure Code (Act X of 1877) ss. 235 and 260.

Upon an application under s. 205 of Act X of 1877 (Civil Procedure Code) for the execution of a decree, which directed the judgment-debtor forthwith to pull down and remove such portion of a wall as had been erected by him upon the wall of the decree-holder, the mode in which the assistance of the Court was required to be given was stated in column (j) of such application to be by giving the decree holder possession of his wall by pulling down the wall erected thereon. The Court directed an order to issue to the Nazir to remove the judgment-debtor's wall from the top of the decree-holder's wall.

* Appeal from Appellate Order, No. 181 of 1881, against the order of R. Rampini, Esq., Officiating Judge of Dacca, dated the 28th May 1881, affirming the order of Baboo Jodoo Nath Ghose, Sudder Munsif of that district, dated the 2nd April 1881.

Held, that the decree-holder's application could not be granted in that form, and that he should have asked the assistance of the Court to be given in the way provided for by s. 260* of Act X of 1877, by the imprisonment of the judgment-debtor, or the attachment of his property, or both.

Held also, that the Court was wrong in passing the order it had, but that it should have pointed out to the decree-holder the manner in which he should have asked the assistance of the Court to be given and the remedy to which he was entitled; and that, upon such amended application being made, the proper course to pursue was to serve a notice on the judgment-debtor, directing him to comply with the order contained in the decree within a time to be fixed by such notice; and that if he failed to comply with such order within the time so limited, the Court might then, at the instance of the decree-holder, make an order, either for the judgment-debtor's imprisonment, or for the attachment of his property, due regard being had to the provision of s. 260 in the latter case.

Held further, that the High Court, in special appeal, should not vary the order for execution which had been passed in such a way as to give the decree-holder that relief for which he did not ask.

THE facts of this case sufficiently appear from the judgments.

[175] Mr. *Branson* and *Baboo Aukhil Chunder Sen* for the Appellant,
The Advocate-General (The Hon. *G. C. Paul*) and *Baboo Bussunt Coomar Bose* for the Respondent.

The **Judgments** of the Court (PRINSEP and FIELD, JJ.) were as follows:—

Field, J. The facts of this case are briefly as follows:—

There are two properties, named Rungmehal and Tripuli. Rungmehal was first in existence as a one-storied building. Tripuli was subsequently erected in the form of a two-storied house. The original eastern wall of Rungmehal was built, as many native walls are built in this country, receding inwards gradually from the basement or foundation. When the Tripuli building was erected, the western side wall of the Tripuli house followed this recession or inclination of the eastern wall of the Rungmehal building, so as to lean upon this and rest partly over the original site thereof, that is upon the top of the one-story, of which the Rungmehal building originally consisted. From that point, the western side wall of the Tripuli building receded gradually inwards towards the east, so that the top of this side wall of the upper story of the Tripuli building lay somewhat to the east of the bottom of the same wall, where it rested upon the top of the wall of the lower story. Subsequently, Rungmehal and Tripuli, which had originally belonged to one and the same owner, passed into the hands of separate proprietors, and the Rungmehal proprietor proceeded to erect a second story on the top of the Rungmehal building, which (as already stated) was originally a one-storied building. In erecting the eastern side-wall of this upper storey, the Rungmehal owner followed the line of inclination of the upper story

* [Sec. 260:—When the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for the performance of any other particular act, has been made, has had an opportunity of obeying the decree or injunction and has wilfully failed to obey it, the decree may be enforced by his imprisonment, or by the attachment of his property, or by both.

No attachment under this section shall remain in force for more than one year, at the end of which time, if the judgment-debtor has not obeyed the decree, the property attached may be sold and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit and may pay the balance, if any, to the judgment-debtor on his application.]

of the Tripuli house. The effect of this was, that the eastern side-wall of the Rungmelhal building dovetailed into, infringed, and rested upon the western side-wall of the Tripuli building. The Tripuli proprietor then brought an action denying the right of the Rungmelhal owner to rest the side-wall of his upper story upon the Tripuli side-wall; and [176] the result of that litigation was, that the Tripuli owner obtained a decree in this Court. The essential part of that decree, for the purposes of the matter now before us, is this, that "the defendants do forthwith pull down and remove such portion of the wall as has been erected by them upon the west wall of the plaintiff's house." An application was made for execution of that decree, and in column (j) of the application made under s. 235 of the Code of Civil Procedure, the mode in which the assistance of the Court was required was stated to be by giving them possession of the western wall of the Tripuli house by pulling down the wall erected thereupon.

Now, we are clearly of opinion, that the assistance here required was a form of assistance which could not be granted in the terms in which it was asked, regard being had to s. 260 of the Code of Civil Procedure. That section provides, that when the party against whom a decree for the performance of, or abstinence from, any particular act has been made has had an opportunity of obeying the decree, and has wilfully failed to obey it, the decree may be enforced by his imprisonment, or by the attachment of his property, or by both. However, that application was received and acted upon in the form in which it was made, and out of this error has arisen the whole of the proceedings which form the subject of appeal now before us. The Munsif made the following order: "Order will accordingly be issued to the Nazir to remove the judgment debtor's wall off the top of the decree-holder's wall of the first story, according to the directions in the High Court's judgment." We think that this was an improper order. In the first place, it was an order not warranted by the law, and it is exceedingly undesirable that the Nazir of a Civil Court should be sent out to perform an act of the kind, for the performance of which he cannot be supposed to be fitted, which, if resisted, might lead to an unseemly breach of the peace and serious subsequent consequences. An appeal was preferred against the Munsif's order, and the District Judge confirmed it on appeal. We think that the course which should have been pursued was this. It should have been pointed out to the decree-holder that the provisions of s. 260 of the Code of [177] Civil Procedure, contain the procedure to be followed for executing a decree of this kind; and it should have been explained to him that the application presented under s. 235 should have asked that particular assistance which, under the provisions of s. 260, could have been granted. It is now pressed upon us by the learned *Advocate-General*, that we ought ourselves to make the order in the terms of s. 260. Section 577 of the Code of Civil Procedure provides, that the judgment in an appeal may be for confirming, varying, or reversing the decree. We think however in this case that, as the decree-holder did not ask for that assistance which he might have had under the provisions of the Code, we ought not to vary the order for execution in such a matter as to give him that for which he did not ask. We think that the proper order to make is to set aside the order made by the Munsif and affirmed by the District Judge, and to remand this case to the lower Appellate Court with this direction, that he allow the decree-holder, within a time to be fixed by the Judge, to amend his application for execution so as to bring it within the terms of s. 260. In order to prevent further difficulty, we deem it right to point out, that the proper course to be pursued, under this section, is to serve a notice upon the judgment-debtor, calling upon him to comply, within a time

to be fixed by such notice, with the order contained in the decree; and if the judgment-debtor, within such time, fails to comply with such order, the Court can then, at the instance of the decree-holder, make an order either for the judgment-debtor's imprisonment or for the attachment of the property, due regard being had to the provisions of the section in the latter case. We think, therefore, that the order of the Munsif must be set aside, and this case remanded in order that these directions may be complied with.

Prinsep, J.—The decree passed in this case contained an order to the defendant to perform a certain act,—that is, to pull down a wall to the extent to which he had erected it upon the plaintiff's wall. The decree-holder and the lower Courts have misunderstood that order so as to justify the Court of Execution acting itself to carry out the terms of the decree on the failure of the judgment-debtor, defendant, to perform the act which he [178] was ordered to perform. The alternative however, is, as declared by s. 260 of the Code of Civil Procedure, that if, after sufficient notice, the party against whom the decree has been passed fails to perform the particular act ordered, the decree may be enforced by the imprisonment of the judgment-debtor, or by the attachment of his property, or by both. In the present instance it is impossible to execute this decree in the manner in which the decree-holder has sought to execute it, and inasmuch as the lower Courts should have corrected the error of the decree-holder in his original application to execute the decree by requiring him to amend that application, I think that we may fairly now allow such amendment to be made so as to bring the application within the terms of s. 260.

Appeal allowed and case remanded.

NOTES.

I. OPPORTUNITY OF OBEYING THE DECREE—

The notice mentioned in this case is not obligatory.—(1905) 33 Cal., 306 10 C. W. N. 297 3 C. L. J., 112; 28 All., 300 2 A. L. J., 836.

II. MODE OF ENFORCING REMOVAL OF OBSTRUCTION—

Similar decisions were given in (1872) 18 W. R., 282; (1901) 26 Bom., 283. The C. P. C., 1908, O. 51 r. 32 cl. 4 with the *illustration* is a new clause changing the previous law.

III. APPLICATION FOR EXECUTION—PARTICULARS—

See also (1893) 19 Bom., 34.]

[8 Cal. 178]

PRIVY COUNCIL.

The 14th, 15th and 16th June, 1881.

PRESENT:

SIR B. PEACOCK, SIR R. P. COLLIER AND SIR R. COUCH.

Fakharuddin Mahomed Ahsan.....Judgment-Debtor

versus

The Official Trustee of Bengal.....Decree-Holder.

The same plaintiff

versus

The same and Aluminissa Khatun and another.

Aluminissa Khatun and another.....Petitioners

versus

The Official Trustee of Bengal.

Sha Sufi Sufiulla and others.....Petitioners

versus

The Official Trustee of Bengal.

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

*Attempt to enforce deed-- Limitation (Act IX of 1871),**sched. ii, cl. 93 -- Wasilat.*

In a suit in which the plaintiff had obtained a decree and the defendant had appealed to Her Majesty in Council, a third party applied to be added as a respondent, on the ground that, by registered deed, the plaintiff had conveyed to him a share of the property decreed. The defendant objected that the deed was a forgery; but an order was made that the applicant should be joined as a respondent, without deciding whether the deed was or [179] was not genuine, and "without prejudice," in the words of the order, "to any action or proceeding by the defendant.

Held, that the setting up the deed and insisting upon it for this purpose constituted "an attempt to enforce" it, and that a suit brought, more than three years after the making of that order, by the appellant against the party so joined as a respondent, to have the deed set aside as being false and fabricated, was barred by limitation under Act IX of 1871, sched. ii, cl. 93.*

* [Art. 93 :-

Description of suit.	Period of limitation.	Time when period begins to run.
To declare the forgery of an instrument issued, or registered, or attempted to be enforced.	Three years ...	The date of the issue, registration or attempt.]

A decree declared the plaintiff entitled to the possession of land with wasilat from a date named, directing "the amount thereof to be ascertained on local enquiry," and to bear interest from the date of its ascertainment until payment, without saying more.

Held, that the decree-holder was entitled to wasilat until the date of delivery of possession to him.

Semble.—It was not necessary for the judicial officer who made the enquiry to hold a Court on the spot.

THE first of these appeals was from a decree of a Divisional Bench of the High Court, *L. S. JACKSON and TOTTENHAM, JJ.* (28th May 1878), upholding a decree of the Judge of the Furreredpore District (31st December 1877). The suits in which these were appeals rose out of the acquirement by Nicholas Peter Pogose, deceased, now represented by the respondent, of rights over the estate of Najamun Nissa Begum, the deceased wife of Fakharuddin Mahomed Ahsan Chowdhry, the appellant. Najamun Nissa, who died in December 1864, obtained a decree, dated 27th July 1864, against her husband, for the possession of zamindari lands and patni mahal in the Furreredpore District, together with wasilat. Questions in execution of decree as to the amount of the latter caused the first of these appeals.

On the 17th of July 1864, Najamun Nissa executed to N. P. Pogose a deed of hibbabil-e-waz, or gift for consideration, granting him a six-anna share in the property for which that decree was, in the same month, obtained. A question, whether limitation barred a suit disputing the execution of this deed, occasioned the second appeal.

On the death of Najamun Nissa, her husband, as a sharer according to the Mahomedan law, took one-fourth of her estate; and thus, to the extent of two and-a-half annas of the property decreed in her favour on 17th July 1864, the decree was satisfied. Her only son, Kafiluddin, took one-half of the residue, [180] or three annas and fifteen gandas of the decree, a share which, on his death in 1867, devolved on his heirs, of whom one was his father, Fakharuddin. His sisters, Kamarun Nissa and Samsun Nissa, took each one-fourth of the residue, or one anna seventeen and-a-half gandas of the decree. From Kamarun Nissa, N. P. Pogose bought her interest in the decree; and he purchased further rights over the estate of Najamun Nissa by attaching, bringing to sale in execution of a decree, and buying a decree made against her in 1860 (appealed to the Privy Council; see 12, Moore's L. A., 65). In the execution-proceedings taken thereupon there came before the Court, Aluminissa, widow of Kafiluddin, and the heirs of his sister Samsun Nissa, who had died, besides Fakharuddin; and questions as to the regularity of these proceedings formed the subject of the other, the third, or consolidated appeal.

By an order of the High Court, dated 28th February 1866, N. P. Pogose was admitted to appear as respondent with the heirs of Najamun Nissa on the proceedings then being taken in appeal to Her Majesty in Council against the decree of the 27th July 1864. That appeal was dismissed on the 20th December 1873.

On the 9th August 1876, N. P. Pogose executed a deed, whereby he assigned all his property, including his interest in the decree of the 27th July 1864, to the Official Trustee of Bengal, in trust for his creditors, with a reversionary trust for his own estate. In October 1876, N. P. Pogose died; and, in the further proceedings in the above matters, the Official Trustee represented him.

The questions in the first appeal were --Whether the respondent, as holder of the decree of the 27th July 1864, was entitled to wasilat down to the

time of the delivery of possession under the decree, or only for the period for which it had been estimated in the schedule of the plaint filed in the suit; and whether, if due for the whole period, it had been properly assessed.

After referring to the words of the decree, which were, that "the plaintiff be declared entitled to possession of the land mentioned in the kabinnama, together with wasilat from the commencement of Srabun; the wasilat to be ascertained by [181] local inquiry, and to bear interest at twelve per cent. from date of the ascertainment of the amount due to date of payment," L. S. JACKSON, J., said: "On referring to the answer of the defendant in the suit of 1864, in that suit it appears that, in fact, he did not deny the correctness of the sum alleged by the plaintiff to be due as wasilat for the specific period there mentioned. That being so, and the plaintiff and the defendant, therefore, not being really at issue as to that particular amount, it is clear that there was nothing to be enquired into or ascertained in execution, if the Court only meant to give wasilat for the particular time mentioned in the plaint. I think that what the Court intended was to give wasilat from the date of dispossession down to the date of the recovery thereof. This interpretation of the decree had already been come to by Mr. Geddes, the District Judge, before whom the execution-proceedings first came. It was impugned before myself and my brother WHITE on a former appeal, and we, though not formally, certainly by implication, expressed our approval of that construction, and after a full consideration of the point my present colleague and I now see no reason to arrive at a different conclusion. I think, therefore, that the decree of this Court, which reversed the decree of the Court below in the original suit, was not silent as to mesne profits, and that the Court intended to exercise, and did exercise, the discretion vested in the Courts by s. 196 of the repealed Code of Civil Procedure, and allowed the plaintiff mesne profits in continuation of what she had claimed in the plaint down to the time of the recovery of possession. It is conceivable and probable that the learned Judges who delivered judgment on that occasion desired to save the parties further endless litigation; and we can see from the concluding words of the Judicial Committee in *Sadasiva Pillay's case* (15 B. L. R. 383: s. c., L. R., 2 Ind. App., 219), how extremely unwilling their Lordships would be that a just claim should be defeated upon an objection thought of at a late period of the proceedings,--namely, upon an objection of limitation brought forward at that time. On the first of these points, therefore, we are distinctly against the appellant.

[182] "The second question is as to the amount of wasilat. Now, what we have before us is the case of a defendant against whom judgment has been given for possession of immovable property with wasilat. That judgment was given by the High Court so long ago as the year 1864. He knew full well that he had this liability for mesne profits hanging over his head, but at the same time he retained in his possession a large share of the same property as to which the plaintiff had obtained a decree. In that state of things he tells the Court that, except accounts for the past five years, every fragment of accounts and materials for arriving at a conclusion as to the value and profits of this large property has entirely disappeared. He has, in every way, not only withheld information, but resisted attempts to obtain information. Having taken that course, he now asks us to set aside on appeal a decision as to the assessment of mesne profits arrived at by the Court below, on what appears to me to be unusually good and ample materials. In cases where the decree-holder has had far less materials to lay before the Court than the Official Trustee has laid before us in the present case, we have constantly held that everything must be presumed against the wrong-doer, and that it does not lie in his mouth to

object to the insufficiency of materials which he might, if he had chosen, have rendered more complete. We think that there were ample and trustworthy materials to enable the Court below to come to the conclusion at which it has arrived, and we decline to open the question of calculation. The appeal is dismissed with costs."

On this appeal Mr. *J. F. Leith*, Q. C., and Mr. *C. W. Arathoon* appeared for the Appellant.

Mr. *T. H. Cowie*, Q. C., Mr. *R. V. Doyne*, and Mr. *J. T. Woodroffe* for the Respondent.

For the appellant it was argued: *First*, that as the Court executing the decree of 1864 had no power to execute it for wasilat, except so far as the decree itself might authorize such execution, and as that decree had stopped short of awarding wasilat down to the date of possession delivered, the High Court had erred in allowing execution for wasilat up to the latter date. The powers of a Court in execution of decree had been exceeded. [183] Reference was made to *Mosoodun Lal v. Bhekaree Singh* (B. L. R., Sup. Vol., 602; s. c., 6 W. R., Mis. Rul., 109), and *Sadasiva Pillai v. Ramalinga Pillai* (15 B. L. R., 383; s. c., L. R., 2 Ind. App., 219). *Secondly*, the enquiry as to wasilat had not been duly carried out; and there had not been a local enquiry as directed in the decree.

For the respondent it was contended, that as the High Court, under s. 196 of Act VIII of 1859, had power to make an order for wasilat to be paid up to the time of re-delivery of possession, and had in the decree used language showing that it meant to do full justice in its award in this respect, the construction put by the High Court upon the decree should prevail. The more limited construction would be forced and incorrect. Reference was made to *Dhurum Narain singh v. Bundhoo Ram* (12 W. R., 75), and *Bunsee Singh v. Mirzu Nuzuf Ali Beg* (22 W. R., 328); and also to the order made in *Raja Lilanand Singh v. Maharaja Luckmessa Singh* (13 Moore's I. A., 490, at p. 496).

Mr. *J. F. Leith*, Q. C., having replied, their Lordships postponed judgment till after the hearing of the other appeals.

The second of these appeals was preferred against a decree of the same Divisional Bench (27th May 1878), upholding a decree of the Judge of the same district (28th March 1877).

The suit in which this appeal was made was brought in the year 1875 by Fakharuddin Mahomed Ahsan Chowdhry against Pogose to set aside, as false and fabricated, a deed of hilibabil-ewaz alleged to have been granted by the plaintiff's wife, who died in December 1864, to the defendants, on the 17th July 1864.

On the merits there was no decision, the defendants having relied on the defence that Act IX of 1871, sched. ii, cl. 93 barred the suit, in consequence of an "attempt to enforce," within the meaning of that clause, having been made in 1864. The facts of the case and the judgment, which was the subject of this appeal, are reported at page 209 of the Indian Law Reports, 4 Calcutta Series.

[184] Mr. *J. F. Leith*, Q. C., and Mr. *C. W. Arathoon* appeared for the Appellant.

Mr. *T. H. Cowie*, Q. C., Mr. *R. V. Doyne* and Mr. *J. T. Woodroffe* for the Respondents.

For the appellant it was argued, that the proceedings taken by N. P. Pogose, in order that he might be added as a respondent in the appeal heard by the Judicial Committee in 1873, did not constitute "an attempt to enforce," within the meaning of Act of 1871, sched. ii, cl. 93.

Their Lordships did not call on the counsel for respondents; and postponed judgment till after the hearing of the third appeal.

The last two appeals (which were consolidated and heard as one) were preferred from two decrees which proceeded on one judgment of the same Divisional Bench (8th May 1878), upholding the orders of the Subordinate Judge of Furreedpore (3rd September 1877).

The appellants in each of these appeals had, by petition to the Subordinate Judge of Furreedpore, objected to the validity of auction-sales of their property on the 21st February 1876. The sales had taken place on the application of N. P. Pogose, who, having died in 1876 after conveying his estate in trust to the Official Trustee of Bengal, was represented by the latter. N. P. Pogose having brought the property to sale had himself become the purchaser.

The appellant in one suit represented Kafiluddin, the son of Najamun Nissa; and the appellants in the other, were two sons and a daughter of Samsun Nissa, her second daughter, abovementioned. The separate appeals of these appellants, who were dissatisfied with the order of the Subordinate Judge, were rejected by one judgment of the High Court. The Judges of the High Court were of opinion, that the objectors had not shown that substantial injury had been caused to them by reason of a material irregularity in publishing and conducting the sale.

On this appeal Mr *J. F. Leth*, Q.C., and Mr. *C. W. Arathoon* appeared for the Appellants.

[185] Mr. *T. H. Coore*, Q.C., Mr. *R. V. Doyle*, and Mr. *J. T. Woodroffe* for the Respondents.

Their Lordships' **Judgment** in all the appeals was delivered by

Sir R. P. Collier.—The circumstances which give rise to these appeals are as follows:—Najamun Nissa Khatun, a Mahomedan lady, in 1861, brought a suit against her husband for the purpose of obtaining possession, together with mesne profits, of certain lands which she alleged to have been conveyed to her by her husband by a deed described as a kabinnama in lieu of prompt dower. The first Court decided against her. The High Court, on the 27th of July 1864, reversed that decision, and gave her what she claimed. She describes her suit as brought "to obtain possession of the zamindaries and patni talooks mentioned in the schedule given below, and the mesne profits thereof," claiming mesne profits in a very general manner. It is true that, subsequently, valuing the suit, and for that purpose describing her claim in the schedule, she speaks of her claim for mesne profits for the period of dispossession,—that is to say, some eighteen months before the institution of the suit,—as amounting to 48,400 rupees. The High Court, in giving judgment in her favour, on the 27th July 1864, observed:—"It is unnecessary to make further comment on the case of the plaintiff, which I think fully proved to the extent of the factum of the kabinnama and her right to the absolute possession of the lands therein mentioned, together with wasilat and interest from the commencement of Srabun 1267, when she was taken from her husband's house." The decree is drawn up in pursuance of that judgment, and is in these terms: "It is ordered and decreed by the said Court, that the decree of the lower Court be, and the same is, hereby reversed, and the plaintiff is declared entitled to possession of the land mentioned in the kabinnama with wasilat

from the commencement of Srabun 1267 : the wasilat to be ascertained by local inquiry, and to bear interest at twelve per cent. from date of the ascertainment of the amount due to date of payment." From that judgment and decree of the High Court, the husband, Ahsan Chowdry, appealed to this Board ; but that appeal [186] did not come on for hearing till the year 1873. In the meantime, the lady being dispossessed, and probably being in pecuniary difficulties, had recourse to a money-lender ; and on the 17th July 1864, ten days before the written judgment, but after an oral judgment had been pronounced, she executed a hibbanama, or deed of conveyance, to Pogose, a money-lender, of a six-anna share in the decree, in consideration of an advance by him, which probably, among other reasons, she would require for the protection of her interest in the appeal. In 1865, Pogose applied, upon the strength of this hibbanama, to be admitted as a respondent in the appeal. That application was opposed by Ahsan Chowdry, but finally an order was made in 1866, permitting Pogose to be added as a respondent, but declaring it to be open to Ahsan Chowdry to bring an action or any proceeding he might think fit, at any time, for the purpose of setting aside this hibbanama, which Ahsan Chowdry disputed.

The appeal then came on before this Board in 1873, and the judgment of the High Court was affirmed. In 1875, Pogose appears to have taken some steps to obtain execution of the decree ; but he made an assignment for the benefit of his creditors, and, having died not very long after, he was and is still represented in this suit by the Official Trustee, who is now the respondent. The Official Trustee, in 1876, applied for execution, claiming to be put into possession of a seven-anna share and a little more, and subsequently claiming to be put into possession of a thirteen-and-a-half-anna share.

It requires to be explained how the rights of Pogose had grown from the six annas to the thirteen-and-a-half-anna share. It appears that the lady, the original plaintiff, had died ; thereupon her property devolved upon her heirs, being her husband, two daughters, and a son. Pogose, in 1874, bought, by private contract, the share of one of the daughters ; he further bought a decree against the mother, which bound her property, and on the strength of that decree he applied for a sale of that portion of it to which the son and the daughter were entitled as heirs of their mother : and under that decree the property was put up for sale in February 1876. Objections were made to the sale on the part of those who then represented the son and the [187] daughter, on the ground of various irregularities. The first Court found there was no irregularity : but the High Court found there was, and remitted the case to the Court below for the purpose of ascertaining whether the plaintiffs had proved that they had sustained material damage on account of this irregularity, which it was necessary for them to prove in order to set aside the sale. Both Courts have found that no such damage was proved. An appeal has been brought from the decision of the High Court upon that question, and it is the subject-matter of the third appeal.

The second appeal arises in this way : Ahsan Chowdhry, in 1875, brought a suit for the purpose of setting aside the hibbanama of 1864, whereby Pogose claimed the six annas which were by it conveyed to him. The Official Trustee appeared as defendant in that suit, and he was satisfied to rest his defence upon two points of law, one limitation, and the other *res decisa*. The latter point has been decided against him ; but both Courts have decided in his favour on the question of limitation, and that is the subject of the second appeal.

The subject of the first appeal is this : It has been decided by the High Court that the plaintiff, representing Pogose, who claimed in right of the original plaintiff, Najamun Nissa, was entitled to wasilat or mesne profits up to the

time of the delivery of possession, it being contended by the defendant that he was only entitled in this suit to *wasilat* up to the time of the commencement of the suit; further questions have been raised as to the amount of the *wasilat*, and whether there ought not to have been a local inquiry other than that which was instituted. These questions are the subject-matter of the first suit.

Such being the circumstances giving rise to the appeals, it appears to their Lordships convenient to take the last suit first. The only question in that suit, --*viz.*, whether or not those who sought to set aside the sale have proved that they have been materially injured by any irregularity which occurred in the notification of it, --is a pure question of fact. It has been decided by both Courts, and their Lordships, on looking through the judgments of those Courts, have come to the conclusion, that no evidence of a satisfactory character was adduced on [188] the part of the objectors to the sale, proving, what it lay upon them to prove, that they had sustained any material damage or injury. In the absence of any such proof the judgments are right, and their Lordships are of opinion that that appeal should be dismissed.

The question in the second appeal arises on the Statute of Limitation, and the point is a narrow one. The deed sought to be set aside, and which is impugned as a forgery, was executed in the year 1864. The suit to set it aside was brought in the year 1875. The question is, whether the suit was in time or not. The Act bearing upon this matter, which was in force at the time of the institution of the suit, namely, in 1874, is Act IX of 1871, and the part of the second schedule referring to the subject-matter is cl. 93, which is in these terms: -- "Description of suit: To declare the forgery of an instrument issued or registered or attempted to be enforced;" for which the period of limitation is three years. This suit, undoubtedly, was a suit of that description, for in the plaint the plaintiff declares that the deed was false and fabricated. The words applicable to such a suit are: "Time when the period begins to run; the date of the issue, registration, or attempt." "Registration or attempt" must be construed with regard to the words in the former paragraph, that is, the date of the registration, or the date of the attempt to enforce the deed. Both Courts have held, and their Lordships think rightly, that when Pogose, in the year 1865, set up this deed, and insisted upon it for the purpose of being made a respondent in the suit, and when that application was opposed by Ahsan Chowdry, and, the parties being heard, Pogose succeeded in his attempt to become a respondent, without prejudice in the words of the order, to any action or proceeding to be brought by Ahsan Chowdry, that was an attempt to enforce the deed, and from that date limitation ran. Their Lordships observe further, that the words of the section refer also to "the date of registration": and looking at the deed, they find it was registered two days after it was made. It was made on the 17th, and registered on the 19th; and, therefore, it seems to their Lordships that the Statute of Limitation doubly applies. On these grounds, [189] therefore, they will advise Her Majesty that the judgment in this case be affirmed.

The plaint has been already read in the first case, and their Lordships are of opinion that it is at all events open to the construction that the plaintiff intended to claim *wasilat* up to the time of delivery of possession, although, for the purpose of valuation only, so much was valued as was then due; but be that as it may, they are of opinion that, under s. 196 of Act VIII of 1859, it was in the power of the Court, if it thought fit, to make a decree which should give the plaintiff *wasilat* up to the date of obtaining possession. Section 196 is in these terms: -- "When the suit is for land or other property paying rent, the Court may provide in the decree for the payment of mesne

profits or rent on such land or other property from the date of the suit until the date of delivery of possession to the decree-holder, with interest thereupon at such rate as the Court may think proper." The words of the judgment are: "The plaintiff is declared entitled to possession of the land mentioned in the kabinnama, with wasilat from the commencement of Srabun 1267; the wasilat, to be ascertained by local inquiry," and so on. Wasilat, by law, is demandable up to the time of possession; and the question is, whether the Court intended to give to the plaintiff that amount of wasilat to which he was undoubtedly entitled by law in this action, or whether they intended to cut his claim for wasilat into two, and to give him in this suit so much only as accrued up to the time of the commencement of the suit, and to leave him to bring a separate suit for the rest. According to that interpretation, they could not have intended to give him wasilat up to the time of the decision, which was three or four years after the commencement of the suit. It appears to their Lordships that the more reasonable construction of this document—which undoubtedly might have been clearer—is, that the Court, with a view to carrying out the object of the legislature, namely, the prevention of unnecessary litigation and multiplication of suits, intended in this suit to give, with possession, that wasilat which was by law claimable up to the time of possession. The view which their Lordships take of the decree is much confirmed by [190] the two cases—*Dhurm Naram Singh v. Bundhoo Raur* (12 W. R., 75), and *Bunsee Singh v. Mirza Nuzuf Ali Beg* (22 W. R., 328), to which their attention has been called, wherein it would appear that the High Court have, dealing with words identical or extremely similar, given them the interpretation that 'possession with wasilat' means wasilat up to the time of possession being delivered. Their Lordships cannot but fear that, if they were to hold the contrary, they would throw doubt upon many cases which have been decided and acted upon in India.

Their Lordships do not feel at all pressed by the authority of several cases to which their attention has been called, the doctrine of which has been affirmed by this Board,—namely, that where a decree is silent on the subject of interest or of wasilat, interest or wasilat cannot be added in the course of execution. But here the decree is not silent on the subject of wasilat. On the contrary, it is expressly mentioned; and the term "possession with wasilat" appears to them reasonably to bear the construction which has been put upon it by the High Court, not only in this, but in many other cases. Their Lordships are, therefore, of opinion that the High Court were right in deciding as they did, that wasilat is claimable up to the time of delivery of possession.

The course of litigation in this case was this: Some time after the claim for execution on behalf of Pogose, the matter came before Mr. Geddes, a local Judge, who took the view of the judgment which has been expressed. An appeal was preferred against his ruling to the High Court, and it was confirmed by the High Court. Subsequently, Mr. Peterson, who had succeeded Mr. Geddes as local Judge, took the opposite view,—namely, that wasilat was only claimable up to the time of the institution of the suit. The matter was sent back to Mr. Peterson, and he was directed to ascertain the amount of wasilat up to the time of the delivery of possession; and his judgment, giving upwards of seven lacs of rupees, was affirmed by the decision now under appeal. The High Court in their judgment state:—"The questions which we are called upon to determine in this appeal are two: *Firstly*, whether the decree-[191] holder,—that is to say, the person who now stands in the shoes of the original plaintiff, in whose favour the decree has been made,—is entitled to recover mesne profits upon the estate which was the subject of dispute down

to the period of obtaining possession, or only for the precise period for which wasilat is estimated in the schedule attached to the original plaint: and the *second* is, whether, supposing that the decree-holder is entitled to wasilat for the whole period, the Court below has assessed it upon a proper principle and upon sufficient materials." With regard to the second question there are two concurrent findings of Mr. Peterson, the Subordinate Judge, and that of the High Court: and under those circumstances, their Lordships have come to the conclusion, that the finding cannot be disturbed. However, a third point has been taken before their Lordships, which, as far as appears from the judgment of the Court, was not taken in the argument below, although it is raised in the grounds of appeal. That point is, that although wasilat may be due and obtainable in this suit up to the time of delivery of possession, and the calculation of the amount may be right, still, inasmuch as the decree directed the calculation to be made by a local inquiry, and there has been no local inquiry,—that is to say, an inquiry held by a Judge or an amin sitting within the boundary of the land, the judgment cannot stand. Whether the judgment is to be reversed upon that ground, or the case is to be sent back for another local inquiry, has not been very clearly put before their Lordships; but they are of opinion that there is nothing in the point. The judgment of the High Court undoubtedly directs that the wasilat should be ascertained by local inquiry. An inquiry was instituted by the Judge of the district. The Judge made an order that Ahsan Chowdry should appear before him, and should produce his jumma-wasil-baki papers, which would show the amount of his receipts and expenditure with regard to this property, and would be the best possible evidence, if trustworthy, which could be obtained, and worth more than the examination on the spot of any number of ryots. He appealed against that order to the High Court, but he made it no ground of appeal that the Judge ought to have gone to the spot, or have sent [192] a commissioner to the spot, or that he ought to have sat on some portion of his land. He made no objection of that kind, and it appears that he attorned, as it were, to the jurisdiction, and sent in certain papers (which were deemed highly unsatisfactory), thereby taking his chance of a decision in his favour by the Judge. It would be, therefore, too late for him to object to the inquiry being conducted as it was, if he could ever have objected. Their Lordships infer from the judgment that no such point was seriously argued before the High Court, probably because the counsel in India felt it to be untenable.

For these reasons, their Lordships will humbly advise Her Majesty to dismiss this appeal, together with the other appeals, with costs.

Appeals dismissed.

Solicitor for the several Appellants: Mr. T. L. Wilson.

Solicitors for the Respondent in the three cases: Messrs. *Lawford, Waterhouse, and Lawford*.

NOTES.

[MESNE PROFITS—

Where the decree is silent as to mesne profits, they cannot be added in execution but they can be recovered by a separate suit.—(1886) 13 Cal., 283; (1894) 22 Cal., 434; (1890) 17 Cal., 968; 15 Mad., 203.

Where the decree awards mesne profits and is silent as to the time up to which they are given, the date of delivery of possession is generally understood to be the time limit:—(1897) 11 All., 296; (1891) 19 Cal., 132. See also 6 A. B. J., 327.

But this is subject to the rule of *three years* introduced for the first time in the C. P. C., 1877 and retained in all the subsequent Codes.—(1899) 24 Bom., 149; 1 Bom., L.R., 638; (1908) 35 Cal., 1017.

The mesne profits awarded by Court may be larger than the claim when what was ascertained by the Court is so:—(1882) 9 Cal., 112.]

[8 Cal. 192]

APPELLATE CIVIL.

The 8th September, 1881.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Hubibul Hossein and others.....Defendants

versus

Mahomed Reza and others.....Plaintiffs.*

Court Fees Act (VII of 1870), cl. 5, sub-dm. (a) of s. 7
Subordinate tenure-holder—Assessment of court-fee in suit for possession
of a fractional part of an estate— Rejection of plaint —
Civil Procedure Code (Act X of 1877), s. 54.

The assessment of the court-fee in a suit by a subordinate tenure-holder to recover possession of a definite portion of an entire estate paying a permanently settled annual revenue to Government, should be made under the first part of sub-division (a), cl. 5 of s. 7 of the Court Fees Act.

A plaint can only be rejected under s. 54 of Act X of 1877 before it is registered.

THIS was a suit to recover possession of nine dams twelve kanees of land out of an entire estate recorded as No. 3305, the [193] Government revenue of which was Rs. 36-12. The estate No. 3305 represented eighteen dams and a fraction of another larger estate consisting of sixteen annas, and the plaintiffs sought to recover this share on the strength of their mokurari title, stating that they were not the proprietors of a definite fractional share of the estate, but were simply mokuraridars under the proprietor of such a share. The value of the land, which was the subject-matter of dispute, was stated in the plaint to be Rs. 400; but the court-fee paid upon the plaint was assessed upon an amount which was ten times the proportionate Government revenue payable for the definite share of the estate. The plaint was registered without any objection. The defendants, in their written statement, took an objection that the court-fee paid was not sufficient; and that the plaintiffs were bound to pay the court-fee upon Rs. 400, which was the market-value of the land as stated in the plaint.

Several issues were framed by the Munsif, and evidence was taken upon all of them; and when the case was finally taken up for disposal, the Munsif held, that the court-fee paid was not sufficient under the Court Fees Act, and that the plaintiffs were bound to pay the court-fee upon the full market-value of the subject-matter of the suit, namely, Rs. 400, and ordered the plaintiffs within two days to pay the court-fee on the sum of Rs. 400 after deducting what they had already paid. The plaintiffs refusing to make up this deficiency, the Munsif rejected the plaint under s. 54 of the Code of Civil Procedure. Against this order an appeal was preferred by the plaintiffs, and the District Judge reversed the order of the Munsif, holding that the plaintiffs

*Appeal from Appellate Order, No. 53 of 1881, against the order of G. E. Porter, Esq., Judge of Gya, dated the 14th December 1880, reversing the order of Baboo Shiva Shunker Sahov, First Munsif of Gya, dated the 30th June 1880.

had paid the court-fee required under the Court Fees Act, and directed the plaint to be received, remanding the case to be tried on the merits.

Against the order of the District Judge the defendants appealed to the High Court.

Mr. *Sandef* for the Appellants.

Baboo *Saligram Singh* for the Respondents took the preliminary objection, that a second appeal against the order of the District Judge would not lie.

[194] The **Judgment** of the Court (MITTER and MACLEAN, JJ.). was delivered by

Mitter, J. (who, after stating the facts, continued as follows) : It seems to be doubtful whether the order in question falls within the definition of the word 'decree' in s. 2 of the Civil Procedure Code. Section 2 says : "'Decree' means the formal expression of an adjudication upon any right, claim, or defence set up in a Civil Court, when such adjudication, so far as regards the Court expressing it, decides the suit on appeal." The only way in which the order of the District Judge may be brought within the definition is by holding that it is an adjudication on the right of the plaintiffs to have their suit heard upon the plaint with the court-fee which they have paid, and that it was that right which was determined by the District Judge. But it seems to me that it would be a strained construction of the words of the definition given above. However, without expressing a decided opinion on this point, it seems to us that the appeal must fail on the merits.

The law with reference to the payment of the court-fee in a case like this is to be found in cl. 5, s. 7 of the Court Fees Act. That clause says : "In suits for the possession of land, houses, and gardens, according to the value of the subject-matter; and such value shall be deemed to be, where the subject-matter is land," and so on : the several sub-divisions of the clause show how different kinds of land are to be assessed for the purpose of the court-fee. Looking to those sub-divisions it appears to us that the present case comes within the first part of sub-division (a), which is to the effect, that "where the land forms an entire estate, or a definite share of an estate, paying annual revenue to Government, and such revenue is permanently settled, then the stamp-fee is to be assessed on ten times the revenue so payable." It is contended on behalf of the appellants that as the suit was not brought by the proprietor himself but by the *mokuraridars*, this clause does not apply. We are of opinion that there is no force in this contention. If it was the intention of the Legislature, that where a suit is not brought by a proprietor of an entire estate but by subordinate tenure-holders, such as *mokuraridars*, &c., there should be a different way of [195] assessing the court-fee, that would have been clearly expressed in one of the clauses of this section. Referring to all the clauses, it is evident that there is no separate provision for a suit like the one which is now under our consideration, that is, a suit by a subordinate tenure-holder. Therefore, it is clear that the present case comes within sub-division (a) of clause 5, s. 7 of the Court Fees Act. It cannot be said that this is not a claim for land which forms a definite share of an estate paying annual revenue to Government, such revenue being permanently settled. All that is said in support of the order of the Munsif is, that the suit is not brought by the proprietor himself; but that is no ground for holding that the claim does not come within s. 7.

We are, therefore, of opinion that the order of the District Judge is correct. In conclusion, we would remark that the Munsif was clearly in error in directing

the plaint to be rejected after having registered it and taken evidence upon the issues recorded by him. A plaint can only be rejected under s. 54 before it is registered.

The appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[Dissenting from this ruling, the Courts have held that the plaint may be rejected after its registration and at any stage of the suit. (1906) 31 Cal., 20 F.B. 1 C.L.J., 121 11 C.W.N., 38 1 M.L.T. 355; (1889) 12 All., 553; (1899) 27 Cal., 376; (1896) U.B.R., (1892-96) Vol. II, 253; (1905) 1 N. L.R., 103.]

[8 Cal 195]

APPELLATE CRIMINAL.

The 6th September, 1881.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

In the matter of the Petition of Radoinath Shaha.

The Empress

versus

Radoinath Shaha.

Excise Act (Beng. Act VII of 1878 ss. 53, 59, and 64 Beng. Act IV of 1881), s. 2 -Selling spirituous liquor without license -Reasons for finding of Magistrate in case of conviction to be recorded Criminal Procedure Code (Act X of 1872), s. 227, cl. (h).

A Magistrate, in cases where no appeal lies, is bound to record a brief statement of his reasons for convicting an accused.

[196] Where a person is arrested, and certain charges are entered against him in the Police book, he should not, on the day of trial, be called upon to meet other charges without previous intimation being given to him of the additional charges.

ONE Radoinath Shaha was arrested on the 12th July 1881, and charged with selling (under s. 53 of Beng. Act VII of 1878) and having in his possession (under s. 64) imported spirituous liquors without a license.

The prisoner was released on bail, and the case postponed until the 25th July 1881, when the Magistrate tried him summarily on the following charges :—

- 1st.—Refusal to produce license (s. 59).
- 2nd.—Illegal sale of imported liquors (s. 53).
- 3rd.—Illegal possession of imported liquors (s. 64).
- 4th.—Breach of condition of license (s. 59).

The prisoner pleaded not guilty, but was found guilty under ss. 53 and 59, and fined Rs. 100.

*Criminal Motion, No. 223 of 1881, against the order of Major W. Hopkinson, Cantonment Magistrate of Barrackpore, dated the 25th July 1881.

No statement, however, of the grounds for his conviction was recorded, as required by s. 227, cl. (h) of Act X of 1872. The prisoner applied to the High Court under the revisional section.

Baboo *Jadub Chunder Seal* for the petitioner contended, that the conviction under s. 61 was bad, as that section had been repealed by s. 2 of Beng. Act IV of 1881; and that the whole conviction was illegal, no grounds having been given for the conviction as required by s. 227, cl. (h), of Act X of 1872.

The **Judgments** of the Court (MITTER and MACLEAN, JJ.) were as follow :—

Mitter, J.—The petitioner, it is said, owns a wine-shop in the village of Chundun Pookur, within the jurisdiction of the Police station of Barrackpore. On the night of the 12th July he was arrested by Inspector A. H. Prichard, and taken to the Police-station. There the Inspector entered a charge against him for selling and having in possession English liquor without a license. He was released on bail, being directed to appear before the Magistrate of Barrackpore the next day, the 13th July, to answer these charges. On his application, [197] the case was postponed to the 25th July, on which date the Magistrate tried him summarily for the following offences:—

- 1st. —Refusal to produce license (s. 59).
- 2nd. —Illegal sale of imported liquors (s. 53).
- 3rd. —Illegal possession of imported liquors (s. 64).
- 4th. —Breach of condition of license (s. 59).

The petitioner pleaded not guilty to all the charges. But he was found guilty under ss. 53 and 59 of the Act, and fined Rs. 100. It is not stated by the Magistrate whether both the charges under s. 59 were established, or only one of them. Under cl. (h) of s. 227 of the Criminal Procedure Code, the Magistrate is required to make a brief statement of the reasons for the conviction. But no such statement has been recorded. The trial has been indeed too summary, the record and the register kept under s. 227 furnishing no information as to the ground upon which the conviction is based.

Now, as far as the charges one and four are concerned, we think the Magistrate should not have tried the petitioner for them. He was arrested, and a charge was entered against him for selling and having in his possession imported liquor without a license. He would, therefore, be prepared to meet these charges alone. It does not appear that, between the 12th of July and the 25th of that month, when the trial took place, the petitioner had any intimation that he would be called upon to meet other charges. In our opinion, therefore, he should not have been tried for the first and the fourth charges mentioned above.

As to the charge under s. 61, probably the Magistrate was not aware that that section has been repealed by Act IV of this year, s. 2. There remains the charge under s. 53 for the sale of imported liquor without a license. In the absence of the reasons for the conviction, it is impossible for this Court to judge how far this conviction is legal. From the explanation submitted by the Magistrate, it does not appear that there was any evidence of the sale of imported liquor. Be that as it may, we think that, under the circumstances of this case, the conviction should be quashed on the ground that the Magistrate omitted to record briefly the reasons for his finding which he is required to do under s. 227 of the Criminal Procedure Code. We accordingly set it aside, and direct a re-trial of the petitioner [198] for the alleged offence of selling imported liquor without a license under s. 53. The question, whether

the petitioner will be entitled to the refund of the fine or not, will depend upon the result of the re-trial.

Maclean, J.—The proceedings as recorded in the register kept under s. 227, Act X of 1872, are not sufficient to indicate that the conviction is supported by proper evidence. The brief statement of the reasons for conviction required by cl. (h) is entirely wanting, and the explanation contained in the Magistrate's letter of 19th August is not satisfactory.

In the first place it appears, that the accused, so far from not producing a license, produced two. They were, however, for sale of country spirits. It is not alleged that the accused had a license himself for sale of imported liquor. So he could not be punished for not producing it.

The next charge is for selling imported liquor illegally. The record does not show how this charge was proved. But it appears that one Dwarkanath Ghose produced a license, and stated that the accused was his servant. This the Magistrate says he does not believe, having regard to something that passed in his Court in May last. That record is not evidence in this case; but if it were, the presumption is, that the quarrel that occurred there has been followed by an alliance between the two men. If Dwarkanath is selling spirits at two shops under score of one license, he should be proceeded against for any offence he thus commits; and the accused, if he abets that offence, may also be proceeded against as an abettor.

Possession of imported liquor must be dealt with under some section other than s. 64, which has been repealed by Beng. Act IV of 1881.

The last charge is of a breach of the condition of his license. The record does not specify the condition broken.

Lastly, the conviction should have stated which of the offences was punished, and by what amount of fine, as the penalty under s. 59 cannot exceed Rs. 50 for one offence.

I concur in setting aside the conviction and directing the Magistrate, if he thinks necessary, to re-try the accused.

Conviction set aside.

[199] PRIVY COUNCIL.

The 1st July, 1881.

PRESENT:

SIR B. PEACOCK, SIR M. E. SMITH, SIR R. P. COLLIER, SIR R. COUCH, AND SIR A. HOBHOUSE.

Raja Udaya Aditya Deb and another.....Plaintiffs
versus
Jadab Lal Aditya Deb.....Defendant.

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Hindu Law—Alienation of impartible estate—Family custom.

Impartibility of an inheritance does not, as a matter of law, render it inalienable.

The owner of an estate which descends as an impartible inheritance is not, by reason of its impartibility, restricted to making grants or gifts enuring only for his own life. The power of alienation resting upon the general law, inalienability, if existing, must depend upon family custom in this respect, and of such custom proof is required.

Unnud Lal Singh Deo v. Maharaj Dheraj Guru Narain Deo (5 Moore's L. A., 82) followed.

In the case of a titular raj, of which the lately deceased Raja had made a mokurari patta, or grant in perpetuity, of part of the zamindari lands thereto belonging, in favour of a younger son, it was found, that the only custom proved was, that the raj estate descended to the eldest son to the exclusion of the other sons, and that there was no proof of a custom prohibiting such an alienation as that made by the grant.

Held, that the mokurari grant was not invalidated by reason of the raj estate being by custom impartible.

APPEAL from a decree of a Divisional Bench of the High Court (8th April 1879), affirming a decree of the Officiating Judicial Commissioner of Chutia Nagpur (6th May 1878), affirming a decree of the Deputy Commissioner of Manbhum (30th July 1877).

The zamindari and titular raj of Patkum, in Zilla Manbhum, in Chutia Nagpur [subject to the provisions of Reg. X of 1800] was an ancient principality, descending [200] as impartible inheritance by primogeniture.

The late Raja having died in 1873, the raj was held by his eldest son, the appellant, with whom was joined as a party Puresnath Ghose, the manager of his raj estate, appointed under "The Chutia Nagpur Encumbered Estates Act, 1876."

The respondent was the younger half-brother of the appellant, and to him the deceased Raja, his father, had, in 1868, made a grant of certain villages belonging to the raj estate. This grant gave rise to the question now in dispute.

Two instruments, of which the genuineness was not questioned, were executed by the Raja, one on the 30th April, and the other on the 30th November 1868. The first was a pon-baha mokurari patta, or permanent grant for consideration, from generation to generation, in consideration of Rs. 1,200 paid, granting to the respondent two villages in the pargana of Patkum, whereof one was stated to have been previously granted to him for his maintenance. The second was a khorposh mokurari patta, or permanent grant for maintenance (lit. for food and raiment). Both are set forth in their Lordships' judgment.

The suit out of which this appeal arose was brought by the appellant to set aside those grants, on the ground that they were contrary to the custom of the family, which was, that younger brothers (called 'bakim' and 'konwar,' and the rest 'lals,' according to the order of their birth) should receive suitable maintenance from their eldest brother, the Raja, for the time being, and not by the gift of the parent Raja, deceased. It was also alleged that any grant for a longer period than the life of the Raja could be set aside by his successor.

The defence insisted on the validity of the grant. The first part of the custom above stated was established, and no question arose on this appeal as to the second, or 'khorposh' patta; three Courts in India having concurred in finding that, by the custom of this family, any property of the raj estate so granted by a father for maintenance was resumable by the succeeding Raja. As

* A Regulation for preventing the division of landed estates in the Jungle Mehals of the zillah of Midnapur and other districts. Section 2 enacts, that "Reg. XI of 1793 shall not be considered to supersede or affect any established usage which may have obtained in the Jungle Mehals of Midnapur and other districts by which the succession to landed estates (the proprietor of which may die intestate) has hitherto been considered to devolve on a single heir to the exclusion of the other heirs of the deceased."

to so much of the decree as was based on this finding, no appeal from the decision of the High Court was preferred.

[201] With regard, however, to the 'pon-baha' mokurari patta of 30th April 1868, the Deputy Commissioner of Manbhum found that the granting of it was not contrary to family custom. And, although he was of opinion that the alleged consideration of Rs. 1,200 had not passed, he was at the same time of opinion, that the right to alienate land belonging to the Patkum Raj had been proved; and he, therefore, held this patta to be valid.

- The plaintiff, accordingly, obtained a decree for possession of the villages comprised in the 'khorposh' mokurari patta; and his claim for the two villages granted by the 'pon-baha' mokurari patta was dismissed.

Both parties appealed to the Judicial Commissioner of Chutia Nagpur, who confirmed the decree of the Deputy Commissioner of Manbhum.

A Divisional Bench of the High Court (Mr. Justice BIRCH and Mr. Justice MITTER) dismissed the appeals preferred by both parties against the decision of the Judicial Commissioner.

The Judgment of the High Court is reported in the Indian Law Reports, 5 Calcutta Series, p. 118.

On this appeal,

Mr. T. P. Leith, Q.C., and Mr. J. T. Woodroffe appeared for the Appellants.

The Respondent did not appear.

For the appellants it was argued that the pon-baha mokurari patta of the 30th April 1868, was, in substance, a grant by the Raja for the maintenance of a younger son; consequently, to maintain this grant would be to permit a mere evasion of the family custom which had been upheld in dealing with the other patta. The impartibility of the Patkum Raj, and the custom in regard to the maintenance of younger brothers, having been established, there was no authority shown for the act of the late Raja in alienating part of the Raj estate. Reference was made to *Anund Lal Singh Deo v. Maharaja Dheraj Gurnumarn Deo* (5 Moore's I. A. 82), *Lebee Panchum Koomar v. Maharaja Gurnumarn Deo* (6 S. D. A. Sel. Cal. 140), *Musst. Soelee Koum v. Purnoo Roy* (6 S. D. A. Sel. Cal., 154) and *Maharaja Gurnumarn Deo v. Anund Lal Singh* (6 S. D. A. Sel. Cal., 282).

[202] Their Lordships' Judgment was delivered by

Sir A. Hobhouse. In this case the only appellant the other plaintiff in the suit being the manager of the estate of the first plaintiff is the Raja of Patkum, in Chutia Nagpur, and he is the son and successor of Raja Shatrooghun. The raj is admittedly an impartible raj, and one in which the custom of primogeniture exists. There is also a custom that the younger sons of the Raja are entitled to maintenance, the second being called 'hakim,' the third, 'konwar,' and the fourth and subsequent 'lals'; but the maintenance given according to this custom ceases with the life of the grantor, and has to be renewed upon a succession to the raj.

The late Raja Shatrooghun, during his lifetime, executed two instruments, one being called a 'pon-baha' mokurari patta, or permanent lease at a fixed rental granted in consideration of a bonus or fine; and the other a 'khorposh' mokurari patta, or permanent maintenance grant. The pon-baha mokurari patta was the first, being dated the 30th April 1868, and is in these terms: "This mokurari patta, on payment of bonus, is executed. Within my

zamindari of Purgana Patkum, appertaining to the sub-district of Division Manbhum, the entire Mouza Kallianpore (being one mouza) as per boundaries given below, was previously fixed for your maintenance. Now, excluding it from that maintenance, I make a mokurari settlement of the above entire Kallianpore (one mouza) and jhimri (one mouza), with all rights appertaining thereto, in all two mouzas, with you, by means of a mokurari patta, and on receipt of a bonus of Rs. 1,200, and at an annual mokurari rental of Rs. 85-10-2-2-2." Then, after some further passages, it says : - "Neither I, nor my heirs, shall have any other right in those two mouzas beyond the above fixed mokurari rent."

The other instrument is dated the 30th November 1868, and is in these terms : - "This mokurari patta for maintenance is executed. My second son and the future hakim, Keshub Lal Aditya Deb, deceased, having died, and you being at present the second of my sons, you will, according to the special rule of our rajdhani, become the hakim on my death. [203] A gift was, therefore, made to you before of one Mouza Doodri, one Mouza Chamda, one Mouza Laya, one Mouza Kallianpore," -and so on, naming other mouzas, in all eight--"without any title-deed, and for your maintenance as hakim, and you are in possession of those mouzas. Now, considering it proper to execute a deed in respect of seven of the above mouzas except Kallianpore, I execute a deed for the remaining seven mouzas aforesaid with the exception of one Mouza, Kallianpore. You shall continue to possess and enjoy the rights appertaining to the seven mouzas aforesaid, lying within the following boundaries, by right of maintenance, during your lifetime." Then after some other passages : - "I made a gift of Mouza Kallianpore for maintenance. I have excluded that Mouza Kallianpore, and granted you a mokurari settlement of the same along with Mouza Jhimri by a separate deed, and on another date, i.e., the 19th Bysack of the present year." These two instruments were given to the respondent, who was the half-brother of the appellant, and had been the third son of Raja Shatrooghun : but, in consequence of the death of his brother, had become, when the instruments were executed, the second son and the future hakim.

It is to be observed here with reference to the intention of these instruments, that Kallianpore had, as is stated in the latter, been originally given for maintenance, but it is withdrawn from that gift and is included in the other mokurari with the Mouza Jhimri, showing that Kallianpore was no longer intended to be for maintenance, and that the instrument of the 28th April 1866 was not intended by the Raja to be of the nature of a maintenance grant, but was intended to be a gift, or, as he thought it would be safer to make it on the face of it, a mokurari for consideration.

The suit is brought by the eldest son, the present Raja, to set aside both these instruments, and for possession of the mouzas included in them. The lower Courts have found that the instrument of the 30th November 1868, which is described as being a mokurari patta for maintenance, ceased to have effect on the death of the grantor, Raja Shatrooghun ; and there is now no question with reference to that part of the decision of the lower Courts.

[204] The question in this appeal arises upon the instrument of the 30th April 1868, and it is contended that the estate being impartible was inalienable as their Lordships understand the argument by reason of such impartibility : and further that, there being the custom to give maintenance, this instrument was in reality for the purpose of maintenance, and consequently subject to the limitation, which is part of the custom, that it could not remain in force beyond the life of the grantor.

Now it is important to see what has been found by the lower Courts upon this subject. The Deputy Commissioner has said:—"With regard to the mokurari patta, I hold that plaintiff has failed to prove that the granting of it was contrary to family custom. An attempt has been made to show that the deed should be thrown out, because it is more than doubtful whether the consideration recited in it ever passed; but I agree with the defence that such shifting of the plaintiff's claim cannot be allowed. I have not a shadow of a doubt that the late Raja did grant the deed to the defendant; plaintiff himself does not deny it. But whilst I cannot allow the shifting of the claim, I hold that the fact, if fact it be, and I believe it to be a fact, that the consideration of Rs. 1,200 did not pass, is a valuable piece of evidence. If no consideration passed, does it not prove that the late Raja was not sure of his ground? It seems to me he felt that he was going somewhat near a breaking of a family custom which the Courts might possibly not allow, and therefore he wished to give a business look to the transaction and pretend to take a consideration. If I am right, what was the family custom? I think that referred to by Reg. X of 1800, that a zamindar, such as plaintiff unquestionably is, succeeds to all that his father cannot by such custom alienate. So far as the evidence goes, I am of opinion that even if Shatrooghun had made on paper, what I believe he made in fact, a present of the mokurari lease to the defendant, the plaintiff could not have set the deed aside." This shows the Deputy Commissioner considered that, although it had not been proved that the consideration passed as stated in the instrument, a gift of the lease was in fact made to the defendant. Further on he says:—"It appears to me that the right to alienate land in Patkum has been proved, and [205] therefore that the mokurari grant must stand. The granting of a mukurari is a favour on the part of the grantor, the obtaining of maintenance is a right on the part of the grantee; and the Courts of this district have been in the habit of laying down what maintenance any particular member of a zamindar's family shall be entitled to recover." Here, therefore, we have two distinct findings: one that this was intended to be a present to the defendant, the respondent; and the other that there was a right in this raj to alienate land.

The case then went by way of appeal to the Judicial Commissioner, and he agreed with the Deputy Commissioner in the finding as to the consideration. He says: "There is no doubt whatever, as the lower Court holds, that the receipt of the Rs. 1,200 by the grantor is a complete fiction, and that the transaction was not a business one, but a simple gift to defendant. But then the question arises what was there to prevent the Raja from making a mokurari to the defendant in the same way as he might to a stranger, even if no *pun* (consideration) passed?" Further on he says:—"I think I ought to confirm the decision of the Deputy Commissioner. The general power of alienation on the part of the late Raja being, I think, established, and the mokurari patta being undoubtedly genuine and registered, it lies with the plaintiff to show its invalidity; and this he has attempted to do by maintaining that it is contrary to family custom." And in a later paragraph he says,—"That custom has not, I think, been shown to be opposed to the mokurari." Therefore, the Judicial Commissioner quite concurs with the Deputy Commissioner in the findings of fact.

When the case came before the High Court, the Judges pointed out that it was necessary for the plaintiff, in order to succeed, to show that there was some custom which would prevent the operation of the general law which would give a power of alienation; and they said that the only custom proved was, that the estate descends to the eldest son to the exclusion of the other

sons, and that, instead of there being proof of a [206] custom against alienation, what evidence there was, showed that alienations had been made.

Upon those findings the question whether the mokurari patta is valid or not seems to be concluded. It could only be impeached either upon the ground that it was really intended to be a maintenance grant, and so would cease at the death of the grantor, or that, either by law or by a family custom, there was no power to alienate any part of the raj. It seems that there have been some decisions in India in which it was considered that there was not a power of alienation in zamindari of this kind. But one of those decisions came before this Board in the case of *Anand Lal Singh Deo v. Maharaj Dheraj Guru Narain Deo* (5 Moore's L. A., 82), and there their Lordships considered that the inalienability of the zamindari was a matter to be proved; and as it appeared to them that it had not been sufficiently established, they proceeded to consider whether or not the grant that had been made was for maintenance. They certainly did not consider that, as a matter of law, the impartibility of the raj made it inalienable, but their Lordships treated the question of inalienability as one depending upon family custom, which would require to be proved. Here the findings are very distinct that there is no such custom in existence with reference to this raj; and their Lordships, therefore, are of opinion that the judgment of the High Court is a correct one, and they will humbly advise Her Majesty to affirm it and to dismiss the appeal.

Appeal dismissed.

Solicitor for the Appellants: Mr. H. Treasue.

NOTES.

[I. HINDU LAW—IMPARTIBLE ESTATES—ALIENABILITY

Impartible estates are not *ipso facto* inalienable. This was finally settled as to alienations *inter vivos* in (1888) 10 All., 272—15 L. A., 51 P. C.—reversing (1882) 5 All., 512, and as to devises by *will* in (1898) 22 Mad., 383—26 L. A., 83 P. C.; (1909) 36 Cal., 913 P. C.

But alienability may attach to such estates by virtue of special custom (or the Statute).—(1889) 13 Mad., 197.

See also (1888) 2 C. P. L. R., 111 as to the applicability of the general law in the absence of custom; 36 Cal., 913 (liability to sale by father); 11 Cal., 163 (adoption).

II. DURATION OF GRANTS

See (1905) 4 C. L. J., 399 as regards maintenance grants; 30 Cal., 20 (33).]

[207] APPELLATE CRIMINAL.

The 2nd November, 1881.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE TOTTENHAM.

In the matter of the Petition of Baney Madhub Shaw and another.¹

The Empress
versus

Baney Madhub Shaw and another.

Excise—Sale by servant—Breach of condition of license—Benq. Act VII of 1878, ss. 41, 42, and 59.

The conviction of servants of a licensed vendor of spirits for a breach of the license is not necessarily illegal.

* Criminal Motion, No. 269 of 1881, against the order of P. J. Marsden, Esq., Chief Presidency Magistrate of Calcutta, dated the 7th September 1881.

In re Ishur Chunder Shaha (19 W. R., Cr. Rul., 34) followed.

The Empress v. Nuddiar Chand Shaw (I. L. R., 6 Cal., 832 : S.C., 8 C. L. R., 152) dissented from.

Two servants of a licensed vendor of spirits were charged with having committed two breaches of the conditions of the license, and the maximum fine for each breach was inflicted.

Held, that the Magistrate was competent to punish each of the servants separately in this manner.

The excise officer, to whom a licensed vendor of spirits is bound to produce his license, must be an excise officer of the higher grades, not any Police officer who may be exercising the powers of an excise officer.

THE petitioners in this case were charged before the Chief Presidency Magistrate with having, on the 6th September 1881, at No. 85, South Collingah Street, sold two bottles of imported spirituous liquor without an additional license in contravention of s. 53, Beng. Act VII of 1878 ; and they were further charged with committing two breaches of the sixth and twelfth conditions of their license under s. 59 of Beng. Act VII of 1878.

The petitioners were convicted and sentenced each to a fine of Rs. 100,—*viz.*, Rs. 50 each for two breaches of license.

Baboo Surendra Nath Bannerjee for the Petitioners.

The *Officiating Standing Counsel* (Mr. Bannerjee) appeared to support the conviction

[208] The **Judgment** of the Court (PRINSEP and TOTTENHAM, JJ.) was delivered by

Prinsep, J.—The petitioners in this case are two servants of a licensed vendor of spirits, who have been convicted, each of them, for having, in breach of their license, *firstly*, sold a bottle of brandy which was carried off and not drunk on the premises ; and *secondly*, for having refused, on the demand of the Police Inspector, to produce their license.

As regards the first breach, an objection is taken, that the master, the licensed vendor, was alone liable, and not the servants. Two judgments of this Court have been considered by us on this point :—*In re Ishur Chunder Shaha* (19 W. R., Cr., Rul., 34), and the other, recently delivered by Mr. Justice PONTIFEX and Mr. Justice FIELD—*The Empress v. Nuddiar Chand Shaw* (I. L. R., 6 Cal., 832 : S.C., 8 C. L. R., 152). These decisions are in conflict. Our opinion inclines to the decision in *In re Ishur Chunder Shaha* (19 W. R., Cr. Rul., 34) ; and having regard to the fact that that decision was not brought to the notice of the Judges who decided the more recent case, we think that we are justified in following it. We accordingly hold, that the conviction of the servants is not necessarily illegal.

The next objection taken is, that, inasmuch as there was only one breach of license in this respect there should have been only one penalty inflicted ; whereas by reason of the maximum fine having been imposed on each of the servants, the penalty has been doubled. It appears to us that the Magistrate was competent to punish each of the servants separately in the manner he has done, if he found, as he apparently has found, that each of them committed a breach of the license. Section 59 of Beng. Act VII of 1878 no doubt declares that the amount may be recoverable from the master ; but it does not necessarily follow that the servants may not be liable for the full amount prescribed by the law, although, possibly, the master may reasonably object to be saddled with more than one full penalty for the carelessness or neglect of his servant. We, therefore, think that the convictions and fines imposed, as regards this breach of the license, should be sustained.

[209] As regards the other penalties for breach of license, in consequence of refusal to produce the same on demand of the Inspector Fitzgerald, we are of opinion that the convictions and fines must be set aside. It has been argued by the learned Standing Counsel, who appears to support the convictions, that, reading ss. 41 and 42 together, the officers empowered under s. 42, among whom the Inspector in the present case is, must be regarded as excise officers within the terms of the Act, and that it would be impossible for a Police-officer, so acting as an excise officer, to discharge his duties, if he had not power to demand the production of a license. But, although he might properly demand the production of the license, and on refusal to produce it, proceed to arrest or to confiscate as allowed by the Act, it would not necessarily follow that such refusal would render the license-holder or his servants liable to fine under s. 59 for breach of the license, unless it were expressly provided that he or they were bound to produce it. The condition contained in the license is to the following effect: "That he" (the license-holder) "produce for inspection, on demand of any excise officer above the rank of a head constable or chuprasi, his license and accounts," &c.

Now, if the term the 'excise officer' had alone been used in that clause of the license, we should not be disinclined to hold that it should be interpreted to mean an excise officer within the meaning of the Abkari Act; and therefore a Police-officer like Inspector Fitzgerald was duly empowered under s. 42 of the Act. Inasmuch as that clause of the license proceeds to declare that the excise officer must be above the rank of a head constable or chuprasi, we are of opinion that it was the intention of those who drew up this form of the license that the excise officer should be an excise officer of the higher grades; such an officer only and not any Police-officer who may be exercising the powers of an excise officer. In this view of the terms of the license, we think that the conviction as regards the second breach must be set aside, and the fines, if paid, refunded.

NOTES.

[This case was **overruled** in (1902) 29 Cal., 606 (610) F.B.; see also (1890) 17 Cal., 566; (1883) 9 Cal., 817; (1905) 1 N. L. R., 81.]

[210] APPELLATE CIVIL.

The 6th January, 1882.

PRESENT :

MR. JUSTICE PONTIFEX.

Joogulkishore.....Plaintiff

versus

Jotendro Mohun Tagore.....Defendant.

Appeal to Privy Council -Value of suit - Civil Procedure Code (Act X of 1877), s. 596.

A and B purchased the same properties, deriving title through different persons. The value of the properties with mesne profits was over Rs. 10,000. B granted two patni leases of the properties to different persons. A was, therefore, obliged to bring two suits for the recovery of the properties, and the value of the subject-matter in each suit was less than Rs. 10,000.

Held, that an appeal would lie to the Privy Council.

THIS was an application for leave to appeal to the Privy Council.

The facts of this case sufficiently appear from the **Judgment**.

Mr. *Branson* for the Appellant.

The Advocate-General (the Hon'ble *G. C. Paul*) and Bahoo *Nilmadhab Bose* for the Respondent.

Pontifex, J.—I have already given my opinion in several cases as to the construction of the second clause of s. 596 of Act X of 1877, which relates to a decree indirectly involving some claim or question to property of like amount or value, when the same title applies to other property as to which litigation might arise. In this case the plaintiff purchased two properties for a certain value, deriving his title from the reversionary heir of one N. C. Roy. The Tagore defendant purchased exactly the same properties, deriving their title through the widow of N. C. Roy. The question between the plaintiff and the Tagore defendant is, which has the better title to these two properties under the circumstances. The Tagore defendant has put in an affidavit, from which it appears that the value of the two properties with mesne profits would be over Rs. 10,000. [211] The predecessors of the Tagores gave one of the properties in patni to one set of persons, and gave a patni of the other property to another set of persons, and the plaintiff was obliged, therefore, to institute two suits for the recovery of the two properties. If the predecessors of the Tagore defendant had not executed the patnis, there need only have been one suit and appeal, which would have been valued at upwards of Rs. 10,000. According to what I consider to be the proper construction of this clause therefore, the petitioner is

Privy Council Appeal, No. 51 of 1881.

entitled to appeal to Her Majesty in Council in both these cases, otherwise the act of the respondent's predecessors might invalidate the plaintiff's right of appeal. Let, therefore, the usual certificates be given.

Application granted.

NOTES.

[VALUATION--APPEAL TO THE PRIVY COUNCIL -

The consolidation of suits is generally allowed :--(1907) 34 Cal., 100 (102) ; (1899) 30 Cal., 96 (100)--even when the question of *law* arises in some of the suits only, the fundamental question being common : (1910) 13 C. L. J., 503 10 I.C., 967.

The C.P.C., 1908 Or. 45 r. 4 makes express provision on the subject of consolidation of suits for the purposes of the pecuniary valuation.]

[8 Cal. 211]

APPELLATE CRIMINAL.

The 14th December, 1881.

PRESENT :

MR. JUSTICE PONTIFEX AND MR. JUSTICE FIELD.

In the matter of the Petition of Samiruddin.

The Empress

versus

Samiruddin.

*Evidence—Dying statement—Presence of accused—Penal Code
(Act XLV of 1860), s. 300 - Frame of charge.*

The dying statement of a deceased person must be taken in the presence of the accused ; if not so taken, the writing cannot be admitted to prove the statement made. The statement may be proved in the ordinary way by a person who heard it, and the writing may be used for the purpose of refreshing the witness' memory.

A prisoner was charged with "causing the death of A by inflicting a wound on him with a 'chheni,' with the intention of causing bodily injury, such as was sufficient, in the course of nature, to cause death, or which he knew to be likely to cause death."

Held, that the charge was defective and inexact as regarded the second and third clauses of the definition of murder in 300 of the Penal Code. With reference to the second clause it should have run "likely to cause the death of A, the person to whom the harm was caused." With reference to the third clause, it should have said "ordinary course of nature."

ONE Samiruddin was charged with "causing the death of one 'Baul Mir' alias 'Baber Ali' by inflicting on him a [212] wound with a 'chheni' with the intention of causing bodily injury such as was sufficient, in the course of nature, to cause death, or which he knew to be likely to cause death."

The dying statement of the deceased had been recorded by the Deputy Magistrate as a deposition, but it did not appear that the deceased had been examined in the presence of the accused ; this evidence was, however, admitted at the trial before the Sessions Judge, although the Deputy Magistrate had not been called to prove the writing taken down by him.

*Criminal Appeal, No. 59 of 1881, against the order of F. J. G. Campbell, Esq., Officiating Sessions Judge of Furrעדpore, dated the 14th November 1881.

The medical evidence at the Sessions trial consisted of the deposition of the native doctor taken before the Magistrate; but no evidence was given to show that the injuries were sufficient, in the ordinary course of nature, to cause death.

The Sessions Judge, concurring with the Assessors, found the prisoner guilty under s. 302 of the Penal Code, and sentenced him to death. The sentence was sent up to the High Court for confirmation; and the prisoner also appealed.

No one appeared for the prisoner.

The **Judgment** of the Court (PONTIFEX and FIELD, JJ.) was delivered by **Field, J.**—In this case one Samiruddin has been convicted of murder by the Sessions Judge of Furrceepore sitting with Assessors, and has been sentenced to death. This sentence has been referred for confirmation; and the prisoner has appealed at the same time.

In referring the case the Sessions Judge forwards a copy of a letter received by him from the Civil Surgeon, and expressing an opinion as to the nature of the wound inflicted upon the person of causing whose death the prisoner has been convicted. We cannot receive, or in any way act upon, this extra-judicial matter. The only opinion of the Civil Surgeon which can be considered in judicially dealing with the case, is an opinion expressed by him when examined as a witness under the usual tests to which witnesses are subjected.

The Assessors were of opinion that the prisoner should be convicted of murder. But the value of this opinion is very [213] much diminished when we find that some important matter which should not have been admitted as evidence, was admitted to influence their minds.

The piece of evidence to which this observation relates is the dying statement of the deceased Baber Ali. This was recorded by the Deputy Magistrate as a 'deposition'; but it does not appear that Baber Ali was examined in the presence of the accused Samiruddin, and unless he were so examined by the Deputy Magistrate exercising judicial jurisdiction, the writing made by such Magistrate could not be admitted to prove the statement made by the deceased. This statement must have been proved in the ordinary way by a person who heard it made. If the Deputy Magistrate had been called to prove it, he might have refreshed his memory with the writing made by himself at the time when the statement was made.

The prisoner was charged with "causing the death of one Baul Mir, *alias* Baber Ali, by inflicting on him a wound with a 'chheni' with the intention of causing bodily injury such as was sufficient, in the course of nature, to cause death, or which he knew to be likely to cause death." This charge was probably intended to refer to the second and third clauses of the definition of murder contained in s. 300 of the Penal Code. But it is defective and inexact as regards both clauses. With reference to the second clause it should have run thus "Likely to cause the death of Baber Ali, the person to whom the harm was caused." With reference to the third clause it should have said "ordinary course of nature."

The medical evidence in the case is the deposition of the native doctor who was not examined in the Court of Sessions, as we think he should have been. This deposition goes to show that deceased "died from gangrene of the left lung and pleura brought on by" the injuries observed on his body. The native doctor further says, that the wound inflicted on the deceased was sufficient to bring on gangrene.

There is no evidence that the injuries were sufficient, in the ordinary course of nature, to cause death. There is no evidence that gangrene was a likely or probable result of the injuries inflicted, or that death was a likely or necessary result of gan-[214]grene. The native doctor was not even asked, and did not say, whether the injuries inflicted were likely to cause death.

Upon the evidence on the record we think that the prisoner cannot be convicted of murder or of culpable homicide not amounting to murder. Upon his own confession and the evidence of the witnesses Palon Mandal and Holodhur Das we are satisfied that he wounded or injured the deceased with a 'chheni,' and we think that he ought to be convicted under s. 326 of the Penal Code of causing grievous hurt by a dangerous weapon. We set aside the conviction and sentence for murder: and convicting the prisoner Samiruddin under s. 326 of the Indian Penal Code, sentence him to ten years' rigorous imprisonment.

NOTES.

[I. DYING DECLARATION

This case was followed in 6 C. W. N., 921; (1886) 2 Weir, 753; 36 Cal. 659 13 C. W. N., 681. See also 4 P. W. R., 1909 19 Cr. L. J., 156; 1 I. C. 100, where a conviction was supported on clear proof of the dying declaration.

II. STATEMENT TO POLICE OFFICER REFRESHING MEMORY -

See also 8 Cal., 151; 31 Cal., 1050.]

[8 Cal. 214]

APPELLATE CRIMINAL.

The 14th December, 1881.

PRESENT :

MR. JUSTICE PONTIFEX AND MR. JUSTICE FIELD.

The Empress

versus

Kola Lalang and another.*

Construction of Act—Beng. Act VII of 1878, ss. 15, 17, and 61—Specified quantity of Spirits—Maximum amount.

Penal Statutes must be construed strictly, —i.e., nothing is to be regarded as within the meaning of the Statute when it is not within the letter and clearly and intelligibly described in the very words of the Statute itself.

Where, under s. 15, Beng. Act VII of 1878, the Chief Commissioner of Assam, exercising the powers of the Board of Revenue, fixed, by a Circular order, the limit at six quart bottles

* Criminal Reference No. 208 of 1881 from the order made by C. Donovan, Esq., Deputy Commissioner of District Kamrup, dated Gauhati, the 27th October 1881.

†[Sec. 15 :—The sale of any excisable article in a larger quantity than is specified below shall be deemed to be a sale by wholesale, and the sale of any other quantity shall be deemed to be a retail sale: Provided that the Board may, from time to time, by rule, fix any larger quantity as a limit for a retail sale of any excisable article :
Wholesale and retail sale.

Spirituous or fermented liquors imported by sea, two imperial gallons, or twelve reputed quart bottles; other spirituous or fermented liquors excepting tadi and pachwai, one seer, or one reputed quart bottle; tari or pachwai, four seers; ganja, siddhi, or bhang, or any preparation or admixture of the same, one quarter of a seer; charas or any preparation or admixture of the same, five tolas weight.

of country spirit as allowable for retail sales, and an accused was charged under s. 17 with possessing more than that quantity, but the amount he had was less than the amount stated in s. 15,—

Held, that he was not guilty of any offence under s. 61, and that no lesser quantity than that specifically mentioned in s. 15 of country spirits which might have been declared to be the maximum quantity by any such order made under the provisions of s. 15 could be deemed to be the quantity specified in s. 15 within the meaning of s. 61.

THIS was a case referred to the High Court by the Deputy Commissioner of Kamroop. The facts were as follows :—

[215] The accused were sent up, on the 4th October 1881, by the Police, on a charge of having in their possession a quantity of distilled country spirits at Sonapur, within the area for which the right of manufacture and sale of native spirits had been farmed out to one Gura Diyal Mohalder, the quantity being four quart bottles and one large pot of liquor found to contain ten quart bottles of spirits.

The Extra Assistant Commissioner, not being satisfied as to what quantity each of the accused had, and being of opinion that, under s. 61, Beng. Act VII of 1878, any person could lawfully have in his possession twelve quart bottles, directed the accused to be discharged. It appeared, however, from the statement of the accused themselves, that one of them at least was in possession of the pot containing ten quart bottles full.

It also appeared that Beng. Act VII of 1878 was extended to Assam by the Chief Commissioner with the previous sanction of the Governor General in Council, and that, under the power contained in the Act to that effect, the Chief Commissioner, who has the same powers as the Board of Revenue, by Circular No. 2E, dated the 12th June 1880, fixed the limit for retail sales of country spirits at six quart bottles.

Upon these facts the Deputy Commissioner, considering that there had been a failure of justice, referred the case to the High Court, on the ground that the Extra Assistant Commissioner was wrong in holding that the quantity of spirits specified in s. 15, Beng. Act VII of 1878, was, for the purpose of the case under consideration, to be considered twelve quart bottles, but that he should have taken it at the amount mentioned in the Circular of the Chief Commissioner, *viz.*, six quart bottles.

No one appeared on the reference.

The **Judgments** of the Court (PONTIFEX and FIELD, JJ.) was as follow:—

Field, J.—The question in this case is concerned with the construction of ss. 15 and 16 of the Beng. Excise Act, VII of 1878. Two persons were

No licensed wholesale vendor shall sell by retail, and no licensed retail vendor shall sell wholesale. Under this section a sale of an assortment of spirituous or fermented liquors in the quantity specified above, or in less quantity, by a licensed wholesale vendor, and a similar sale of such liquors in greater quantity than is specified above by a licensed retail vendor, are prohibited.

The Board may by rule define what shall be held to be an assortment for the purposes of this section.

The Board may also determine what shall be a retail sale of any article from time to time declared by the Local Government to be included in the definition of intoxicating drugs under this Act.]

charged under s. 61 of this Act with "being in possession of a certain excisable article, to wit six quart bottles of native spirits, being a quantity in excess [216] of the quantity specified in s. 15." Now s. 15 is as follows:—

"Unless the Board shall otherwise specially direct, the sale of any excisable article in a larger quantity than is specified below shall be deemed to be a sale by wholesale, and the sale of any other quantity shall be deemed a retail sale: Spirituous or fermented liquors, two imperial gallons, or twelve quart bottles." The Chief Commissioner of Assam, exercising the powers of the Board of Revenue, made an order under the provisions of s. 15, declaring that six quart bottles shall be the maximum amount; and the question is, whether any lesser quantity so declared to be the maximum quantity by the Board of Revenue under the powers conferred by s. 15 of the Act can be taken to be the quantity specified for each article in s. 15 within the meaning of s. 61. Now, it is a rule that a penal Statute must be construed strictly. The meaning of this rule is, that nothing is to be regarded as within the meaning of the Statute which is not within the letter— which is not clearly and intelligibly described in the very words of the Statute itself. It was said in the case of *Lord Huntingtower v. Gardiner* (1 B. and C., 297, at p. 299) that "effect must not be given to a penal Statute unless the offence charged comes within the very words of it;" and in that case of *Rex v. Bond* (1 B., and All., 390, at p. 392), ABBOTT, J., said, that "it would be extremely wrong, that a man should, by a long train of conclusions, be reasoned into a penalty when the express words of the Act of Parliament do not authorize it." Again, WILLES, J., said, in the case of *Britt v. Robinson* (L. R., 5 C. P., 503, at p. 513), that criminal enactments are not to be extended by construction, and that "when an offence against the law is alleged, and when the Court has to consider whether that alleged offence falls within the language of a criminal Statute, the Court must be satisfied not only that the spirit of the Legislative enactment has been violated, but also that the language used by the Legislature includes the offence in question, and makes it criminal." Applying this rule of construction to the present case, we think it impossible to say that any lesser quantity of country spirits which may have been declared to be the maximum quantity [217] by any rule or order made under the provisions of s. 15 of the Act can be deemed to be "the quantity specified in s. 15 within the meaning of s. 61." A thing specified is a thing definitively mentioned or designated; and that can scarcely be said to be specified which depends on a rule or order to be made at some future time, and which may never come to the notice of the class of outside persons with which s. 61 of the Act is concerned. For s. 15 is applicable to licensed vendors who would naturally know of any alteration made by the Chief Commissioner as to quantity under that section; but s. 61 applies to the general public who would have no general knowledge of any such alteration. It may be possible that the intention of those who promoted the Act was different; but if this were so, we can only say that adequate language has not been used to effectuate that intention. We think that the order of the Assistant Commissioner was correct, and we decline to interfere.

Pontifex, J. I am of opinion that the order of the Assistant Commissioner is correct, and that we cannot interfere with it.

The charge was under s. 61 of the Beng. Excise Act. The Assistant Commissioner held, that the persons charged were not subject to a fine, unless they were in possession of a larger quantity of native spirits than that actually specified in s. 15 of the Act.

Section 15 enacts as follows :—“ Unless the Board shall otherwise specially direct, the sale of any excisable article in a larger quantity than is specified below shall be deemed to be a sale by wholesale : spirituous or fermented liquors, two imperial gallons, or twelve quart bottles.”

This section applies only to the sale of liquor by licensed manufacturers and vendors.

The language by which legislative authority is deputed to the Board to vary the quantity is peculiar; and as at present advised, it seems to me questionable whether the legislative authority so deputed empowers the Board (or in this case the Chief Commissioner) to lessen the quantity which is to constitute a wholesale sale even with respect to the licensed manufacturers and vendors mentioned in the section. And apart from the peculiar language by which this legislative authority [218] is deputed, it would seem, on general grounds, questionable. For though the Legislature might reasonably depute its authority for the purpose of relaxing the penal obligation of its own Act, it is scarcely reasonable to suppose that it would, even if it could, depute its authority to render its Act more stringent, to impose severe restraints without debate, and after having itself carefully considered and specified what quantity should be deemed to constitute a wholesale sale.

But however this may be, I can find no authority deputed to vary the quantity so as to affect the general public under ss. 17 and 61, and to render them liable to a penalty for possessing a smaller quantity than that actually specified by the Legislature in s. 15.

According to the well-known rule, a Statute imposing penalties must be construed strictly; and the Assistant Commissioner was therefore, in my opinion, right in refusing to impose a fine in this present case.

NOTES.

[See also (1883) 9 Cal., 847 (848), as regards Beng. Act VII of 1878; (1886) 8 All., 475 (482); (1892) 16 Bom., 689 as regards the maxim of interpretation.]

[8 Cal. 218 10 C.L.R. 425]

FULL BENCH.

The 20th January, 1882.

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE PONTIFEX,
MR. JUSTICE MORRIS, MR. JUSTICE MITTER, AND MR. JUSTICE PRINSEP.

Lucmun Persad Singh and others.....Decree-holders

versus

Kishun Persad Singh and others.....Judgment-debtors.*

*Execution of an order of Privy Council—Limitation Act, (XV of 1877),
sched. II, art. 180—Order in Council confirming a decree.*

Although an order of Her Majesty in Council may confirm a decree of the Court below, that order is the paramount decision in the suit; and any application to enforce it is, in point of law, an application to execute the order and not the decree which it confirmed.

Such an application is governed by art. 180,† sch. II of Act XV of 1877.

THIS was a reference to a Full Bench made by MITTER and MACLEAN, JJ., in an appeal against an order of the Judge of [219] Gya, dated the 4th January 1881, in which the latter rejected an application for execution of an order of Her Majesty in Council, dated the 26th June 1873, on the ground that it had not been made within three years from the date of the order in Council, and was, therefore, barred under art. 179,† sch. II of Act XV of 1877.

The order of reference fully sets out the facts, and was as follows:—

MACLEAN, J. This is an execution-case. The original suit was decided by the First Court on the 31st July 1868, and by the High Court on the 24th January 1870. This last decree was affirmed on appeal to England, the order in Council being dated the 26th June 1873.

* Full Bench Reference in appeal from original order, No. 105 of 1881, preferred from an order of G. E. Porter, Esq., Judge of Gya, dated the 4th January 1881.

† [Art. 180.—

Description of application.	Period of limitation.	Time from which period begins to run.
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To enforce a judgment, decree or order of any Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction, or an order of Her Majesty in Council.

Twelve years ... When a present right to enforce the judgment, decree or order accrues to some person capable of releasing the right:

Provided that when the judgment, decree or order has been revived, or some part of the principal money secured thereby, or some interest on such money has been paid, or some acknowledgment of the right thereto has been given in writing, signed by the person liable to pay such principal or interest, or his agent, to the person entitled thereto or his agent, the twelve years shall be computed, from the date of such revivor, payment or acknowledgment, or the latest of such revivors, payments or acknowledgments, as the case may be.

† [q. v. *supra*, 8 Cal. 29.]

Application for execution was made to the Judge of Gya on the 13th December 1875, but it was dismissed, on the authority of *Jou Naram Giree v. Goluck Chunder Mytee* (22 W. R., 102), on the ground that application had not been made to the High Court under s. 19, Act VI of 1874. This order was made on the 5th May 1877.

On the 7th May 1880, application was made to the High Court under s. 610,* Civil Procedure Code, and then the order in Council having been sent down, application was made to the District Judge on the 9th July 1880.

The District Judge has now rejected the application, on the ground that, not having been made within three years from the 26th June 1873, it is barred by Act XV of 1877, sch. ii, art. 179. The present appeal is against the District Judge's order.

The question for decision is, whether art. 179 or art. 180 of the 2nd schedule of Act XV of 1877 governs an application to enforce an order of Her Majesty in Council affirming a decree of the High Court on its Appellate Side.

The former article applies to decrees or orders of any Civil Court not provided for by the latter, which applies to decrees of Courts established by Royal Charter in the exercise of their original civil jurisdiction or to orders of Her Majesty in Council. The last eight words were added to art. 169† of

*[Sec. 610: -Whoever desires to enforce or to obtain execution of any order of Her Majesty in Council shall apply by petition, accompanied by a certified copy of the decree or order made in appeal and sought to be enforced or executed, to the Court from which the appeal to Her Majesty was preferred.

Such Court shall transmit the order of Her Majesty to the Court which made the first decree appealed from, or to such other Court as Her Majesty by her said order may direct, and shall (upon the application of either party) give such directions as may be required for the enforcement or execution of the same; and the Court to which the said order is so transmitted shall enforce or execute it accordingly, in the manner and according to the rules applicable to the execution of its original decrees.

When any moneys expressed to be payable in British currency are payable in India under such order, the amount so payable shall be estimated according to the rate of exchange for the time being fixed by the Secretary of State for India in Council, with the concurrence of the Lords Commissioners of Her Majesty's Treasury, for the adjustment of financial transactions between the Imperial and the Indian Governments.]

† [Art 169. -

Description of application.	Period of limitation.	Time when period begins to run.
To enforce a judgment, decree or order of any Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction, or an order of Her Majesty in Council.	Twelve years	When a present right to enforce the judgment, decree or order accrued to some person capable of releasing the right: Provided that, when the judgment, decree or order has been revived, or some part of the principal money accrued thereby, or some interest on such money has been paid, or some acknowledgment of the right thereto has been given in writing signed by the person liable to pay such principal or interest or his agent, to the person entitled thereto or his agent, the twelve years shall be computed from the date of such revivor, payment or acknowledgment, or the latest of such revivors, payments or acknowledgments, as the case may be.]

[220] Act IX of 1871 (the law in force when the order in Council was passed) by s. 21, Act VI of 1874, and I believe it has generally been considered, since then at least, that twelve years was the limitation for enforcement of an order in Council. It has also been conclusively established that a decree of the High Court made on appeal from the District Courts is subject to the three years' rule of limitation—*Ram Charan Bysack v. Lakhikant Bannik* (7 B. L. R., 704; s.c., 16 W. R., F. B., 1), approved in *Kristo Kinkur Roy v. Raja Burrodacant Roy* (14 Moore's I. A., 465; s.c., 10 B. L. R., 101). At that time (1872) there was no express rule for limitation of execution or enforcement of orders in Council; but the Judicial Committee considered the question and threw out a tolerably strong hint in *Kristo Kinkur Roy v. Raja Burrodacant Roy* (14 Moore's I. A., 465; s.c., 10 B. L. R. 101), that an order of Her Majesty in Council was not a decree of any Court. At the same time they affirmed, or rather expressed no dissent from, the ruling of this Court, that whether the decree of the lower Court is reversed, or modified, or affirmed, the decree passed by the Appellate Court is the final decree in the suit.

These remarks of their Lordships left it somewhat doubtful whether they would apply the same rule to orders in Council, but a recent decision of the Privy Council throws some light on this question, and as I understand the decision, it leaves very little doubt that the order in Council becomes in fact the decree or order of the Appellate Court—see *Pitts v. La Fontaine* (L. R., 6 App. Cas., 482): “when a decision of this Board has been reported to Her Majesty, and has been sanctioned and embodied in an order of Council, it becomes the decree or order of the final Court of Appeal, and it is the duty of every subordinate tribunal to whom the order is addressed to carry it into execution.”

We next find that, in *Lethbridge v. Raja Saheb Prohlad Sen* (19 W. R., 301), PHILAR, J., laid down that “the Privy Council order affirming the previous decrees must comprehend and embrace these decrees for they fall to be executed with the Privy Council order; in other words, the judgment-creditor [221] is unquestionably entitled in executing the ‘decree or order’ of the Privy Council to get the benefit of the decrees or orders which that Privy Council order affirmed.”

Then followed the addition to art. 169 of the Limitation Act of 1871 of the words “or any order of Her Majesty in Council” by s. 21, Act VI of 1874.

The 19th section of the Act clearly refers to Courts subordinate to the High Court; though it probably includes the High Court in its Original Civil jurisdiction, and it is therefore extraordinary to find that, in s. 21, an addition is made to an article of the Limitation Act of 1871, which had otherwise no application to the Appellate Side of the High Court.

The present Limitation Act, XV of 1877, art. 180,* is in the same terms as art. 169† of Act IX of 1871, after the words referred to were added.

Two decisions have, however, been passed comparatively recently, which appear to me to throw doubts upon the applicability of these words to orders in Council on appeal from the Appellate Side of the High Courts.

In *Narsingh Dass v. Narain Dass* (I. L. R., 2 All., 763) it was held, that the words ‘appeal’ and ‘Appellate Court’ in art. 179 (19 W. R., 301), sch. ii, Act XV of 1877, include an appeal to Her Majesty in Council. The point for decision in that case was, whether the limitation for execution of a High Court decree

* [q. v. *supra*, 8 Cal. 218.]

† [q. v. *supra*, 8 Cal. 219.]

affirmed by Her Majesty in Council ran from the date of the decree of the High Court or from the date of the order in Council, and it was no doubt correctly decided that limitation ran from the last-mentioned date.

In that case, however, the learned Judges were not dealing with an application to enforce an order in Council, nor were they called on to consider whether art. 180 would apply. The principle laid down by PHEAR, J., in *Lethbridge v. Raja Sahib Prohlud Sen* (19 W. R., 301), which is usually followed in the Courts subordinate to this Court, was not called in question, and the application under consideration was made within three years from the date of the order in Council. The case, therefore, though good [222] authority for the proposition that limitation does not begin to run under art. 179 until the date of the order in Council, where such has been made, really does not touch the question whether the period for which it runs is also governed by art. 179, or is governed by art. 180.

But this question has been directly dealt with in the case which I shall now quote.

In *Mohunt Buldraj Dass v. Mohunt Taponudh Gin Gossain* (Mis. App., No. 293 of 1877), JACKSON and MITTER, JJ., ruled, that "application must be made to execute the decree of the Court which grants the relief within three years from the date of the final decree or order of the Appellate Court, and if the period of three years is allowed to elapse, the applicant will not be permitted to avail himself, where the Appellate Court has been the tribunal of Her Majesty in Council, of the twelve years, which apply to the enforcement of a decree of that Court.

This case is not reported, but it is clear authority for the proposition that arts. 169, Act IX of 1871, and 180, Act XV of 1877 do not apply to execution of orders in Council on cases decided by this Court in its Appellate jurisdiction.

In this state of the authorities, it seems to me that, in all cases where there has been an appeal to England and an order in Council has issued on it, it is the latter which has to be enforced, and on this point I find no conflict of authority: but then the question arises, whether, if an application be made to enforce an order of Her Majesty in Council affirming a decree of the High Court in the exercise of its appellate jurisdiction (as I think the application before us must be considered to be), art. 179 or art. 180 would apply. Upon this point I am disposed to think that the latter article would apply, and I am therefore unable to concur in the case last quoted. My learned colleague, I find, entertains some doubts as to the correctness of the decision in that case, and as I think the question is sufficiently important to be submitted to a Full Bench, I propose to send up the following question for decision:—

Whether an application to enforce an order of Her Majesty in Council, affirming a decree of the High Court in the exercise [223] of its appellate jurisdiction, is governed by art. 179 or by art. 180 of the 2nd schedule of Act XV of 1877?

MITTER, J.—I entirely concur with my learned colleague that the application out of which this appeal has arisen must be treated as one made to enforce the order of Her Majesty in Council confirming the decree of this Court, dated the 24th January 1870. As to the period of limitation applicable in this case, I am free to confess that, although I took part in the decision cited, I entertain now grave doubts as to the correctness of our conclusion. I agree to refer the question proposed for the determination of a Full Bench.

Baboo *Jogesh Chunder Dey* for the Appellants.

Mr. *R. E. Twidale* and Baboo *Durga Pershad* for the Respondents.

The **Opinion** of the Full Bench was delivered by

Garth, C.J.—We are of opinion that the application in question is governed by art. 180 of the 2nd schedule of the Limitation Act.

Although an order of Her Majesty in Council may confirm the decree of the Court below, that order is undoubtedly the paramount decision in the suit, and any application to enforce it is, in point of law, an application to execute the order, and not the decree which it confirmed: see *Pitts v. La Fontaine* (L.R., 6 App. Cas., 182).

The test of this is, that before the decree-holder can obtain execution, he must apply to the High Court under s. 610 of the Code to transmit the order of Her Majesty to the Court whose duty it is to issue execution, and it is clear from the language of that section, that the Court to which the order is transmitted has to execute, not its own decree, but the order itself. If this were not so there would seem no necessity for applying to the High Court at all.

As the application, therefore, in this case was to execute the order of Her Majesty, it comes directly within the scope of art. 180 of the Limitation Act.

NOTES

[DECREE OF APPELLATE COURT.]

The decree of the Appellate Court takes the place of the original decree: (1886) 13 Cal., 13 (15); (1892) 20 Cal., 551; (1882) 11 C. L. R., 277; (1899) 11 All., 346 - 9 A.W.N., 126; (1887) 11 All., 267; 11 C. L. J., 91.

In (1906) P. R. 48- (1906) P.L.R. 101, it was held that the decree in the Appellate Court, affirming the Original Court's decree in a pre-emption suit, without fixing the time, incorporated only the time in the original decree even if it should have expired by the date the appellate decree was pronounced.]

[8 I.A. 210 -6 Ind. Jur. 108]

[224] PRIVY COUNCIL.

The 12th July, 1881.

PRESENT :

SIR B. PEACOCK, SIR M. E. SMITH, SIR R. P. COLLIER,
SIR R. COUCH, AND SIR A. HOBHOUSE.

Bibi Sahodra.....Defendant

versus

Rai Jang Bahadur and others.....Plaintiffs.

Lutchman Sahai Chaudhri.... Defendant

versus

Rai Jang Bahadur and others.....Plaintiffs.

*Limitation Act (IX of 1871), sch. v, cl. 144—Breach of condition—
Forfeiture.*

A Hindu widow, under an arrangement with her deceased husband's cousin, was in possession for life of a share of ancestral property of her husband's family, in which he, jointly with the cousin, had held a share in his lifetime. This share she sold as if she had held an absolute interest, and the purchaser's name was entered, instead of hers, in the revenue records; but no change of possession took place till her death.

To a suit brought by the cousin's heirs to recover the property purchased from the widow, more than twelve years after the sale, but less than twelve years after the widow's death, the defence was limitation under Act IX of 1871, sch. ii, cl. 114,* commencing from the date of the sale, there having been, it was alleged, "a breach of condition or forfeiture" within the meaning of that clause.

By the terms of the arrangement contained in a solenama, the widow was to have no power to alienate; and after her death her share was to belong to the cousin.

Held, that these terms prohibited only such an alienation by the widow as would prevent the cousin's succeeding after her death, and the alienation made was good for the widow's lifetime. There was no condition against such an alienation; and if there had been, there was neither any rule of law, nor anything in the words used in the solenama, attaching forfeiture to the breach of such a condition. *Held*, accordingly, that cl. 114 did not apply, and the suit was not barred by limitation.

THE first two appeals, which were consolidated and heard as one, were preferred against two decrees of a Divisional Bench of the High Court (14th and 15th June 1877), affirming two decrees (27th September 1875) of the Subordinate Judge of Mozufferpore, Zilla Tirhoot.

[225] The third appeal was preferred from a decree of the High Court (21st June 1877), affirming that of the same Subordinate Judge (27th September 1875).

The suits, out of which these appeals arose, were instituted in 1874 to recover possession, with mesne profits, of a four-anna share of Mouza Athur, and of an eight-anna share of Mouza Nazirpur, villages in the Tirhoot district.

The appellant was sued as heiress of one Fattehchand Sahu, deceased, who purchased the property in question in 1845. The plaintiffs, respondents in the first two appeals, were the representatives of Kuldip Ram, who died in 1852, and the object of the suits was to recover property purchased from the widow of his cousin, Mehtab Ram, who died in 1822. After the death of Mehtab Ram, his widow Mainan Koer, disputes having occurred between her and Kuldip Ram as to what estate she took, joined in a solenama with him, embodying a compromise, under which she was entitled to a share for life in the family property. She died in 1862, having in 1845 effected the sales in question.

The Subordinate Judge of Mozufferpore decreed in favour of the plaintiffs. This was affirmed by a Divisional Bench of the High Court on all the questions raised; the only one remaining on this appeal being, whether or not limitation barred the suit. On this point the judgment of the High Court was, that regard being had to the mode in which the parties had dealt with the property, holding separately their respective halves of the estate, Kuldip Ram could not have obtained anything by a suit, even if he had sued immediately upon the sales to Fattehchand, beyond a declaration of the invalidity of the sales as to all interest greater than for the widow's life. The twelve years' limitation did not commence till her death. Accordingly, the suits were held not to be barred.

* [Cl. 114 :—

Description of suit.	Period of limitation.	Time when period begins to run.
Like suit, when the plaintiff has become entitled by reason of any forfeiture or breach of condition.	Twelve years ...	When the forfeiture was incurred or the condition broken.

In the first appeal Mr. *J. F. Leith*, Q.C., and Mr. *R. V. Doyle* appeared for the Appellant.

In the second appeal Mr. *C. W. Arathoon* for the Appellant.

Mr. *J. H. W. Arathoon* for the Respondents in both appeals.

For the appellant it was argued, that it being the fact (as [226] it had been contended by the plaintiffs and found by the Court of First Instance) that the widow had no power of alienation over the property in suit, it followed that her attempted alienation was an unauthorized and unlawful act. This amounted to a "breach of condition and a forfeiture" within the meaning of Act IX of 1871, sch. ii, cl. 144. This was enough to bar the suits; but it was also maintainable that the possession of the vendor after the sales, being on account of the purchaser, was adverse from their date to Kuldip Ram, who was bound to sue, if the sales were to be set aside, within twelve years from their date.

For the respondents it was argued, that the cause of action only accrued on the death of the widow; and these suits having been brought within twelve years from the date of her death were within time.

Their Lordships' **Judgment** was delivered by

Sir A. Hobhouse. The question raised by this appeal may be disposed of very briefly. There are two suits, each of which is the subject of an appeal; but the appeals have been consolidated for the purpose of argument here. Taking the earlier suit, No. 253 of 1871, it is brought by the respondents to recover a four-anna share of a mouza called Athur, which the defendant, who is the appellant, claims to be rightfully possessed of under a sale executed to her ancestor in the year 1845 by a widow of the name of Mainan Koer.

The position of the property was this: The Mouza Athur appears to form part of the ancestral property of a family, who, in the year 1826, were represented by Kuldip Ram and this widow Mainan Koer, she being the widow of Kuldip Ram's first cousin, Mehtab Ram. The two parties were in litigation. Kuldip Ram claimed to be entitled to the whole property, subject only to such maintenance as the widow might be entitled to. The widow claimed the whole during her life or widowhood as representing Mehtab Ram. Under these circumstances, the parties came to a compromise in the year 1826, and that compromise was carried into effect in the suit which was then pending for the purpose of settling this question as to the ancestral property. The compromise provides for several different things [227] as to payment of debts and so forth, but the only material provision which we need now consider is that which relates to the interests given in the immoveable property to Kuldip Ram and Mainan Koer respectively. As regards that property, the first clause of the solennum executed by Kuldip Ram is, that all the villages, whether ancestral or acquired by purchase, which lie in certain districts, and which were held by Roy Mehtab Ram deceased, "shall, during the lifetime of the aforesaid Mussamat"—that is Mainan Koer—"remain in equal shares in the joint possession and enjoyment of me the declarant and the aforesaid Mussamat, but the aforesaid Mussamat shall have no power to alienate the moveable or immoveable properties; and after her death all the moveable and immoveable properties, and the outstanding of the time of Roy Mehtab Ram and the said Mussamat, shall be the right of me the declarant." Then there are provisions for a mutation of names in the rent-roll of the Col-

*[*q. v. supra*, 8 Cal. 224.]

lector's office, so that the name of Kuldip Ram should appear with that of Mainan Koer; and also provisions for the parties being represented each by their own agents. A corresponding solenanna was executed by Mainan Koer.

That compromise was carried into effect by the decree, which does not throw any further light upon the question, because it only orders that the two parties, Kuldip Ram and Mainan Koer, "do hold possession and occupation of all the properties left by Roy M htab Ram conformably to the conditions laid down in the deeds of compromise, having had their names entered in the office of the Collector as regards the villages in question." Accordingly, the two parties appear to have entered into possession, and to have remained in such possession until the sale, which is the subject of the present suit.

That sale took place on the 5th of June 1845, and by the deed of sale Mainan Koer purports to convey to the ancestor of the appellant four annas of the Mouza Athur in question, the family property consisting of eight annas of that mouza. It then appears that a mutation of names took place, by which the grantee under that sale put his name in the place of Mainan Koer; and it is stated by the appellant, in her written statement in the Court below, that her ancestor, and after him she [228] herself, continued in possession and occupation of a moiety, to wit four annas, and the plaintiffs and their ancestors in possession of the other four annas, of the mouza in dispute, that is the Mouza Athur.

Nothing else appears to have been done to alter the position of the property. Kuldip Ram died some time in the year 1852, and Mainan Koer died on the 12th October 1862. The respondents, who are the heirs of Kuldip Ram, did not bring any suit for the recovery of the property until nearly twelve years after the death of Mainan Koer, but they did bring a suit just in time to save the Statute of Limitations, if the starting point of the Statute was the death of Mainan Koer.

The suit being brought, a great many issues of fact were raised, which appear to have been of considerable difficulty; but those have all been disposed of by the Courts below, the two Courts finding all the issues of fact in the same way in favour of the respondents, and they are not in question here. The single question now remaining is, whether the suit is barred by the Statute of Limitations, and that depends again upon the question whether the Statute began to run on the 5th June 1845, when Mainan Koer sold her interest in Mouza Athur to the ancestor of the appellant, or on the 12th October 1862, when she died.

The appellant contends, first, that the case falls within head 144 in the second schedule to the Limitation Act, IX of 1871. Head 144 is this: "For possession of immoveable property, when the plaintiff has become entitled by reason of any forfeiture or breach of condition: twelve years from the time when the forfeiture was incurred or the condition broken." Then she says that the effect of the compromise of 1826 was to give Mainan Koer an interest in the property on condition that she should not alienate; that by her attempt to alienate she broke the condition; that the entirety of the property then vested in Kuldip Ram; and that the time of limitation began to run from that moment.

Their Lordships are of opinion that no such condition attached to Mainan Koer's life-estate, and therefore that there was no forfeiture of it.

[229] The terms of the compromise are, that the property shall remain in equal shares in the joint possession and enjoyment of the two parties; but the

Mussamat Mainan Koer shall have no power to alienate the moveable or immoveable properties, and after her death those properties shall be the right or Kuldip Ram. There are no words of forfeiture, and it would be a very strong thing and a very unusual thing to import a forfeiture where the parties have not provided for one, and where there is no rule of law attaching forfeiture to a particular act. But in point of fact the language of the deed of compromise points to quite a different result. There is every indication that Mainan Koer was to have just as full an enjoyment of her interest in the property during her lifetime as Kuldip Ram was to have in his, and there is no reason whatever on the face of the deed why she should not deal freely with her interest. And where it is said that she shall have no power to alienate the property, that prohibition is coupled closely with the statement that, after her death, the property shall go to Kuldip Ram. The inference to be drawn from that is, that when the parties spoke of alienation they were thinking of alienation in perpetuity, and the thing they desired to prohibit was such an alienation as would prevent Kuldip Ram taking the succession immediately upon Mainan Koer's death. That being so, the alienation of Mainan Koer was perfectly good for her lifetime; there was no adverse possession until she died, and the suit is brought within twelve years from that time.

Mr. Doyne argued that the case might fall within head 143 of the same schedule. That head refers to a suit for possession of immoveable property, where the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession, and it allows twelve years from the date of the dispossession or discontinuance. But in order to bring the case under that head of the schedule, he must show that there has been a dispossession or discontinuance; and the passage which has been read from the appellant's written statement distinctly shows that there was no dispossession or discontinuance of Kuldip Ram.

Those considerations are sufficient to dispose of the case as **[230]** to Mouza Athur. The second suit, No. 262 of 1874, relates to another mouza called Nazirpur, and to eight annas of that mouza, which were the subject of another sale by Mainan Koer, but the questions are precisely the same, and therefore there is no need to repeat with reference to Nazirpur what has been said with regard to Athur.

The result is, that their Lordships entirely concur with the view taken by both the Courts below, and think that the appeals should be dismissed with costs.

The appeal of *Lutchman Sahai Chaudhri v. Rai Jang Bahadur* (No. 61 of 1877) should also be dismissed with costs.

Their Lordships will humbly advise Her Majesty in accordance with this opinion.

Appeals dismissed.

Solicitor for the Appellant : Mr. T. L. Wilson.

Solicitors for the Respondents : Messrs. Henderson & Co.

NOTES.

[The effect of alienation by a Hindu widow is dealt with by Justice BHASHYAM AYYANGAR in (1902) 26 Mad. 113 (119) ; 12 M. L. J. 197.

For adverse possession to be successfully asserted it must be shown that the person affected had the opportunity of knowing it :—(1902) 27 Bom. 43 4 Bom. L. R. 721.]

[8 Cal. 230]

APPELLATE CIVIL.

The 25th August, 1881.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE FIELD.

Koylashbashiny Dossee.....Defendant

versus

Gocoomoni Dossee.....Plaintiff.*

Sale for arrears of revenue — Auction-purchaser, right of — Beng. Act VII of 1868, s. 12—Lakheraj grant — Limitation Act (XV of 1877), sched. II, cls. 121, 130, 149 — Resumption — Assessment—Onus probandi.

A person seeking to obtain the benefit of s. 12, Beng. Act VII of 1868, must give some *prima facie* evidence to show that the incumbrance which he seeks to avoid is an incumbrance falling within the terms of the section, that is, an incumbrance imposed on the tenure by some one who previously held it.

The law relating to lakheraj grants reviewed and explained.

[231] If a person, claiming under a badshahi lakheraj grant made before the 1st of December 1790, can show that he has held the land as lakheraj since the 1st of December 1790, this will be a conclusive bar to a suit for resumption, whether brought by the Government, or by a purchaser at a revenue-sale, or by any other person. That is, in order to prove a grant anterior to the 1st of December 1790, it is sufficient to give evidence of possession dating back to the 1st of December 1790.

Susteedhur Saurant v. Romanath Rokhat (6 W. R. 58) cited.

Discussion of the law of limitation as applicable to the resumption and assessment of lakheraj lands.

A person seeking to resume lakheraj land must give *prima facie* evidence to show that rent has been paid for that land at some time since the 1st of December 1790.

Parbati Charan Mookerjee v. Rajkrishna Mookerjee (B. L. R., Sup. Vol., 162), *Sonatan Ghose v. Moulvi Abdul Fawar* (B. L. R., Sup. Vol., 109), and *Hurryghur Mookhopadhyaya v. Madhub Chunder Baboo* (14 Moore's I. A., 152 ; S.C., 8 B. L. R. 566) referred to.

IN this case the plaintiff alleged that, on the 22nd of January 1878, one Gopal Chunder Mookerjee purchased the land in dispute with other land at a sale for arrears of Government revenue ; that Gopal Chunder having obtained possession of this land sold it to the plaintiff, who thereupon acquired a right to the property free from all incumbrances ; that the defendant, who was in possession, had no right to remain on the land ; and the plaintiff asked for possession by ejecting the defendant. The suit was, in the first instance,

* Appeal from Appellate Decree, No. 2302 of 1880, against the decree of W. H. Page, Esq., Officiating Additional Judge of the 24-Parganas, dated the 26th August 1880, reversing the decree of Baboo Dwarka Nath Mitter, Munsif of Sealdah, dated the 22nd July 1879.

brought against Khetter Mohun Das, who filed a written statement, alleging that the land in dispute was the lakheraj land of one Koylashbashiny Dossee. The plaintiff then made Koylashbashiny a defendant, who filed a written statement, denying the plaintiff's right, and claiming the land as her lakheraj.

The Court of First Instance framed the following issues: (i) Whether or not the plaintiff has a cause of action against the defendant Koylashbashiny? (ii) Is the plaintiff's claim barred by the law of limitation? (iii) Are the allegations of the plaintiff and her vendor's purchase true? (iv) Is the disputed property included in Government khas mehal, holding No. 123, and does it form a portion of the revenue-paying [232] estate, or is it rent-free? (v) Has she, the defendant Koylashbashiny, been in undisturbed and adverse possession of the property without payment of rent for upwards of twelve years; if so, will that protect her from ejectment? The Court of First Instance dismissed the suit, and the plaintiff appealed.

The Judgment of the lower Appellate Court is as follows:

The lower Court framed five issues, of which it decided the first, third, and part of the fourth in favour of the appellant. Those now remaining for decision on appeal are the second part of the fourth and the fifth, and the questions are: Is the property in dispute a portion of a revenue-paying estate, or is it rent-free; and secondly, has the respondent Koylashbashiny been so long in uninterrupted adverse possession that she is protected from disturbance by the law of limitation?

The appellant complains in the first paragraph of the grounds of appeal, that the suit has been treated as a suit to set aside an incumbrance, and it was treated by the Munsif as governed by s. 121 of the second schedule of the Limitation Act. I am distinctly of opinion that the suit is more correctly described by cl. 111 as a suit to obtain possession of immoveable property, and that the plaintiff's cause of action arose from the date of the auction-purchase by her predecessor, for whatever rights were obtained by the auction-purchaser passed to the present appellant by the subsequent private sale.

About 1816 there was a survey, in which holding No. 123 is recorded as mal land; and, as is admitted, the Government received revenue for that land from 1817 to 1877, when it was sold for arrears of revenue. The defendant's first plea was, that this disputed property was not included in No. 123 holding, and obstacles were placed in the way of the measurement, which was proposed in order to settle this, by the respondent Koylashbashiny and her son-in-law Nilmoni Dey. When it became evident that the measurement would be enforced, they admitted that the land was included in No. 123, but contended that it was lakheraj within that holding. This was for the respondent to prove—see *Woomesh Chunder Goopto v. Raj Narain Roy* (10 W. R., 15)—and she has entirely failed to prove it.

The lower Court has assumed that this tenure, No. 123, was first created in 1816, on Mr. Crow's survey, and I think that assumption is entirely erroneous. Mr. Crow calls it *nathann*; and the Munsif takes [233] this as if it meant that Mr. Crow could not decide whether it was mal or lakheraj. After going through the proceedings recorded by Mr. Crow, it appears to me that it was found by him to be mal land, and that *nathann* meant merely that he was unable to discover who was the person to be considered as owner of the tenure. I think that the onus of proof was on the respondent, and that she has failed to give sufficient proof that the land was lakheraj.

* [*q. v. supra* 8 Cal. 224.]

If the land was not lakheraj, then Koylashbhashiny's claim is gone, unless she has acquired a title from long continued adverse possession. In my opinion, it cannot be said that her possession was such as to give her this title. The Government was in the receipt of revenue, and as soon as the payment stopped, the tenure was put up to auction as against Government. Koylashbhashiny was a mere trespasser, and therefore the auction-purchaser acquired by his purchase a right to oust her. His right commenced from the date of the purchase, and passed to the present appellant, who is well within the time for bringing the suit. For the reasons above given, I consider that the appellant was entitled to a decree. The appeal is decreed with costs.

Mr. Branson and Baboo Saroda Churn Mitter for the Appellant.

Baboo Mohony Mohan Roy, Baboo Kashi Kant Sen, and Baboo Surjinath Doss for the Respondent.

For the appellant it was argued, that the onus had been wrongly placed on the defendant, as it lay on the plaintiff to give *prima facie* evidence that the land was mal; that the plaintiff's tenure was shown by the evidence to have been created in 1847, and therefore, long subsequent to the defendant's title, which could not, therefore, be considered an incumbrance imposed upon it after its creation, and was not, therefore, within the provisions of s. 12, Beng. Act VII of 1868; and that the suit was barred by limitation. *Mussamut Banno v. Moutrie Amceerooddeen* (23 W. R. 24), *Mussamut Chandrabullee Debia v. Luckhee Debia Chowdhraim* (10 Moore's L. A. 214), and *Heera Lall Pramanick v. Brikunnissa Bibee* (I. L. R., 3 Cal., 501) were cited.

[234] The **Judgment** of the Court (PRINSEP and FIELD, JJ.) was delivered by

Field, J. In this case the plaintiff is an auction-purchaser at a sale for arrears of Government revenue. He purchased a holding No. 123, which consists of some five bighas odd. He has brought the present case to eject certain persons who hold some three bighas of this holding under an alleged lakheraj title. The plaint has been framed in very wide language. The plaintiff alleges the fact of the purchase at a revenue-sale by her assignee. She then alleges that the right acquired by this revenue-sale was a right to hold the property purchased free of all incumbrances; and she concludes the plaint with a prayer that the defendant may be ejected, that khas possession may be given to her, and that she may be declared entitled to hold the land free of all incumbrances.

Now, at one part of the argument it was contended, that this is really a suit to avoid an incumbrance, and is based upon the statutory right conferred by s. 12 of Beng. Act VII of 1868, but we think it would not be fair to tie up the plaintiff and limit the construction of the prayer in her plaint by regarding it as merely a prayer to avoid an incumbrance under this section just referred to. That section declares that "the purchaser of any tenure sold under the provisions of s. 11 of this Act shall acquire it free from all incumbrances which may have been imposed upon it after its creation or after the time of settlement, whichever may have last occurred, and she be entitled to avoid and annul all under-tenures and forthwith to eject all under-tenants." Now, it has been decided, that a person seeking to take the benefit of this statutory enactment must give some *prima facie* evidence to show that the incumbrance which he seeks to avoid is an incumbrance falling within the terms of the section,—that is, an incumbrance imposed upon the tenure by

some person who previously held it. In this case we think there is no such evidence, and that if the plaintiff were seeking to rely merely upon the statutory right of avoidance conferred by the section, her suit must fail. But we think there is another view which may fairly be taken of the case upon the plaint and the written statement of the defendant, [235] and that is, that this is really a suit to resume lakheraj land. The defendant sets up a lakheraj title, and what really occurred in the lower Courts was a trial of the validity of this title. The issues framed by the Munsif were, in our opinion, not sufficiently satisfactory, regard being had to the allegations of the defendant; and we think that, in consequence, it will be necessary to remand this case to have certain inquiries made which were not made owing to the informal nature of the issues framed in the Court of First Instance. In order to guide the lower Court as to the course to be pursued upon the remand, it will be necessary to refer briefly to the law concerned with the subject of lakheraj grants. Now badshahi lakheraj grants were of three kinds: *Firstly*, grants made before the 12th August 1765; *secondly*, grants made after the 12th August 1765, but antecedent to the 1st December 1790; and *thirdly*, grants made subsequently to the 1st December 1790. As to the first two classes, it is only necessary to remark, that if a person claiming to hold under a grant falling within either of these two classes can show that he has held the land as lakheraj since the 1st December 1790, according to the law as it at present stands, this will be a conclusive bar, whether the suit to resume is brought by the Government, by a purchaser at a revenue sale, or by any other person. In order to prove a grant anterior to the 1st December, it is thus sufficient to give evidence of possession as lakherajdar dating back to 1790: see the case of *Sristeedhur Sawant v. Romanath Rokhit* (6 W. R. 58). Then as to the third class, that is, grants made after the 1st December 1790, the old Regulation enacted that such grants whether exceeding or not exceeding 100 bighas, shall be null and void. It, therefore, follows that, apart from the law of limitation, the Government or an auction-purchaser or a zamindar is entitled to resume any lakheraj grant made subsequent to the 1st December 1790. Then we must apply the law of limitation. In the case of Government or any person claiming under Government, art. 149 of the Limitation Act provides the period of sixty years; and it therefore follows that the Government or an auction-purchaser claiming under the Government must sue within [236] sixty years after the cause of action arose to resume lakheraj land, even although held on a grant alleged to have been made after 1790. In the case of a mere auction-purchaser, arts. 121 and 130¹

* [Art. 149 :—

Description of suit.	Period of limitation.	Time from which period begins to run.
Any suit by or on behalf of the Secretary of State for India in Council.	Sixty years	When the period of limitation would begin to run under this Act against a like suit by a private person.]

† [Art. 130 :—

Description of suit.	Period of limitation.	Time from which period begins to run.
For the resumption or assessment or rent free land.	Twelve years.	When the right to resume or assess the land first accrues.]

to Government. In other words, if the period of sixty years expired before the expiry of the twelve years' period in any case in which the purchaser would be subject to the sixty years' rule, such purchaser would only have so much of the twelve years' period as was also covered by the sixty years' period. In the case now before us, the defendant alleged that the land was lakheraj. It is not distinctly stated that the lakheraj was created prior to 1790, but we think that we may fairly assume that that was intended, as otherwise an allegation of a lakheraj title created since 1790 would be no answer to the suit, unless that lakheraj title were created after 1790, and before a date sixty years before the institution of this suit. The Munsif dismissed the plaintiff's suit. The Additional Judge reversed the decision of the Munsif, and was of opinion that the burden of proof was upon the defendant. We think in this view the Additional Judge was in error. According to the Full Bench decision in *Parbati Charan Mookerjee v. Itajkrishna Mookerjee* (B. L. R., Sup. Vol., 162), the burden of proof is upon the zamindar who seeks to resume lakheraj land, alleging that such lakheraj is invalid by reason of its having been created since 1790. We think that, upon the pleadings in this case, we must take it that the plaintiff here seeks to resume lakheraj land, and that she seeks to resume it on the only ground upon which, in the present state of the law, she can resume it; on the ground, namely, that the grant is void by reason of the lakheraj tenure having been created since the 1st December 1790. We may refer to the cases of *Sonatan Ghose v. Moulti Abdul Farar* (B. L. R., Sup. Vol., 109) and *Hurryhar Mookhopadhyay v. Madhub Chunder Baboo* 14 Moores L.A. 152; s.c., 8 B. L. R., 566). What then must be done in this case is as follows:—The plaintiff must give *prima facie* [237] evidence to show that rent has been paid for this land at some time since the 1st December 1790. If she gives such evidence, it will then lie upon the defendant to rebut that evidence by proving, if she can, a valid lakheraj grant. We do not express any opinion upon the value of the evidence supplied by the proceedings of Mr. Crow. The value of that evidence is a question solely for the consideration of the Judge below. We will only observe that, in order to estimate properly the value of that evidence, the Judge ought to inform himself as to the nature of the proceedings in which Mr. Crow was engaged and as to the nature of the jurisdiction he was exercising.

Then it is contended, that the defendant has succeeded in showing that this land has been held as lakheraj for the last sixty years, and that, under art. 149* of the second schedule of the Limitation Act, this is a complete answer to the case. We think that if the defendant is able to show that the land has been held as lakheraj for the last sixty years, this is a good defence, and it will relieve the defendant from rebutting the plaintiff's case by evidence of a valid grant, or of possession extending back to 1790; if the defendant has to rely upon such evidence of possession merely, and is not able to give proof of the original lakheraj grant, the decree of the Additional Judge will be reversed. The case will be remanded to the lower Appellate Court to be dealt with in accordance with these directions; and the costs of this Court will follow the result.

Appeal allowed, and case remanded.

NOTES.

[See (1883) 9 Cal. 813 (816) and the notes to 6 Cal. 666 in the LAW REPORTS REPRINTS.]

* [*q. v. supra*, 8 Cal. 235.]

[10 C. L. R. 581]
 [238] APPELLATE CIVIL.

The 29th July, 1881.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE FIELD.

Lodai Mollah.....Defendant

versus

Kally Das Roy.....Plaintiff.*

*Rent-suit Title of third party alleged by defendant—Parties— Civil
 Procedure Code (Act X of 1877, s. 28.)*

Per FIELD, J. Where a person sued for rent sets up the title of a third party, and alleges that he holds under, and pays rent to him, such third party ought not to be made a party to the suit so as to convert a simple suit for arrears of rent into one for the determination of the title to the property in respect of which the rent is claimed.

Such a suit raises only two issues, *viz.*

- (1) Does the relation of landlord and tenant exist between the plaintiff and defendant ?
- (2) Are the alleged arrears of rent due and unpaid ?

And these are questions in which the plaintiff and defendant are alone concerned, and no third party claiming a title adverse to the plaintiff can properly be made a party to the trial of these issues.

Section 28 of the Civil Procedure Code is not imperative, but allows a discretion to be exercised; and in such a suit it is better, both in the interests of Government and for the proper adjudication of the question of title, that it should be tried by a competent Court in a suit directly framed and brought for that purpose.

THIS was an appeal in one of a number of rent-suits, which, being analogous, were, by consent of the parties, tried together in the Court of First Instance. The defendant denied that any rent was due, and stated that the relation of landlord and tenant did not subsist between him and the plaintiff, and that the lands in respect of which the rent was claimed did not lie within the plaintiff's taluq as alleged, but formed portion of a *nim-howla* belonging to one Tarini Churn Biswas, to whom the defendant paid rent.

The Munsif, in dealing with the suit, declined to add Tarini Churn Biswas as a party defendant, though the pleaders for [239] the plaintiff urged, that the proper issue to frame was as to who had been in receipt of rents from the defendant, and that the question of title ought to be raised in the suit; and after having heard the evidence and dealt with it, found that the relationship of landlord and tenant did not exist between the parties, and accordingly dismissed the suit.

* Appeal from Appellate Decrees. Nos. 581, 582, 583, 584, 585, and 586 of 1880, against the decree of Baboo Nuh Chunder Blutto, Officiating Second Subordinate Judge of Backergunge, dated the 30th December 1879, reversing the decree of A. Perroux, Esq., Officiating Third Munsif of Barrisal, dated the 24th March 1879.

On appeal the lower Appellate Court reversed the decision of the Munsif, holding that a *prima facie* case had been made out by the plaintiff, which should have been rebutted by the defendant, and as that had not been done, the plaintiff was entitled to the decree he prayed for. The Subordinate Judge further held, that Tarini Churn ought to have been a party of his own accord, or been made so at the instance of the defendants, as he was directly interested in the subject-matter of the suit, and that the Court had power to add him *suo motu* under s. 32 of the Civil Procedure Code.

Against this decree the defendant now appealed to the High Court.

Baboo *Kali Mohun Dass* for the Appellant.

Baboo *Bungshedhur Sen* for the Respondent.

The **Judgments** of the Court (PRINSEP and FIELD, JJ.) were as follows:—

Field, J.—The plaintiff in these cases sued a number of ryots for rent. Their defence was substantially this, that no relation of landlord and tenant existed between them and the plaintiff. They alleged that the lands held by them are not situate within Taluq No. 3039, as alleged by the plaintiff, but form a portion of a nin-howla belonging to one Tarni Churn Biswas and situate within Taluq No. 3051. They further said that Tarini Churn Biswas is their landlord, and that they pay their rents to him.

The Munsif, in a careful judgment, dealt with the question whether the relation of landlord and tenant exists between the parties, and having carefully examined the evidence, came to the conclusion that this relation has not been established; and he, therefore, dismissed the plaintiff's suit.

[240] The cases then came on appeal before Baboo Nudur Chunder Bhutto the Officiating Second Subordinate Judge of Backergunge, and this gentleman, in a long judgment, which contains a large amount of irrelevant matter expressed in stilted and high-flown language, reversed the decision of the Munsif for reasons which we think cannot be supported. The Munsif, very properly, and in accordance with a number of decisions of this Court, declined to try, under the guise of a suit for rent, a question involving the title to a considerable property. With reference to this course of procedure, the Subordinate Judge says:—"Tarini ought to have been a party of his own accord or at the instance of the defendants, as he was directly interested in the subject-matter of the suits,—namely the arrears. The Court itself had, under the circumstances, the power *suo motu* to make him a defendant under s. 32 of the Procedure Code. But at all events it was the duty and interest of the defendants to move the Court in the matter in order to protect themselves from similar demands of Tarini, in case of an adverse decision and for better making out of their own case primarily." We think that these observations of the Officiating Subordinate Judge indicate a misconception of the real nature of a rent-suit, as well as a want of acquaintance with a number of cases decided by this Court and published in accepted reports, in which it has been held that, when persons sued for rent set up the title of a third person, such third person ought not to be made a party to the case so as to convert a simple suit for arrears of rent into a suit for the determination of the title to immoveable property. See *Bressur Paurey v. Jogendro Chunder Deb* (24 W.R., 261), *Auluck Monee Debee v. Dino Nath Ghose* (24 W.R., 421), and *Dayal Chand Sahay v. Nabin Chandra Adhikari* (8 B. L. R., 180). In this last case AINSLIE, J., said (p. 193):—"We do not think it can be contended, that a person who is out for possession, has the right to come to the Court and ask for a decree for rent with

the view of bringing in a third party and having tried, under color of a rent-suit, all questions of title between himself and that party."

[241] A suit for the recovery of arrears of rent raises two questions:—

I. Does the relation of landlord and tenant exist between plaintiff and defendant?

II. Are the alleged arrears of rent due and unpaid?

I. The first question may have to be decided under one of two possible cases, —

(i) Where the plaintiff has let the defendant into possession of the land.

(ii) Where the plaintiff is not himself the person who let the defendant into possession, but claims under a title derived from the person who did.

(i) Now, in the first of these two cases the relation of landlord and tenant may have been created in some one of the following ways:—

(a) by written contract, and where there is a written contract, if it be necessary to prove the terms of the tenancy, such written contract must be produced and proved; *see* the cases of *Brewer v. Palmer* (3 Esp., 213) and *Ramsbottom v. Mortley* (2. M. & S., 445);

(b) by an oral contract;

(c) there may have been no express contract, written or oral, but the relation of landlord and tenant may be inferrible from circumstances; for example, from the payment of rent, from submitting to a distress; *see* the cases of *Panton v. Jones* (3 Camp. 372), *Allason v. Stark* (9 A. and E., 255), *Doe d. Harvey v. Francis* (2 M. & Rob., 57), *Bance Madhub Ghose v. Thakoor Doss Mundul* (B. L. R., Sup. Vol., 588) and *Obhoy Gobind Chowdhry v. Beejoy Gobind Chowdhry* (9 W. R., 162).

When the case falls under (a), there may be the following defences:— The execution of the contract may be denied. The actual execution may be admitted, but it may be contended that the contract is invalid, because it was obtained by fraud, force, undue influence, etc. The defendant may show that the plaintiff's title has expired, or has been defeated by a title paramount; as for example, that the plaintiff's tenure has been **[242]** avoided by sale for arrears of revenue; but the defendant cannot deny that the plaintiff had a title at the time when the defendant was let into possession; *see* s. 116 of the Evidence Act. The defendant may also plead that he was not put into possession of, or that the plaintiff has evicted him from, the land demised or a portion of it, or he may show that the demise was for a term which has expired, and that the occupation has been given up.

When the case falls under (b) the defendant may deny the contract, or may set up its invalidity, or show that the plaintiff's title has expired, or been defeated; or may allege that he has never been put in possession of the land demised, or that he has been evicted by his lessor; or may allege that the tenancy has been determined.

When the case falls under (c), the defendant may deny the circumstances from which the plaintiff alleges that the tenancy is inferrible or has been created by implication. He may show that plaintiff's title has expired, or been

defeated: may allege that he has been evicted by the plaintiff, or that his occupation has been determined by relinquishment.

The questions raised by these pleas, where the plaintiff originally let the defendant into possession of the land, are questions with which the plaintiff and defendant only are concerned and no third party claiming a title adverse to the plaintiff can properly be made a party to the trial of these questions.

(ii) Let us now turn to the class of cases where the plaintiff's title is derivative. The following are the most usual ways in which it is derived:—

- (a) by assignment, including gift, sale, devise, lease;
- (b) by inheritance, including adoption amongst Hindus.

As between the defendant and the person from whom plaintiff's title is derived, the relation of landlord and tenant may have been created in any of the ways specified under head (i); and therefore the defendant may make any of the defences which have been specified above under this head (i). The observation just made as to making a person claiming a title adverse to the plaintiff a party to the case, is here equally applicable where some one or more of these defences only are [243] set up, and there is no denial of the facts which constitute the derivation of the plaintiff's title. But it is clear that, in cases falling under this head, there may be a further defence; there may be a denial of the facts which constitute the derivation, or denial of the assignment, or of the adoption, or of the validity of either; or of the plaintiff being the heir of the original person from whom he professes to derive title by inheritance. It is clear that it is only as regards this further matter of defence that the rights of third parties can come into question. The effect of an assignment, or of an adoption, or of a claim founded on inheritance, may be to deprive of the property, and so of the rents and profits, of some other person who, but for such assignment or adoption or claim founded on inheritance, would be entitled thereto. This class of cases may be further divided into (a) cases where the defendant has attorned to the plaintiff: and (b) cases where the defendant has not attorned to the plaintiff. (a) Where the plaintiff claims by a derivative title, and the defendant has attorned to him, the defendant is not thereby stopped from showing that the title is really not in the plaintiff but in some other person: see the cases of *Rogers v. Pitcher* (6 Taun., 202), *Clardye v. Mackenzie* (4 M. and G., 143), and *Gregory v. Doidge* (3 Bing. 474). In this last case a person had occupied lands under A. Upon A's death this person entered into an agreement to pay rent to D, and paid one shilling as an acknowledgment of D's title, being ignorant that D had no title to the property. It afterwards turned out that D had no title, and it was held, that such person might show in answer to a suit for rent that D had really no title. Ordinarily, a tenant who had attorned would not set up this defence unless some person had satisfied him of a better title and prohibited him from paying rent to the plaintiff. There is no plausible reason why this third person should be made a party to the suit for rent, and it is really for his own interest that he should not be a party. If he is a party, he will be bound by the adjudication upon the question of title, and this adjudication may be based upon scanty materials and insufficient investigation, which are not uncommon when the subject-matter of the claim itself is inconsiderable. If he is [244] not a party, he has the chance of the tenant's plea being successful, and so of himself stepping into the place of landlord without personal litigation. If the tenant's plea is unsuccessful, he can litigate the question of title himself with better preparation and with experience gained from the contest at which he looked on without being a party. (b) Where there has been

no attornment, the plaintiff must prove his title as a condition precedent to establishing the relation of landlord and tenant between himself and the defendant; and if there be none of the other defences already referred to, this may be the only point to be decided. In England this constantly happens in actions for use and occupation, which resemble in all essential particulars suits for rent in these provinces. I do not find that persons who claim adversely to the plaintiff have been made parties to these suits, or that such a course has even been contended for: see the cases of *Hickman v. Nachin* (4 H. and N. 716), *Fursdon v. Clogg* (10 M and W., 572), *Cornish v. Searell* (8 B. and C., 171), *Phillips v. Pearce* (5 B. and C., 143), *Steele v. Mart* (1 B. and C., 272), *Rawson v. Eicke* (7 A. and E., 151), and *Selby v. Browne* (7 Q. B. 620). In some cases the plaintiff's title may be so clear, and the defence may be so palpably obstructive and unfounded, that the Court will be justified in dealing with the question of title in the rent-suit and as between the plaintiff and defendant. Again, there may be cases in which this question of title, is raised *bona fide* necessitating lengthy and intricate inquiries and involving property worth a large amount, while the actual matter in dispute may be only a few rupees. Section 28 of the Code of Civil Procedure enacts, that "all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative, in respect of the same matter." Now let *A* be the person claiming by a derivative title an estate and the right to receive the rent thereof, let *B* be another *bona fide* claimant, and let *C* be a tenant holding a jamma in the estate. We assume that *C* has never attorned to *A*. In order to entitle *A* to receive rent, he must prove his title in the rent-suit. [245] Now, if *B* is not made a party to this suit, any decree therein against *C* will not affect *B*. The remarks already made as to the advantage to *B* of watching the rent-suit and awaiting the result are here equally applicable. *B* cannot be injured by adopting this course, for the decree against *C* does not affect him; and if he afterwards recover the estate in a suit brought for that purpose, he will receive in the shape of mesne profits any rent which *A* may have recovered from *C* under the rent-decree. No doubt *A* and *B* may both be made defendants under the provisions of s. 28: but these provisions are not imperative. If the property in dispute is worth some thousands or lacs of rupees, and if *B* is made a party, there will be, in a suit for rent involving a few rupees only, a trial of the question of title to property of large value: and, as the law now stands, if this question of title is decided in the rent-suit, *B* being made a co-defendant with *C*, the decisions will have the effect of *res judicata* between *A* and *B*; and this decision may be had upon a court-fee stamp of small amount and before a judicial officer who would not have jurisdiction to try the title to the property in a suit instituted with this direct object. As has been already said, the provisions of s. 28 are not imperative; they allow a discretion, and in a case of this kind, both in the interests of the Government revenue and for the convenience of a proper adjudication, it is much better that the question of title should be tried in a suit directly framed and brought for this purpose.

There is a class of cases very common in this country,---i.e., where rent-suits are brought merely for the purpose of asserting or making a title to the land occupied by ryots. *A* and *B* are proprietors of adjoining estates. *A* claims some lands as part of his estate: *B*, on the other hand, asserting that these lands belong to his estate. Instead of at once suing *B* and raising the question of title, *A* commences operation by suing for rent the ryots in occupation of the disputed lands. If these lands have always formed part of *B*'s estate, the ryots ought to have no difficulty in showing that they were

not let into possession by A, or that they never attorned to A. If, however, A succeeds by fictitious kabuliats and manufactured evidence, [246] B, if not a party to the rent-suits, is not affected and can prove his title by independent evidence, and he is much wiser to hold aloof from the rent-suits than to run the risk of an adverse decision on the question of title, which will forever conclude him, although arrived at upon scanty materials and insufficient enquiry. Where the disputed lands are new chur, and the ryots who have occupied and cultivated have not attorned, the proprietor who first sues them for rent will have to prove his title, and his adversary has the advantage of watching and preparing himself. In this last class of cases, for reasons already given, it is not desirable that the essential question of title as between proprietors claiming adversely should be raised and tried in a petty rent-suit.

II. Then, as regards the other question which may be raised in a rent-suit,—namely, is the rent claimed due and unpaid? the defences upon this issue may be—

- (a) payment ;
- (b) set-off ;
- (c) deposit under the provisions of the Rent Act ;
- (d) limitation, &c. :

and it is clear that, in order to the trial of any of the questions so raised, it is unnecessary to make third persons parties to the suit.

Under these circumstances, we think the suits for rent should not be complicated by bringing in third persons who claim adversely to the plaintiff, and raising, as between such third persons and the plaintiff, questions of title which involve not merely the right to a small amount of arrears of rent, but also the right to a large and valuable property. In this case it appears that there were alleged to be certain kabuliats said to have been executed by the defendants in the plaintiff's favour. These kabuliats were not produced: and as to their non-production, we think that the remarks made by the Munsif are reasonable and proper. Then the Subordinate Judge remarks upon the fact of the Munsif not having allowed a registered document to be proved for the purpose of showing that the boundaries of the plots given therein described those plots as belonging to the plaintiff's share of the taluq. We think that [247] the Munsif was here correct, and that the Subordinate Judge was in error in supposing that this document, being a document between third parties, could be evidence against the defendants under s. 7 of the Evidence Act. With reference to the observation in the judgment of the Subordinate Judge that it is the boast of the Narail Baboos to bring refractory ryots to their senses, we are not shown that this question was raised, or that there is any evidence on the record to establish this fact; and we think that an observation of a personal nature like this is out of place in the judgment of a Court of justice. The Subordinate Judge having relied upon a considerable portion of documentary evidence, to a part of which he has assigned much greater weight than it deserves, and part of which, for example the registered kabuliat, is inadmissible in evidence, then passes on to consider the effect of the oral evidence. He commences thus:—"Then came a whole host of respectable witnesses, who proved payment of rents by the defendants in 1280 and 1281 partly." Having examined this evidence, he concludes his judgment thus:—"For all these reasons taken together I hold that the plaintiff started a strong *prima facie* case which the defendants were bound to rebut, but did not think it fit to rebut by proving their own case." It appears to us that the

conclusion at which the Subordinate Judge here arrives is a conclusion based upon the whole of the evidence, documentary and oral, taken together; and as we have pointed out that part of this documentary evidence has been improperly received, it follows that a conclusion based upon materials an essential portion of which was irrelevant cannot be sustained. We must, therefore, remand this case in order that the lower Appellate Court may come to a conclusion upon the evidence, excluding that which we have shown to be irrelevant, upon the question whether the relation of landlord and tenant has been established as between the parties to these suits. We desire to say that it lies upon the plaintiff not merely to start a strong *prima facie* case, but in the first instance to bear the whole burden of proof. Having regard to the serious errors committed by the Officiating Subordinate Judge, we direct that these appeals upon remand be taken up and disposed of by the District Judge. [248] The costs will abide the result.

Prinsep, J. --I agree in remanding this case for retrial by the District Judge, because there has been a mis-trial by the Subordinate Judge both in his manner of dealing with the case and in admitting as evidence what is not legal evidence.

Appeal allowed and cases remanded.

NOTES.

[See also 12 C.P.L.R., 1 (3).]

[8 Cal. 248 10 C. L. R. 143.]

APPELLATE CIVIL.

The 8th December, 1881.

PRESENT :

MR. JUSTICE MORRIS AND MR. JUSTICE PRINSEP.

Lutful Huq.....Judgment-debtor

versus

Sumbhudin Pattuck.....Decree-holder.

Limitation Act (XV of 1877), sched. ii, art. 179, and s. 15—Application for execution of decree—Order staying execution.

The plaintiff obtained an *ex parte* decree on 7th February 1876, of which he applied for execution on the 31st May 1876. Thereupon the defendant applied to set aside the decree, on the ground that he had had no notice of the suit, and an order was made staying the execution of the decree. The defendant's application was rejected on the 15th November 1876, and an appeal by the defendant, pending which the stay of execution was continued, was dismissed on the 19th December 1877. Previously, viz., on the 21st February 1877, the execution-case had been struck off the file. *Held* that, notwithstanding the application was made more than three years after the decree, and the plaintiff was not entitled to any

* Appeal from Original Order, No. 246 of 1881, against the order of F. Roes, Esq., Judge of Noakhally, dated the 21st June 1881.

deduction of the time during which the execution was stayed by order of Court, an application for execution made on the 10th December 1880 was, under art. 179* of Act XV of 1877, not barred, the decree not being final until the order dismissing the appeal on the 19th December 1877.

SUMBHUDIN PATTUCK obtained an *ex parte* decree against Lutful Huq on the 7th February 1876. He applied for execution on the 31st May 1876, and thereupon the judgment-debtor applied to revive the suit, on the ground that he had had no notice of it, and an order was made staying execution of the decree. That application of the defendant was rejected on the 15th November 1876, and against the order of rejection an appeal [249] was filed on the 13th January 1877, and the Judge ordered that execution should not be proceeded with until the appeal was decided. The appeal was dismissed on the 19th December 1877; but previously, *viz.*, on the 21st February 1877, the execution-case had been struck off the file. On the 18th December 1880 the present application was made for execution of the decree.

The lower Court held that, as the decree-holder was completely stopped by the order staying execution from taking any steps to execute the decree between the 13th January and 19th December 1877, he was entitled to make the application within three years from the last-mentioned date, and therefore the application was not barred.

Baboo Sreenath Banerjee for the Appellant.

Baboo Durga Mohun Doss for the Respondent.

The **Judgments** of the Court (MORRIS and PRINSEP, JJ.) were delivered as follows :--

Morris, J.—We affirm the order of the lower Court allowing execution to proceed, though upon grounds different from those on which the Judge bases his order. The facts of the case are as follow :—A decree was passed on the 7th February 1876. The decree-holder applied for execution on the 31st May following. On the 15th November of that year, the judgment-debtor made an application to revive the suit, on the ground that he had no notice of it. This application was rejected on the 15th November 1876, and an appeal by the judgment-debtor against this order was dismissed on the 19th December 1877. But previously to this, that is, upon the entertainment of the application to revive the suit, the Court directed the execution-proceedings to be stayed; and on the 21st of February 1877, that is, before the final order on appeal, on the application to revive the suit, was passed, the Court, of its own motion, struck the execution-case off its file. It thus happens that the judgment-creditor did not make a second application for execution to issue until the 18th December 1880, and it is contended that this application is out of time, it having been made more than three years from the date of the decree. But it seems to us, that this case is met by [250] the 2nd clause of art. 179, sch. ii, Act XV of 1877. The application to revive the suit really kept the decree open, and that decree did not become final until the order of the Appellate Court was passed on the 19th December 1877. The result is, that the second application is within time as being “made within three years of the final order of the Appellate Court,” and execution must, therefore, now follow.

The appeal is dismissed with costs.

Prinsep, J.—Execution of the decree now before us was stayed by an injunction issued by the Subordinate Judge. The decree-holder has applied to

*[*q.v. supra*, 8 Cal., 29.]

execute his decree within three years from the removal of that injunction, but it is contended that execution is barred under art. 179, sch. ii, Act XV of 1877, and it has been brought to our notice that, under the terms of s. 15 of that Act, a decree-holder would not be entitled to any exclusion of time during which execution was suspended by an injunction in calculation of the period allowed by the Law of Limitation. It might thus happen that, if the injunction remained in force for three years, execution could be absolutely barred. This appears to be the present state of the law. Fortunately it does not operate prejudicially in the present case, because we are able to treat the order passed by the Subordinate Judge, which had the effect of withdrawing the injunction, as the final order of the Appellate Court in the suit; but injustice may arise in another case owing to s. 15 applying only to suits and not to other proceedings.

Appeal dismissed.

NOTES.

[The Limitation Act, 1908, extended the operation of sec. 15 to applications for the execution of a decree. This sets at rest the previous conflict of decisions on the subject.

As regards the point as to *ex-parte* decrees, see also 2 All. 273; 16 Bom. 123; 21 Cal. 387.]

[11 C.L.R. 177]

[251] APPELLATE CIVIL.

The 9th December, 1881.

PRESENT:

MR. JUSTICE MORRIS AND MR. JUSTICE PRINSEP.

Chunder Doss and others.....Defendants

versus

Boshoon Lall Sookul.....Plaintiff.*

*Admission of an appeal after time Limitation Act (XV of 1877),
s. 5, sched. 1—Power of High Court to rectify such an error.*

The High Court, sitting on second appeal, has power to look into the grounds which a Judge has given for admitting an appeal after the lapse of the period allowed by the Limitation Act.

Morri Bewa v. Surendranath Roy (2 B. L. R., A. C., 184, note; s. C., 10 W. R., 178,) followed.

THIS was a suit to recover from the defendants certain arrears of rent for four bighas of land; the defendants contended that they used to pay the rent claimed, but that they paid it for a larger area of land than that in respect of which rent was now claimed; the Munsif, on the 29th June 1874, decided

* Appeal from Appellate Decree, No. 2458 of 1879, against the decree of Baboo Trailakhya Nath Mitter, Officiating First Subordinate Judge of Chittagong, dated the 2nd May 1879, affirming the decree of Baboo Ambicachurn Ghose, Munsif of Puttea, dated the 29th June 1874.

the case in favour of the plaintiff. On the 28th June 1875, the defendants brought a regular suit for a declaration that they held possession of eight bighas of the plaintiff's land, which suit was eventually, on the 5th February 1879, decided by the High Court, the Judges holding that the question of area had been already decided in the rent-suit, and could not be re-opened. On the 5th March 1879, the defendants applied to be allowed to appeal from the decree of the 29th June 1874, stating that they had instituted and prosecuted the regular suit on the belief that the rent-suit was no bar to it, claiming the relief under s. 5^d of the Limitation Act.

The District Judge recorded on the order sheet the following order: "The appeal is admissible under the provisions of s. 5, cl. 2, of Act XV of 1877, read with s. 14, cl. 1, of the same Act," and sent the appeal to the Subordinate Judge of the district for disposal.

[252] The Subordinate Judge held, that ignorance of the law on the part of the defendants was no sufficient reason for the delay in the presentation of the appeal: and that, moreover, twelve times the period of limitation allowed by law had expired before they instituted the regular suit, so that s. 5, cl. 2, of Act XV of 1877 could not apply. He therefore dismissed the appeal.

The defendants appealed to the High Court.

Baboo *Sreenath Banerjee* for the Appellants.

Mr. *R. E. Twidale* and Baboo *Aukilchunder Sen* for the Respondent.

The **Judgment** of the Court (MORRIS and PRINSEP, JJ.) was delivered by

Morris, J.—What has occurred in this case is, that the District Judge, after admitting the appeal, which was long out of time, sent the appeal for decision to the Subordinate Judge. On the hearing of the appeal, after hearing both sides in the matter, the Subordinate Judge threw out the appeal on the ground that it was inadmissible. It is contended before us in special appeal, on the authority of the case of *Jhotee Sahoo v. Omesh Chunder Sircar* (1. L. R., 5 Cal., 1), that the Subordinate Judge could not override the order of the District Judge admitting the appeal, and that he had only jurisdiction to hear the appeal on its merits. We have referred to the original order passed by the Judge. He does not in express words say that the appeal is admitted. He only says that it is 'admissible.' A doubt arises whether, by this order, the Judge did not intend that the appeal should be entertained subject to hearing objections to its admissibility when both sides were before the Court. However, assuming that the Judge did admit the appeal, and that, under the authority of the case quoted, the Subordinate Judge had no jurisdiction to overrule the District Judge's order of admission, it seems to us that we ought to deal with this matter in special appeal as a case in which the District Judge has exercised so bad a discretion as to amount to an irregularity in law. The record shows that the subject of dispute between the parties [253] was decided by the Munsif so long ago as the 29th June 1874, and that order became final as the defendants preferred no appeal against it. For

* [Sec 5:—If the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, presented or made on the day

Proviso where Court is closed when period expires. that the Court re-opens:

Any appeal or application for a review of judgment may be admitted after the period of limitation prescribed therefor, when the appellant or

Proviso as to appeals and applications for review. applicant satisfies the Court that he had sufficient cause for not presenting the appeal or making the application within such period.]

a whole year the defendants slept over their rights, and then, by means of a suit for declaration of right, they sought a form of relief which the High Court eventually, in 1879, declared to be closed against them. Foiled in this attempt, the defendants have attempted to re-open, by means of appeal, the question which was determined by the Munsif in June 1874. It seems to us that the District Judge, in admitting this appeal, has overlooked the fact that, for a whole year, that is, long after the period prescribed by the Law of Limitation for appeal had expired,—the defendants allowed the decision to stand, and that it is entirely owing to their laches that this long delay occurred. The District Judge, too, has done this without having before him material sufficient in law to enable him to come to the conclusion that the delay was justified. We follow as an authority in this matter the case of *Mowri Bewa v. Surendranath Roy* (2 B. L. R., A. C., 184, note; S. C., 10 W. R., 178), in which a Division Bench of this Court held, that “it is competent for the High Court, sitting on special appeal, to look into the grounds which a Judge has given for admitting an appeal after the lapse of the period limited for the purpose by the Procedure Code.” We consider that the Judge has exercised an improper and unwarrantable discretion in admitting this appeal: and we therefore affirm in substance, though on an entirely different ground, the order of the Subordinate Judge disallowing the admission of the appeal.

We give no costs of this appeal.

Appeal dismissed.

NOTES.

[As to the exercise of discretion, see also 6 Bom. 304; 23 Bom. 513; 25 All. 71; 27 All. 688

As regards cancellation, see 2 C.W.N. 461 and the Notes to 5 Cal. 1, in the LAW REPORTS REPRINTS.]

[10 C.L.R. 33]

[254] APPELLATE CIVIL.

The 17th September, 1881.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE,
MR. JUSTICE MORRIS, AND MR. JUSTICE TOTTENHAM.

In the matter of a reference from the Board of Revenue under s. 46
of the General Stamp Act.

Ex parte Hill and others

*Stamp Act (1 of 1879), s. 3, cls. 12, 13; s. 7, para. 2.—Stamp-duty—
Lease—Patta—Mortgage.*

By an instrument which recited that *A* was indebted to *B* in the sum of two lacs of rupees and that *A* had taken a fresh loan of Rs. 2,59,000 from *B*, the former leased certain monzas to the latter for a term of twenty years, at a yearly rental of Rs. 1,40,000. It was provided that, from the rent of each year, a portion should be deducted in payment of *A*'s debt to *B*; so that in this way the whole debt should be paid by a series of instalments

* Reference from the Board of Revenue, No. 977 B. of 1881, made by A. Forbes, Esq., Officiating Secretary to the Board of Revenue, L. P., dated the 13th September 1881.

extending over the term of the lease. The instrument also contained the usual clauses found in pattas. On the question, what was the proper amount of stamp-duty leviable on the document,—

Held, that though the arrangement intended to be effected was partly a lease and partly an usufructuary mortgage, yet the instrument came within the provisions of s. 7, para. 2 of the Stamp Act, and should be stamped as a mortgage only.

IN this case the question was as to the stamp-duty chargeable on an instrument called a patta, granted by the Rajah of Bettia to Messrs. Hill & Co., the proprietors of the Turkowlia factories. The instrument is as follows :—

“1, Maharajah Rajendra Kisore Singh, Bahadoor, malik of Parganas Majhawa, Semraon Sarkar, Chumparun, and of villages in the districts of Sarun, Mozufferpore, and Gorakhpore, &c., do hereby declare that Mouzas, Turkowlia, etc., are in thika to Turkowlia Indigo Concern, at a yearly rental of Rs. 1,26,892-6, on receipt of a security deposit to the amount of a year's rental (jamma) and of a patowa loan on interest as stipulated in the lease dated the 8th February 1873, for the term of fifteen years up to 1294 Fuslee; and Mouzas Bijulpore, &c., at an annual rental (jamma) of Rs. 12,314-12, on [235] receipt of a year's rental as deposit without interest, and of a patowa loan on interest extending the term of years for different villages up to 1306 Fuslee; and Khap Koosahar and Khap Chatia, at a yearly rental of Rs. 43, on receipt of a deposit of Rs. 8-12 without interest. The total amount of the yearly rental of the abovesaid villages being Rs. 1,40,280, and the total amount of deposit received being Rs. 1,40,245-14. On deducting the yearly receipts up to 1207 Fuslee by the thikadars from the leased villages in liquidation of the loan as per stipulation of the patowa lease, the Raj still owes to the said Indigo Concern an amount of Rs. 2,01,406-13 on account of loan and deposits made by the proprietors of Turkowlia Concern. I have now taken another new loan of Rs. 2,58,393-3 on interest at annas 8 per cent. per month from Messrs. Henry Hill & Co., proprietors of Turkowlia factories, etc., through their Manager Dr. James H. G. Hill, by drafts on Messrs. Begg, Dunlop & Co., of Calcutta, which being added to the old, amounts to Rs. 4,59,800. Now it has been agreed with my free will and consent, with the concurrence of my son Maharaj Kumar Harendra Kisore Singh Bahadoor, and of Messrs. Henry Hill & Co., proprietors of Turkowlia indigo factories, etc., through the mediation of Mr. F. M. Gibbon, C.I.E., Manager of my estate, and of Dr. James H. G. Hill, Manager of Turkowlia Concern, that, in supersession of all the abovesaid leases, the terms of which have not yet expired, another new lease for Mouzas Turkowlia, etc., be given for a term of twenty years, commencing from 1288 Fuslee, and during the first nineteen years of the term, the amount of the principal debt due by me, together with interest at 8 annas per cent. per month, be liquidated from the yearly rental of the villages given in lease according to sadhawa patowa (conditional usufructuary mortgage) system. Out of Rs. 1,40,245-14 received as deposit under old leases, I will repay in cash just at the time of the execution of this deed Rs. 39-10 to the said thikadars, keeping the balance of Rs. 1,40,206-4, equivalent to one year's rental, as deposit under this new lease, which amount will be accounted for as rent for the year ending with the term of this lease. On the above agreement, I do hereby lease to the said Company the villages Turkowlia, etc., named at the bottom of this document, and which are still in their possession by virtue of the former leases for the term of twenty years from 1288 Fuslee to 1307 inclusive, by taking due kabuliats from them and transferring to them the same zamindari rights and

* Conditional usufructuary mortgage.

privileges as they had heretofore with the exception of Mohal Neemakxayer, Khori saltpetre refineries, Mokharikhap and jagir [236] lands given by the Raj, jalkar mehal of Tappa Khadda, and other items prohibited by Government. - the amount of the yearly rental of all the villages given now in lease being the same as before, with a small deduction of Rs. 376 as mojarai, and with the addition of Rs. 302-2, being the rent of Mehal Charsa, which is now transferred to the said thikadars under the lease, and thereby the total amount of the yearly rental under the lease being Rs. 1,40,206-4 as detailed below. It is hereby required that the said thikadars, their heirs, and their executors should remain in possession as they were heretofore under former leases, appropriating the produces and income of the villages, and satisfying their demands of debt due from me, together with interest, out of the yearly rental of the villages till 1306 Fuslee, according to the kist given below, and the amount of deposit, Rs. 1,10,206-4, as stated above to have been received by the Raj, should be kept as deposit without interest in like manner, as it was before, with the condition that it will be accounted for as rent of the villages due to the Raj for the year ending with the term. It is also required that the thikadars, after satisfying the annual kist of their dues with interest out of the yearly rental, shall pay the balance every year in four kists, as stated below, in the treasury of the Raj, taking due receipts from the maliks, or the manager for the time being. In default of paying the above four kists or one year's rent, I, the malik, my heirs, or my manager for the time being, shall have the rights reserved to us to deduct from the amount of deposit, the arrear rent due to the Raj with 12 per cent. interest thereon, and to break this lease after repaying the unliquidated portion of the loan to the thikadars, their heirs or executors, and to make resettlement of the villages with any other person. The thikadars should not cut themselves, or allow others to cut, the trees belonging to assamis or gayari (unclaimed) trees; nor should plant any tope, establish any hat, bazar, or gola; dismiss any registered patwari without my and my manager's sanction. In case the thikadars like to get their work done by their own motsaddi, they can do so on giving copies of village papers to the registered patwari by taking due receipt from him. No claim for remission in jamma on account of diluvion shall be heard or accepted, nor the Raj shall claim any excess jamma on account of alluvion. The thikadars should take proper care of the gayari (unclaimed) bamboos, and supply annually by their own carts 2,289 bamboos and 476 bundles of thatching grass during the term of the lease to the chawnis of Chitowni and Motihari; in default, the cost of the same, at the rate of 10 [237] per cent., will be deducted from the amount of the rent paid by the thikadars. It is also required that the thikadars should not grant patta to any assami at a low rate of rent. The orders of Courts and Police should be executed by the thikadars. The thikadars should take care of the boundaries of the villages under this lease, that a dhooz of land may not go out of their possession. Should any dispute regarding boundary arise between them and other thikadars of the Raj, they should settle it on referring to the Government thakbust map of 1845, or to any settlement done by the Raj, the expenses being borne by themselves; but should such dispute arise in the Civil Court between them and other maliks, the Raj would conduct the case and bear the cost. The village charges and salaries of patwaris, as a custom, should be paid in by the thikadars, and during the term of this thika, the thikadars should not grant leases at a low rate to their relatives or protégés; and if during the term of the lease the thikadars purchase any ryot's rights of occupancy, they shall have, after the expiration of the terms, no claim to such purchase or right of possession. The thikadars should submit copies of decrees they may get in cases of dispossession, etc., other than rent cases. The

thikadars should take utmost care of the sayers and property of the Raj, and protect ryots. The road, public works, and embankment cesses, etc., should be paid in by the thikadars in addition to the jamma paid by them, they having every right to realise such cesses from the ryots by the virtue of this deed. If they deviate from any of the above terms or conditions after repeated takeoeds given to them, this lease shall be considered null and void. On the above terms or conditions this sadhawa patowa patta is written."

Then followed a schedule containing in the first column the years, in succession, of the term for which the patta was granted: in the second column, opposite each year, the total yearly rental, namely, Rs. 1,40,000-4-0; in the third column, the proportion of this total rental to be given in each year to the lessor; and in the fourth column, the proportion of this total rental retained by the lessee. From this schedule it appeared that the whole debt would be paid off by the last year of the term.

The only question was as to the amount of stamp-duty payable on this instrument.

Mr. *P O'Kneally* argued, that the document amounted to a lease for the time stipulated, with a power to the lessee to [258] appropriate a part of the rent, as it should become due, in paying off his lessor's debt. Had the power been written on a separate piece of paper, the remainder of the document would clearly have been a lease. What difference can it make that the lease and the power are in the same document? [GARTH, C.J.—It is not a mere power. The lessee could not sue for his debt during the term of the lease.] Then the power at most amounted to an agreement which would require an additional eight-anna stamp. It is impossible to put this document higher than a lease with an agreement for payment of the debt superadded. Taxing Acts must be construed strictly—*The Port Canning Land Company, Ltd.* (16 W. R., 208) and *Cor v. Rabbits* (L. R., 3 App. Cas., 473, at p. 478). This is no mortgage, as there is no intention to mortgage and no equity of redemption reserved—*Mashook Ameen Sazzada v. Murem Reddy* (8 Mad. II. C. Rep., 31) and *Macpherson on Mortgages*, pp. 8, 9.

The Advocate General Mr. (*G. C. Paul*) for the Government.—This instrument is a lease, and it is also a mortgage; it should therefore be stamped as a lease and as a mortgage. [TOTTENHAM, J. Are you not governed by the second clause of s. 7?] No, the instrument relates to two distinct matters, the lease and the security, and should be stamped as such. *Mashook Ameen Sazzada v. Murem Reddy* (8 Mad. II. C. Rep., 31), is not consistent with the decisions of this Court.

The **Opinion** of the Court (GARTH, C.J., MORRIS, J., and TOTTENHAM, J.,) was delivered by

Garth, C.J.—We think that the instrument in question should be stamped as a mortgage only.

The arrangement which it is intended to effect is partly a lease and partly a usufructuary mortgage. In consideration of the former loan being allowed to continue, and of the additional loan being now made by the proprietors of the Concern, the Maharajah grants a lease of the properties for twenty years, upon terms which secure to the lessees the repayment of the [239] whole sum with interest by yearly instalments and at the same time secure to the Maharajah a very substantial share in the usufruct of the property. It seems clear to us, that, under these circumstances, the loan is the consideration for the lease and the lease is the consideration for the loan; and that

neither part of the arrangement would have been complete without the other.

We, therefore, think it impossible to say, that the instrument relates to two distinct matters within the meaning of the first clause of s. 7 of the General Stamp Act. That clause, in our opinion, relates only to transactions so distinct in their nature as to be capable of being carried out by two or more instruments instead of one, whereas here the contract is essentially one transaction. On the other hand we think, that the case falls within the second clause of s. 7, the instrument being one which answers two of the descriptions in the first schedule, and which is therefore chargeable with the highest duty which can be imposed on an instrument of either description.

It has been suggested that, in this point of view, a large proportion of the rental would in effect pay no duty, because that share of it only would be charged which the lessees are empowered to retain in payment of the mortgage-debt, and no duty would be charged upon the share which is payable to the Maharajah. This, however, is a contingency, which might arise in many other cases, and for which the Stamp Act, so far as we can see, appears to have made no provision.

NOTES.

[See (1894) 17 All. 55 (57) F.B., which deals with the scope of sec. 7 of the Stamp Act (1879) Stamp Act 1899, s. 6]

[8 Cal. 259 10 C.L.R. 365]

APPELLATE CRIMINAL.

The 14th December, 1881.

PRESENT :

MR. JUSTICE PONTIFEX AND MR. JUSTICE FIELD.

The Empress

versus

Soddanund Mahanty and others.*

Stamp Act (I of 1879), —ss. 37, 40 - Arbitration—Award—Evading payment of stamp-duty.

Six persons acted as arbitrators in a dispute between two of their fellow-villagers, and delivered their award in writing. Subsequently, the award was [260] filed in evidence by one of the disputants in a civil suit in the Court of the Munsif of Cuttack, who, on the ground that the document bore no stamp, impounded it and forwarded it to the Collector, who ordered the writer to be prosecuted. The Deputy Magistrate, to whom the case was referred, summoned the six persons who had acted as arbitrators, and fined them Rs. 25 each. On a reference to the High Court by the District Magistrate,—

Held, that the conviction was illegal, and should be set aside.

Criminal Reference, No. 218 of 1881. from the order made by R.H. Pawsey, Esq., Magistrate of Cuttack, dated the 12th November 1881.

Held also, that the procedure laid down in s. 37 of the Stamp Act must be strictly followed; and that, before a prosecution can be instituted under s. 40, the Collector is bound to form an opinion as to whether the offence was committed with the intention of evading payment of the proper duty.

In this case the accused were six persons who had acted as arbitrators in a dispute between two of their fellow-villagers respecting a plot of land, the value of which was not above Rs. 50. One of the disputants having afterwards filed the award in the Court of the Munsif of Cuttack, that Judge held, that the stamp payable was Rs. 5, which with the penalty amounted in all to Rs. 55. This sum not having been paid, the Munsif, on the 20th June 1881, impounded the document, and sent it to the Collector, who ordered a criminal prosecution. The Deputy Magistrate, to whom the case was referred, summoned the six members of the punchayet, and fined them Rs. 25 each. The case was referred by the Magistrate to the High Court.

The **Judgments** of the Court (PONTIFEX and FIELD, JJ.) were delivered as follows:—

Field, J.—In this case six persons have been convicted under s. 61 of the Indian Stamp Act, I of 1879, under the following circumstances: These six persons were members of a punchayet, who decided a matter relating to a small piece of land, acting as arbitrators or umpires between two of their fellow-villagers. This decision, or arbitration, was reduced into writing, but the writing was not stamped. One of the persons at whose instance it was made having subsequently resorted to the Civil Court, this written award was filed in the suit. This paper may possibly have been an award within the meaning of art. 10, sched. I of the Stamp Act, and as it had not been stamped, the Munsif, before whom it was filed, proceeded to impound it; and subsequently, in accordance with the provisions of s. 35 of the Stamp Act, he forwarded the paper to the Collector. The Collector upon this made an order that the writer of the document be sent to the Deputy Magistrate for trial under the Criminal Code. The Deputy Magistrate upon this summoned the six persons who had acted as arbitrators, and imposed upon them a fine of Rs. 25 each, making a total of Rs. 150.

It appears to us, that this conviction is illegal, and must be set aside. When the Munsif forwarded the award to the Collector under the provisions of s. 35 of the Stamp Act, the course which the Collector ought to have pursued was that laid down by s. 37 of the Act, the language of which section is imperative: "He shall adopt the following procedure." If the Collector was of opinion that the instrument was chargeable with duty and was not duly stamped, his course was to require the payment of the proper duty, or the amount required to make up the same together with a penalty (*see* cl. (b) of s. 37). If this duty and penalty had been paid, then, according to the provisions of s. 40, such payment would not have been a bar to the prosecution of any person who appeared to have committed an offence against the stamp law in respect to the instrument under the proviso to s. 40; a criminal prosecution could not have been instituted unless it appeared to the Collector that the offence was committed with an intention of evading payment of the proper duty. It appears to us to be clear from the provisions referred to, that it was the intention of the Legislature in the first place to compel the payment of the stamp-duty together with a penalty. By the payment of the stamp-duty, the revenue would be protected from loss; and the exaction of a small money penalty would be a sufficient punishment in the large majority of cases in which the omission to stamp at all, or stamp duly, arises from negligence,

inadvertence, or ignorance of the provisions of the stamp law. The severer proceeding of a criminal prosecution is intended for those cases only in which there is an intention to evade the stamp law; and before a criminal prosecution can be instituted, it is incumbent upon the Collector to form an opinion whether it appears to him that such intention existed. Now, in the [262] present case the Collector did not adopt the procedure provided by the Act. He did not call upon the parties concerned to pay the stamp-duty together with the penalty prescribed by cl. (b), s. 37. Had he done so, there is no reason to suppose that it would not have been paid. The penalty required by the Munsif was apparently higher than it should have been under the Stamp Act; and it may well have been that the Collector would have required a smaller sum, and that this smaller sum would have been paid by the parties concerned. Thus, if the duty, as assessed by the Collector, together with the penalty, had been paid, a criminal prosecution could not have been instituted, unless it appeared to the Collector that there had been an intention of evading the proper duty. It is quite possible that the Collector might have been satisfied that no such intention existed, and that the exaction of the stamp-duty and the stamp penalty may have appeared to him a sufficient vindication of the interests of the public revenue. We may observe that, as the arbitrators did not claim any benefit under the award, and could receive no advantage from the non-payment of the stamp-duty, it is not easy to see how they could have had an intention of evading the stamp law. The Stamp Act is a fiscal enactment, and must be strictly construed; and before any person can be punished for an offence relating to the stamp revenue, the procedure prescribed by the Act must be strictly followed. "If," said Lord Mansfield in *Hartley v. Hooker* (2 Cowper, 523), "a new offence is created by statute, and a special jurisdiction out of the course of the common law is prescribed, it must be followed. If not strictly pursued, all is a nullity and *coram non jure*." We are, therefore, of opinion that, as the course of procedure prescribed by the Act was not followed in this case, the prosecution before the Deputy Magistrate was unwarranted, and the conviction is bad in law. We reverse the conviction and direct that the fines, if paid, be refunded.

Pontifex, J. -I am of the same opinion.

NOTES.

[As regards the intention to evade duty, see also 7 Bom. 82; 7 Mad. 537. In 12 Mad. 231 it was held that the conviction would not be bad for failure of the Collector to record proceedings under sec. 40 of the Stamp Act 1877. See also (1893) U. B. R. (1892-96) Vol. I, 307; (1892) L. B. R. (1872-92) Vol. I, 623.]

[- 10 C. L. R. 1]
 [263] APPELLATE CIVIL.

The 3rd September, 1881.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

In the matter of the Petition of Mahomed Busheerul Hossein.

Bibee Munghur and another
versus
 Mahomed Busheerul Hossein.*

Appeal—Lunatic—Act XXXV of 1858, ss. 3, 4, 22—Notice.

On an application made by the wife and son of Tajamul Hossem, an alleged lunatic, under the provisions of Act XXXV of 1858, s. 3, the daughters of the alleged lunatic, who were served with a notice under s. 1† of the same Act, appeared at the hearing of the application and cross-examined the witnesses examined in support of the application. The Judge found that Tajamul Hossem was of unsound mind, and appointed his wife, Mussanrut Latifan, to be the guardian of his person. The daughters appealed to the High Court.

Held (on an objection being taken that the appellants had no *locus standi*) that the daughters were entitled to appeal under the provisions of s. 22, Act XXXV of 1858.

Sherman v. Schorn (21 W. R., 121) referred to.

Quære—Whether a right to sue to recover a property would be sufficient to confer jurisdiction under Act XXXV of 1858?

THE facts of this case are sufficiently set forth in the Judgment of the Court.

Mr. Sandel for the Appellants.

Baboo Saligram Singh for the Respondent.

The **Judgment** of the Court (MITTER and MACLEAN, JJ.) was delivered by

Mitter, J.—This is an appeal against an order of the District Judge of Patna, adjudging one Tajamul Hossein, a lunatic under Act XXXV of 1858, and appointing his son, [264] the respondent before us, the manager of his estate. The appeal has been preferred by the daughters of the alleged lunatic. When this appeal was first argued before us, we adjourned it for a time to allow the alleged lunatic to prefer an appeal if he was so advised; but on the expiration of the time allowed no such appeal having been preferred, this appeal of the daughters was heard.

An objection *in limine* has been taken by the pleader on behalf of the respondent, that this appeal ought to be rejected on the ground that the daughters have no *locus standi*. We do not think this objection is valid.

* Appeal from Original Order, No. 138 of 1881, against the order of H. Beveridge, Esq., Officiating Judge of Patna, dated the 4th March 1881.

† [Sec. 4 :—When the Civil Court is about to institute any such enquiry as aforesaid, it shall cause notice to be given to the alleged lunatic of the time and place at which it is proposed to hold the enquiry. If it shall appear that the alleged lunatic is in such a state that personal service on him would be ineffectual, the Court may direct such substituted service of the notice as it shall think proper. The Court may also direct a copy of such notice to be served upon any relative of the alleged lunatic.]

*The proceedings in the District Judge's Court at Patna were initiated by an application made by the respondent under s. 3 of Act XXXV of 1858. It was alleged in that application, that the alleged lunatic was then residing at Patna with the applicant, his son, and the applicant's mother, his wife. It was alleged that Tajamul Hossein is a resident of the district of Gya. A notice under s. 4 was ordered to be stuck up at the house of the lunatic in the district of Gya. A general notice was also issued inviting objections from persons interested. Therefore the daughters, appellants before us, appeared and opposed the petition. They were treated as parties to the proceeding, being allowed to cross-examine the witnesses examined in support of the application.

Under the circumstances stated above, we are of opinion that the daughters of the alleged lunatic have the right of appeal to this Court under s. 22 of Act XXXV of 1858. Although an absence of appeal on the part of the alleged lunatic raises some presumption in favour of the correctness of the lower Court's order, yet a relative interested in the personal welfare of the alleged lunatic, and in the preservation of his estate, may appeal against the adjudication by the lower Court, if he was a party to the proceedings. In *Sherman v. Schorn* (24 W. R., 121), a relative of an alleged lunatic was allowed to appeal against an order adjudging him a lunatic under the Act in question. The provision in s. 4 of the Act, that "the Court may also direct a copy of such notice to be served upon any relative [265] of the alleged lunatic," shows that it was the intention of the Legislature to confer the right of appeal upon such relatives who are made parties to the proceeding, or who are entitled to appear as such. We therefore overrule the preliminary objection.

Upon the merits it is quite clear to us that the enquiry in this case was quite insufficient. The petitioner and another witness were examined, and it is not satisfactorily established upon their evidence that Tajamul Hossein is of unsound mind and incapable of managing his affairs. The District Judge mainly relies upon two medical certificates which have not been regularly proved in this case. But putting aside that defect in the procedure, the medical opinions expressed in those two documents do not show that the alleged lunatic is of unsound mind and incapable of managing his affairs. The order of the lower Court, therefore, cannot stand, and we reverse it accordingly. The appellants are entitled to recover from the respondent the costs of this proceeding in this as well as in the lower Court. We assess the hearing fees at Rs. 50.

It may be noted here that the appellants before us objected to the jurisdiction of the lower Court to entertain the application in question on two grounds, *viz.*, (i) that Tajamul Hossein was not residing within its jurisdiction, and (ii) that he was not possessed of any property. As regards the first objection, it appeared to us that the District Judge has too readily assumed jurisdiction without sufficient inquiry. The other objection raises a difficult question of law. The District Judge is of opinion that a right to sue for the recovery of a property would be sufficient to confer jurisdiction under the Act. The question is not free from difficulty. However, it is not necessary for us to express any opinion upon it, as we reverse the decision of the lower Court upon the merits.

Appeal allowed.

NOTES.

[See the Indian Lunacy Act IV of 1912.]

[= 40 C. L. R. 91]

[266] APPELLATE CIVIL.

The 25th August, 1881.

PRESENT :

MR. JUSTICE TOTTENHAM AND MR. JUSTICE BROUGHTON.

In the matter of the Petition of Kashi Chunder Sen.

Brohmomoyee and another

versus

Kashi Chunder Sen.*

Act IX of 1861—Jurisdiction—Marriage—Custody of minor—Injunction.

The paternal uncle of a female Hindu minor, whose father was dead, applied to the District Judge, under Act IX of 1861, for the custody of the minor, and for an injunction to prevent the mother of the minor from carrying out a projected marriage. On the 8th of March 1881, the Judge issued an *ad interim* injunction. When the application came on for hearing, it appeared that the marriage had taken place before the order of injunction had reached the parties. The District Judge found that though the mother was entitled to the custody of the minor, yet the petitioner was entitled to give the minor in marriage in preference to the mother. The District Judge also found that the marriage had not in fact been validly performed. On appeal to the High Court, it was contended that the District Judge had no jurisdiction to determine the right of any party to give an infant in marriage on an application under Act IX of 1861, or to grant an injunction; and it was also contended that the Magistrate was wrong in entering into the question of the factum of the marriage.

Held that, under the provisions of Act IX of 1861, the District Judge had jurisdiction

Balmakund v. Janhi (I. L. R., 3 All. 403), *Wolverhampton Waterworks Co. v. Hawkesford* [28 L. J. (N. S.), C. P., 212], and *Collector of Pubna v. Ramakath Tagore* (B. L. R. Sup. Vol., 630) referred to.

Held also, that for the purpose of deciding whether the injunction should issue, the Judge was justified in entering into the question of the factum of the marriage, though his finding on that point would have no effect in determining its validity.

THIS was an appeal from a decision of the District Judge of Hooghly, dated the 23rd of April 1881. The case made and the issues settled are thus set out in the Judgment of the Court below :—

“ In this case the uncle of a female minor has applied to this Court to restrain the mother from giving the girl in marriage [267] without his sanction, and to make over the person of the girl to his guardianship under Act IX of 1861. A temporary injunction prohibiting the celebration of the marriage was issued. The father of the intended bridegroom has represented by petition that the marriage had been celebrated before the order reached the parties. He also alleges that the mother has a prior title to the custody of the minor. The mother also represents that the marriage has been completed, and that, by her husband's permission, she had the right to sanction the marriage. The petitioner denies that a marriage in due form has been celebrated.

“ The following issues were framed : (i)—Has an uncle authority to give in marriage his deceased brother's daughter, or to forbid the giving of the girl,

* Appeal from Original Order, No. 162 of 1881, against the order of T. F. Bignold, Esq., Judge of Chittagong, dated the 23rd April 1881.

in marriage by her mother? (ii)—If there has been a *de facto* marriage of such girl, is the uncle entitled to obtain her custody directly or otherwise in preference to her mother? (iii) Has the marriage of Shoshee Mukhi been celebrated? (iv)—Is the plaintiff entitled to any and what relief?"

A preliminary objection was taken that the case did not come within the scope of Act IX of 1861: this the Judge overruled, and then proceeded to consider the issues. The Judge found the first issue in favour of the uncle, citing *Vyavastha Darpana*, 651; *Ex parte Junky Persaud Angurwallah, In re Moonce Beebe* (2 Boulnois, 114); and *Namasevayam Pillay v. Annammai Unmul* (4 Mad. II. C. R., 339). The second issue was found in favour of the mother. On the third issue the Judge found that there was not a valid marriage (referring to Tagore Law Lectures for 1878, p. 94, *et seq*), and then went on to say:—"I therefore issue an injunction to the mother forbidding her to give the girl in marriage without the uncle's consent. If the uncle arranges a suitable marriage for the girl, who is already nine years old, within the current year 1881, and desires the custody of the minor to effect the marriage, the Court will, if the uncle has duly consulted the mother, and if the marriage be a suitable one, be disposed, on application at the time, to arrange for the custody of the minor with a view to such marriage. But if the uncle neglect to arrange [268] a suitable marriage within the current year 1881, the Court will be disposed, on application, to authorize the mother to contract the girl in marriage without reference to the uncle."

The mother appealed to the High Court, on the grounds that nothing, except a mere right to the custody of the infant, could be determined on an application made under Act IX of 1861: and further, that the learned Judge was wrong in his finding as to the factum of a valid marriage; and that, admitting his finding to be correct, he had no right to enter into that question.

Baboo *Kali Prasanna Dutt* and Baboo *Troilukhyanath Mitter* for the Appellants.

Baboo *Gurudas Banerjee* and Baboo *Rashbehary Ghose* for the Respondent.

The **Judgments** of the Court (TOTTENHAM and BROUGHTON, JJ.) were delivered as follows:—

Tottenham, J.—This was an application made by one Kashi Chunder Sen to the District Judge, praying under Act IX of 1861 for the custody of a minor, his niece, and also for an injunction restraining the minor's mother and one Gopee Mohun Ghose from carrying out a marriage between the minor and the son of Gopee Mohun.

The marriage was at first fixed for the 10th of March 1881, being two days after the petition was presented. The Judge accordingly issued an injunction on the 8th of March, and fixed a day for the disposal of the petition. When the petition came on for hearing, it was objected that, before the Judge's injunction reached the parties, the marriage had been performed. It was therefore contended that the applicant Kashi Chunder Sen had no more *locus standi* under Act IX of 1861. The Judge at once found that the mother of the minor was by law the person entitled to the custody of her daughter so far as the bodily custody was concerned, and that point appears to have been practically undisputed. But in order to satisfy himself whether he should give a permanent injunction or not as prayed by the petition, the Judge thought it necessary to investigate the question whether the marriage alleged to have been per- [269] formed had been performed according to the *shastras*, and whether it was a valid marriage or not: for, as he says, if the marriage turned out to be not a

valid one, the uncle would be entitled to an injunction prohibiting the mother from giving the girl in marriage without his consent. Besides the undisputed point as to the right of the mother to the bodily guardianship, it was also found, and was undisputed, that, as regards the minor's disposal in marriage, the uncle, being her father's brother, had a superior right to that of the mother. It was for this reason that the Judge laid down that if the ceremonies gone through did not amount to a marriage, the uncle would be entitled to an injunction prohibiting the mother from giving the girl in marriage without his consent. The result of this enquiry was, that the Judge was satisfied that the proceedings shown to have taken place between the minor and the son of Gopee Mohun did not amount to a marriage, and upon this finding the Judge finally ordered the issue of an injunction to the mother prohibiting her from giving the girl in marriage without the uncle's consent. The order further provides, that in the event of the uncle arranging a suitable marriage for the girl within the current year 1881, the Court would interfere to arrange for the proper custody of the minor with the view of giving effect to such marriage of the minor. The order further provides, that if the uncle neglect to arrange a suitable marriage within the current year 1881, the Court will be disposed, on application, to authorize the mother to contract the girl in marriage without reference to the uncle.

The mother and Gopee Mohun (whose have appealed to this Court against the District Judge's order. It is contended on their behalf that Act IX of 1861 does not allow the District Judge to determine the right of any party to give an infant female in marriage, or to allow any party to obtain an injunction in respect of a proposed marriage. It is contended, that the application ought to have been dismissed upon the first finding that the mother was lawfully entitled to the custody of her daughter. An objection also has been taken to the decision of the Judge against the validity of the marriage which took place. We agree with the Judge in thinking that the application [270] made does come within the scope of Act IX of 1861, as that Act provides for "any claim" in respect of "the custody or guardianship" of a minor. We think that a claim to be guardian for the purpose of marriage does come within the scope of the Act. If a person can, under the Act, claim the guardianship for marriage, we think it quite clear that he is entitled to ask under the Act an injunction to restrain any other person from contracting an improper marriage between the infant and another. So far, therefore, as the Judge went into the question as to the petitioner's right to an injunction, we think he was correct. It is equally clear to us, that under Act IX of 1861 the Judge could not decide as between the parties the question whether the marriage actually performed was a valid marriage or not. We think that in this case the Judge only meant to go into that question, so far as it was necessary to satisfy his own mind, as to whether there was still time or necessity for him to issue an injunction. He could not have intended his finding on this point to be binding upon any of the parties. It certainly could not bind the parties, who most are interested in the question, —viz., the alleged bride and the bridegroom, as they were not parties to the proceedings. We have been asked to set aside this part of the Judge's decision altogether. But it seems to us unnecessary to do this, as it is sufficient that we should record that the finding, such as it is, is not a judicial declaration in the sense of its being binding upon anybody. It leaves the question of the validity of the marriage still an open question, and when that question is disputed, it must be settled by a regular suit.

As to the injunction issued by the District Judge, we think that, in the view he took of the positions of the parties, he was right in issuing it: and we do not think it right for us to set it aside. If the marriage has already been

validly performed, that injunction of course hurts nobody. If, on the other hand, the marriage has not been validly performed, the injunction still remains in force, and will be of very great use.

On the whole, it appears to us that the appeal should be dismissed with costs.

Broughton, J.—I agree in thinking that the Judge has no [271] power to determine the question of marriage so as to bind the minors who are not parties to the proceedings; and I think that he cannot and did not intend to determine the question except for the purpose of satisfying himself whether he should or should not issue an injunction. If a valid marriage has taken place, the injunction would not affect anybody; if, on the other hand, a valid marriage has not taken place, then the injunction is a very useful thing for the interests of the minor. The question of marriage or no marriage is for all purposes still an open question. I think the Judge had jurisdiction under Act IX of 1861 to determine whether he ought to issue an injunction on this application, and I do not think that the Act is confined merely to questions that relate to the custody of the person of an infant. In fact, it clearly appears from the Act itself that it relates to the custody or guardianship. The alternative expression is to be found in several of the sections. And this is a case which shows the necessity of a summary mode of interference when the interests of the minor are put in jeopardy by the conduct of those people who are immediately about her. I think our decision accords with the decision of the Allahabad High Court in the case of *Balmakund v. Janki* (I. L. R., 3 All., 403), that the question of marriage cannot be enquired into in a summary proceeding like this with regard to the issuing of our injunction; there is no doubt that the same object might be obtained by instituting a civil suit. But the fact that that is so, does not prevent action being taken under a special Act of the Legislature. The Act does not create any new right or liability, but it simply provides for a special remedy for a right or liability already existing. That being the case, parties might resort either to the ordinary form of a suit or resort to the special form given by the Act. This I understand to be the law laid down in several cases which have been applied to this country—see the case of the *Wolverhampton Waterworks Co. v. Hawkesford* (28 L. J. (N. S.), C. P., 242), and the cases referred to by Sir B. PEACOCK in the case of *The Collector of Pubna v. Ramanath Tagore* (B. L. R., Sup. Vol., 630). [272] If the minor in this instance has suffered any injury, it is clearly due to the conduct of those who are about her. The parties knew well enough, at least their conduct sufficiently shows that they were perfectly aware, that an application was being made in a Court of Justice for the protection of the child's interest. In the face of that, even if they did not know that an injunction had issued, it was their duty to stay their hands, and not, as they did, to hurry on the marriage two days before the day originally fixed for it, in order to avoid any order that the Court might make. If the girl has suffered any injury, I say, it is owing to the conduct of the people who are about her, and they are solely to blame.

Appeal dismissed.

NOTES.

[Dr. Trevelyan (*Minors*, 1912 IV Edn., p. 191) suggests that under the Guardian and Wards Act, VIII of 1890, sec. 25 whereof does not contain the word *guardianship*, the Court could not decide the right to give in marriage. As regards the guardian's remedy under the general law to prevent the marriage of the minor to a person not approved of by him, see also 11 Bom. 247 (253); 12 Bom 110; 12 Bom. 481; For the other relative's rights, see 10 P. R. 1901; Ratanlal (1895) p. 820.

As to whether VIII of 1890 precludes suits independently of it, see (1904) A.W.N. 135—1 A.L.J. 266; (1901) 25 Bom. 574 3 Bom. L.R. 167.]

[8 Cal. 272 10 C. L. R. 502]

APPELLATE CIVIL.

The 23rd January, 1882.

PRESENT :

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

Ashruffunnissa and another.....Defendants

versus

Lehareaux.....Plaintiff.*

Non-appearance by defendant—Application to defend refused—Ex parte decree against defendants—Right of defendants to appeal without taking steps to set aside the decree— Civil Procedure Code (Act X of 1877), ss. 101, 108.

Defendants who put in no appearance at the original hearing, and who have subsequently been refused leave to appear and defend, are at liberty, where an ' *ex parte* ' decree has been passed against them, to appeal to a higher Court, without previously taking any steps to have the ' *ex parte* ' decree set aside under s. 108 of Act X of 1877.

THIS was a suit brought for arrears of rent upon a kabuliati against three defendants. The 7th of June was originally fixed for the trial. Upon that date there was no proof of the kabuliati adduced; and in order to afford the plaintiff an opportunity of adducing this proof, an adjournment was granted till the 6th of July 1880. On the 6th July a petition was presented by two out of the three defendants, asking, under the provisions of s. 101 of the Code of Civil [273] Procedure, to be admitted to defend the case; averring that no summons had been served upon them, and also alleging other matters.

This petition was not verified, nor was it supported by affidavits, and was rejected by the District Judge, because "no sort of good cause was forthcoming"; and he, therefore, without allowing the petitioners to be heard, proceeded to hear the case ' *ex parte* ,' and made an *ex parte* decree in favour of the plaintiff.

The defendants took no steps under s. 108 of Act X of 1877 to have the *ex parte* decree set aside, but appealed direct to the High Court.

Baboo Aukhil Chunder Sen and Baboo Chunder Madhub (those for the Appellants.

Baboo Doorga Mohun Dass for the Respondent.

The Judgment of the Court (McDONELL and FIELD, JJ.) was delivered by

Field, J. (who, after setting out the facts as above stated, continued) :— It appears to us that we cannot say that the District Judge was wrong in rejecting a petition of this kind, which was not supported by affidavit and which was not even verified by the defendants on whose behalf it was presented.

Now, the first question that has been raised before us is, whether, under the circumstances, the defendants are entitled to appeal against the *ex parte* decree without having first resorted to the procedure laid down in s. 108. It appears to us that they are entitled to appeal. Section 101 is as follows :—" If the Court has adjourned the hearing of the suit *ex parte*, and the defendant,

* Appeal from Original Decree, No. 228 of 1880, against the decree of F. McLaughlin, Esq., Judge of Nonkhally, dated the 8th July 1880.

at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit." It appears to us that what the Legislature here intended was, that the defendant might be admitted to defend the suit merely upon a petition, and without any evidence being gone into to prove [274] the truth of the facts stated in that petition. The section contains no provision for, and does not appear to contemplate, taking such evidence. If, however, the Court does not admit the defendant to defend the suit upon such a petition, he then has a further remedy under s. 108. He can, under this section, claim to satisfy the Court that the summons was not duly served or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing. If he can satisfy the Court on any of these matters, the result will be, that the *ex parte* decree will be set aside, the case will be reheard, and the defendant will have an opportunity of producing his own evidence and cross-examining the witnesses produced on the part of the plaintiff. Now, in this case the defendant has not taken this course, and the question is raised can he, without taking this course, appeal against the *ex parte* decree? Section 119 of the old Code (Act VIII of 1859) provided as follows:—"No appeal shall lie from a judgment passed *ex parte* against a defendant who has not appeared, &c." There is no such express prohibition in the present Code: and we think that the reasonable conclusion to be drawn from the omission of this express prohibition, and from the amended definition of the term decree in s. 2 of the present Code is, that the Legislature intended to allow an appeal against an *ex parte* decree, and it appears to us that this is just and reasonable, because there may be many cases in which, although the defendant is unable to satisfy the Court that he was not served with summons or that he was, by some other sufficient cause, prevented from appearing, yet, upon the evidence given by the plaintiff, he may be able to satisfy the Appellate Court that the decree is one which cannot be supported. If a defendant, instead of resorting to the procedure provided by s. 108, appeals direct against an *ex parte* decree, he of course lies under this disadvantage that he has no evidence of his own to depend upon. He has not the advantage which he might have obtained by cross-examining the plaintiff's witnesses, and his contention on appeal must be limited either to questions of law or to such arguments as arise upon the evidence which the plaintiff has placed on the record. In the [275] present case it appears to us that there are no grounds for interfering with the decree of the Court below. We think that there was sufficient evidence to prove the execution of the *kabuliati*, and also to prove that the arrears of rent for which this suit was instituted were, as a matter of fact, due. This appeal must, therefore, be dismissed with costs.

Appeal dismissed.

NOTES.

[The order rejecting the application to appear and defend is itself appealable:—C. P. C. 1908, O. 43; r. 1 (d).]

The *ex parte* decree itself may be set aside under O. 9, r. 13 notwithstanding the refusal of the Court to hear the defendant: (1896) 10 C. P. L. R., 45.

The Legislature by the Amending Act of 1888 expressly declared in favour of appeals from *ex parte* decrees:—See C. P. C., 1908 sec. 96; (1886) 9 Mad., 445; (1886) 8 All., 354 (appellate *ex parte* decree); and in the appeal, the Appellate Court can remand the suit for re-hearing on the ground that the lower Court should not have proceeded *ex parte*:—(1906) 30 Mad., 54 (F. B.).

As to appeal from order setting aside the *ex parte* decree, see (1912) 34 All., 592; (1895) 22 Cal., 981; (1905) 9 C. W. N., 584.]

[8 Cal. 275 10 C. L. R. 159 6 Ind. Jur. 362]

APPELLATE CIVIL.

The 20th January, 1882.

PRESENT:

MR. JUSTICE PRINSEP AND MR. JUSTICE BOSE.

Bhugirath Patoni and others.....Defendants

versus

Ram Lochun Deb and others.....Plaintiffs.

Suit for arrears of rent—Evidence—Ex-parte decree.

In a suit for arrears of rent of a half-share of land, the plaintiffs relied upon an *ex parte* decree for rent at a certain rate, which they had obtained in 1869 against the tenants of this share. The defendants relied upon a subsequent decree in a contested suit by the plaintiffs against the tenants of the other half-share, in which a lower rate of rent had been given. No other evidence than the decrees was produced on either side. It did not appear whether the *ex parte* decree had ever been executed.

Held, that it was open to the defendants to dispute the rate of rent claimed, and that the plaintiffs were bound to prove that they were entitled to recover it.

Nilmoney Singh v. Heera Lall Dass (I. L. R., 7 Cal., 23) followed.

Baboo Busunt Coomar Bose for the Appellants.

Baboo Grish Chunder Chowdhry for the Respondents.

THE facts of the case sufficiently appear from the **Judgment** of the Court (PRINSEP and BOSE, JJ.) which was delivered by

Prinsep, J.—In the year 1869, the plaintiffs sued the present defendants and those who represent the half-share of the tenure [276] for arrears of rent and obtained an *ex parte* decree in the Court of the Deputy Collector at the rate of Rs. 37-4 per annum for the half-share now in dispute. In the year 1870, they sued the tenants of the other half-share at the same rate. That suit was contested and was dismissed, but in appeal a decree was given at the rate admitted by those defendants, namely, Rs. 15, for that half-share.

In the present case the plaintiffs rely on the *ex parte* decree of 1869. The defendants, on the other hand, produce the decree in the suit of 1870 against the tenants of the other share, and claim to be treated in the same way. There is no evidence on the record except these two decrees. The lower Appellate Court, setting aside the judgment of the first Court, considered that, inasmuch as the defendants in the present suit had not obtained a reversal of the *ex parte* decree, it was conclusive against them, and held that the rent, Rs. 37-4, was the rent decreed in that *ex parte* case. It is not stated before us that that *ex parte* decree has ever been executed so as to become final. (As it was passed in 1869 it cannot now be executed). We therefore consider that it is not binding against the defendants, and that it is open to them to dispute the rate of rent claimed, and that the plaintiffs were bound to prove that they were entitled to receive it. In dealing with the case in this manner we follow the decision in the case of *Nilmoney Singh v. Heera Lall Dass* (I. L. R., 7 Cal., 23).

*Appeal from Appellate Decree, No. 6 of 1880, against the decree of Baboo Nobin Chunder Ghose, Subordinate Judge of Mymensingh, dated the 7th October 1879, reversing the decree of Baboo Grish Chunder Roy, Munsif of Ghosegaon, dated the 12th June 1879.

The decree of the lower Appellate Court must, therefore, be set aside, and that of the first Court restored. The plaintiffs will pay the cost of this Court and also of the lower Appellate Court.

Appeal allowed.

NOTES.

[RES JUDICATA—

The *ex parte* judgment may also operate as *Res judicata*:—(1897) A. W. N. 29 where cogent reasons are given in support. See also 7 Cal., 23; the opinion of Hukm Chand in his Civil Procedure (1900) Vol. 1, pp. 200, 201; 16 Cal., 300; (1899) 9 M. L. J., 60.]

[277] APPELLATE CIVIL

The 12th January, 1882.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE BOSE.

Obhoy Gobind Chowdhry.....Plaintiff

versus

Hurychurn Chowdhry and others.....Defendants.

Parties—Suit for arrears of rent—Co-sharers—Appeal, amendment on.

In a suit for arrears of rent of the plaintiff's share of a taluq, it appeared that, in the year 1279, a batwara was effected of the zamindari in which the defendant's taluq was situated, and that the taluq ceased to be held exclusively by the plaintiff, and was divided between him and certain other persons, who were not made parties to the suit.

Held, that all the co-sharers should have been joined as parties, and that, as this had not been done, the suit was bad.

Held also, that the plaint could not be amended by making the co-sharers parties at the hearing of the appeal.

Mr. Bell, Baboo Mohini Mohun Roy, and Baboo Ishur Chunder Chuckerbatty for the Appellant.

Baboo Mohesh Chunder Chowdry and Baboo Sreenath Dass for the Respondents.

THE facts of this case sufficiently appear from the **Judgment** of the Court (PRINSEP and BOSE, JJ.), which was delivered by

Prinsep, J.—It is sufficient for the purposes of this appeal to describe the position of the parties briefly, by stating that the defendants are the proprietors of a certain taluq for which they were paying rent to the plaintiff, the plaintiff also being a co-sharer with others in the estate of which the taluq formed a part. A batwara took place of the estate, and it would seem that this taluq ceased to be held exclusively by the plaintiff, and was divided between the plaintiff, Bimola, and others. On the strength of that batwara, the plaintiff has now sued the defendants for arrears of rent of the share stated

* Appeal from the Appellate Decree, No. 2139 of 1879, against the decree of H. W. Gordon, Esq., Officiating Judge of Pubna, dated the 14th July 1879, affirming the decree of Moulvie Abul Munsur, Munsif of that district, dated the 31st March 1879.

to have been given to him under that batwara, and he claims rent at a higher [278] rate in consequence of certain agreements said to have been entered into by the defendants with him when the taluq was his sole property.

The first objection taken in special appeal is, that the lower Appellate Court should not have held that the suit was bad, because Bimola and others, who are co-sharers, were not made parties to it. It appears to us that, under the terms of the Full Bench decision in the case of *Iswar Chunder Dutt v. Ram Krishna Dass* (I. L. R., 5 Cal. 902; s.c., 6 C. L. R. 421), the order of the lower Appellate Court in this respect is correct. The judgment of the Full Bench declares, that if the purchaser of a share desires to effect a severance of the tenure and an apportionment of the rent, he must give the tenant due notice to that effect; and then, if an amicable apportionment of the rent cannot be made by arrangement between all the parties concerned, the purchaser may bring a suit against the tenant for the purpose of having the rent apportioned, making all the other co-sharers parties to the suit. The judgment further proceeds: "No real injustice will be done to the tenant under such circumstances, because the possibility of the severance of the tenure by batwara, sale or otherwise is only one of those necessary incidents of the property which every tenant is, or must be presumed to have been, aware of when he took his lease." Now, in this case, we think that the defendants, tenants, were entitled to insist upon Bimola and others, in fact all persons concerned in the taluq, being made parties to the suit, before the plaintiff's suit could be decreed. Mr. Bell, for the appellant, however, contends, that, inasmuch as the first Court decided this point in his favour, and the lower Appellate Court decided it adversely, the Court was bound to do justice in the case by adding Bimola and others as parties to the suit. It appears to us, that if the plaintiff has insisted upon his right to bring an action in the absence of his co-sharers, he must abide by the result; and that it is too late, at this stage of the case, for him to ask to be allowed an indulgence of which he did not avail himself when it was available.

A second point is raised, that, inasmuch as, in the present case, the plaintiff did not sue for enhancement of rent, but [279] claimed a higher rent on an agreement said to have been entered into between the parties, the Court should not have proceeded to consider whether, upon the general grounds taken, the defendants were protected from enhancement. This ground, however arguable it might be, is not one which fairly arises out of the terms of the petition of appeal to us. The fourth ground, within which it is stated to fall, clearly refers to a different point altogether, and that is whether the lower Court was right in holding that the tenure was created before or subsequent to the Permanent Settlement, and not whether the Court was right in proceeding to consider the point at all. In this view of the case, we must dismiss this appeal with costs.

Appeal dismissed.

NOTES.

[Amendment may be allowed even on second appeal.—8 Bom., 168; 19 All., 330; but no amendment is allowed when the party did not avail himself of the opportunity when it first came :—15 Mad., 255; 1 All., 591; 24 Cal., 584.]

[8 Cal. 279 10 C.L.R. 204]

APPELLATE CIVIL.

The 1st February, 1882.

PRESENT :

MR. JUSTICE CUNNINGHAM AND MR. JUSTICE TOTTENHAM.

Umesh Chunder Roy.....Plaintiff

versus

Raj Bullubh Sen and others.....Defendants.*

*Limitation Execution of decree—Res judicata—Act VIII of 1859, s. 246—
Civil Procedure Code (Act X of 1877), s. 278.*

* In the course of certain execution-proceedings in execution of a decree for arrears of rent, the decree-holder attached a tenure belonging to the judgment-debtor, who, pending the attachment, sold it to A, on the 21st March 1869. A then applied, under s. 246 of Act VIII of 1859, for an order to release the tenure from attachment; but the application was dismissed, on the ground that the alienation had been made pending the attachment. In 1877, the heirs and successors in title of the decree-holder abovementioned obtained another decree for arrears of rent against the same defendant, and in execution thereof again attached the tenure. A applied under s. 278 of the Code of Civil Procedure to have the property released, but his application was rejected on the 3rd of May 1879. In a suit brought by A, on the 6th of May 1879, to establish his right to, and confirm his possession of, the tenure, the lower Courts dismissed the suit, on the ground that it ought to have been brought within one year from the 24th of March 1869. On appeal to the High Court,—*Held*, that the suit was not barred by limitation, nor as *res judicata*.

[280] THE facts of this case are as follows :—In 1869, Rohini Dossee, one of the defendants, held a tenure, comprising 32 bighas of land, within a zamindari belonging to the ancestor of the Sen defendants. Some time previously, the then zamindar, Biressur Sen, had obtained a personal decree for arrears of rent of the tenure against Rohini, and in execution of that decree he attached the tenure in question. While the tenure was under attachment, and on the 21st of March 1869, Rohini sold it to the plaintiff's mother (his predecessor in title), who thereupon applied under s. 246 of the Old Code of Civil Procedure, Act VIII of 1859, to have the attachment removed. This application was rejected, on the ground that the sale to the applicant had been made pending attachment. Subsequently, and before any further process in execution was taken, the judgment-debtor, Rohini, paid up and satisfied Biressur Sen's decree. In 1877, the Sen defendants got another personal decree against Rohini for arrears of rent of the tenure, which they attached in execution in the following year. The plaintiff applied under s. 278 of the Code of Civil Procedure (Act X of 1877), to have the attachment removed; but the application was rejected, on the 3rd of May 1879, in consequence of his delaying to furnish security to the amount for which the execution was taken out. The plaintiff then brought the present suit on the 6th of May 1879, "to establish his right to, and confirm his possession of, the land in suit," and for costs.

* Appeal from Appellate Decree, No. 1168 of 1880, against the decree of S. H. C. Taylor, Esq., Judge of Beerbhoom, dated the 31st March 1880, affirming the decree of Baboo Kanti Chunder Bhaduri, Munsif of Bholepore, dated the 29th August 1879.

The Court of First Instance dismissed the suit with costs. On appeal, the District Judge said :—"The plaintiff is clearly out of Court. His predecessor in interest preferred a claim to the property in dispute when it was attached in execution of a decree against a third party, and that claim was disallowed. The present suit has not been brought within one year from the date of the rejection of the claim. The fact that the decree in execution of which this property was attached was paid off by the judgment-debtor, makes no difference whatever."

The plaintiff appealed to the High Court.

Baboo *Taruck Nath Sen* for the Appellant.

Baboo *Nil Mudhab Sen* for the Respondents.

[281] The **Judgment** of the Court (TOTTENHAM and CUNNINGHAM, JJ.) was delivered by

Tottenham, J. The lower Appellate Court, confirming the order of the first Court, has dismissed the plaintiff's suit on the ground that it is barred by limitation. The Judge has applied the rule of one year, and has held that, because the suit was not brought within one year from 1869, when the claim to this property preferred in the execution department by the plaintiff's mother was rejected, the present suit is barred.

It seems that, in 1869, when, in execution of a rent-decree, this tenure was attached as belonging to one Rohini Dossee, the plaintiff's mother preferred a claim under s. 246 of the Old Code of Civil Procedure, alleging that she had purchased the tenure from Rohini Dossee, and the Court found that the purchase had been made after the attachment had taken place, and that, therefore, the alienation was void, and accordingly rejected the claim. But it appears that no sale was held, because the judgment-debtor paid off the amount of the decree. The effect of that was, that the attachment ceased, and any right which the plaintiff's mother acquired by purchase, even though pending the attachment, became valid, and nothing having occurred to injure her right, if any, she had no occasion to bring any suit. The Judge of the Court below says, that the fact that the decree in execution of which the property was attached was paid off by the judgment-debtor makes no difference whatever. In this view, we think that he is mistaken. The payment by the judgment-debtor of the decretal amount did away with the necessity for a sale, and the attachment being withdrawn, the purchased right of the plaintiff's mother stood good.

The respondents' pleader contends, that the finding of the Court, in 1869, that the conveyance was void, because it was effected while the property was under attachment, is now *res judicata*; and that the plaintiff's right derived from that conveyance was then and there done away with for ever, because he, or his predecessor in title, neglected to bring this suit within one year. But the finding of the Court in the execution department **[282]** that the sale was invalid, only meant that the sale was invalid as against the judgment-creditor, and as against any purchaser who might purchase at a sale held in execution following that attachment. When the judgment-creditor was paid off, he had no further claim. The present suit has arisen out of a subsequent decree and subsequent attachment. On this occasion the same tenant having been sued by the representatives of the former zamindar, and the tenure having been attached in execution, the plaintiff put in a claim under s. 278 of the present Code, but omitted to fulfil certain conditions imposed on him by the Court, and the Court declined to register his claim or to adjudicate upon it. He brings his suit to establish his right; and we think it clear, under the circumstances, that he is entitled to have his suit tried.

The judgment of the lower Appellate Court must, therefore, be set aside and the case must go back to that Court to be tried on the merits.
Costs will abide the result.

Appeal allowed and case remanded.

NOTES.

[ALIENATION PENDING ATTACHMENT—

Alienation subsists except as against those having rights under the attachment and when the attachment is raised, the alienation operates in full force and virtue :—(1883) 6 All., 33 ; (1888) 13 Bom., 72 ; (1899) 23 Mad., 478 (1911) 13 Bom. L. R., 977 (988) ; (1906) P. R. 11 4 P. L. R. 1906. See also (1905) 29 Mad., 225 16 M. L. J., 136.]

[8 Cal. 282 6 Ind. Jur. 415]

CIVIL REFERENCE.

The 8th December, 1881.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE McDONELL.

Binja Ram and another.....Plaintiffs

versus

Rajmohun Roy.....Defendant.*

Stamp Act (I of 1879), sched. i, cl. 1—Suit for goods sold and delivered—

Parol evidence—Acknowledgment—Hatchitta.

In a suit, which was brought for the price of goods sold and delivered, the plaintiff swore to the fact of the sale, and tendered in evidence a written admission of the defendant, that the goods had been supplied to him. The writing was rejected as unstamped, and the suit was dismissed.

Held, that the Judge should have allowed the plaintiff an opportunity of proving by oral testimony the delivery of the goods sold, and their value.

Whether an account signed by a debtor in the books of his creditor amounts to an acknowledgment within the meaning of the Stamp Act (I of 1879), sched. i, art. 1, is a question depending in each case upon the form and intention of the entry.

[283] THIS was a reference under s. 617 of the Code of Civil Procedure, from the Munsif of Cuttack, the terms of which are as follows :—

“ The plaintiffs brought this suit to recover Rs. 21-11-6, due upon certain entries made by the defendant in a book, which does not appear to me the account-book of the plaintiffs' shop as contemplated by s. 34 of the Indian Evidence Act, but appears to be one kept for the express purpose of such entries of acknowledgment by debtors. One of the plaintiffs also gave his evidence to prove the entries, and duly attested them. The document relied upon being then evidently an acknowledgment of debt over Rs. 20 in the hand-writing of the debtor, and not being stamped with an adhesive stamp of one anna as required by art. 1, sched. i of the Stamp Act, the suit, on the ground of inadmissibility of the documentary evidence, has been dismissed, subject to the opinion of the Hon'ble High Court.”

* Civil Reference under s. 617 of Act X of 1877, No. 12 of 1881, by the First Munsif of Cuttack.

On the trial, before the Munsif, the plaintiff, Gunesh Ram, gave the following evidence:—"I am plaintiff in the suit. About three years ago defendant had purchased from me clothes of Rs. 21-11-6 worth, and entered the purchases in my book with his hand. After the institution of this suit he paid me Rs. 6." (Then witness attests the entries.)

The judgment of the Munsif was as follows:—"I am of opinion that the claim should be dismissed, as the document on which it is based is inadmissible in evidence by reason of its not bearing the adhesive stamp of one anna with which it should have been stamped, being an acknowledgment of debt over 20 rupees in the handwriting of the debtor."

No one appeared for either party.

The **Opinion** of the Court (GARTH, C.J., and McDONELL, J.) was delivered by

Garth, C. J.—It is difficult to decide a case of this kind satisfactorily without being furnished with an exact copy of the so-called 'acknowledgment.' If the defendant subscribed his name to the entry as an admission that he owed the plaintiff the sum or sums mentioned in it, there is no doubt that the Munsif is right in excluding evidence of the acknowledgment on [284] the ground that it was not duly stamped. But whether an account thus signed by the defendant amounts to such an acknowledgment or not, depends in each case upon the form and intention of the entry.

Apart, however, from this admission, it would seem that, in this case, the plaintiff expressly stated that he sold clothes to the defendant to the amount of Rs. 21-11-6. If he did, there would appear to have been ample evidence, especially if uncontradicted, to establish the plaintiff's claim without resorting to the admission. If the Munsif has any doubt upon this point, he should certainly give the plaintiff an opportunity of proving by oral testimony the delivery of the goods and their value. It is needless to say, that although a written admission may have been made by the defendant, which is inadmissible for want of a stamp, the plaintiff has a right to prove his case in any other available way.

NOTES.

[For similar cases, see (1892) 15 All., 56; (1896) 21 Bom. 201 (205) F. B.; (1903) 30 Cal., 687.]

[8 Cal. 284]

CIVIL REFERENCE.

The 8th December, 1881.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE McDONELL.

Gisborne & Co.....Plaintiffs

versus

Subal Bowri.....Defendant.*

Stamp Act (XVIII of 1869)—Bond—Agreement with covenant sounding in damages.

An instrument containing a covenant to do a particular act, the breach of which is to be compensated in damages, is not a bond, and requires an eight-anna stamp only.

Remedies on such an instrument, and on a bond discussed.

ON the 7th December 1874, one Subal Bowri entered into an engagement with Messrs. Gisborne & Co., agreeing, in consideration of certain advances, to cultivate indigo on twenty bighas of land for ten years, and to deliver the indigo at the factory to Messrs. Gisborne & Co. at a certain fixed rate. The 11th clause in the document, in which the terms were embodied, was as follows :—“ I do further stipulate and agree that, if within the term of this patta [agreement] I neglect to cultivate, or do not at all cultivate, the whole of the said twenty bighas of land according to your orders, from the month of Kartick up to 15th [283] Bysack, or at any other time of any year or years, or neglect to sow indigo thereon at the usual or proper time of any year or years after you have measured, marked out, and selected the land, then, under all circumstances, I will pay to you, as I hereby bind myself and agree to do, a yearly sum of Rs. 200 as damages ; that I shall be precluded from taking any objection to the amount so fixed as compensation for any loss that you may sustain in consequence of my non-compliance with stipulations contained in this paragraph, in the event of your bringing a suit against me for payment of the same, and that it will be in your power to sue me to recover damages for any loss that may be caused to you on account of the breach, on my part, of any of the conditions of the agreement.”

This document was stamped with an eight-anna stamp. Subal Bowri, in 1879, placed under cultivation five bighas only, whereupon Messrs. Gisborne & Co. sued him to recover Rs. 150 as damages.

The Munsif was of opinion, that the 11th clause of the agreement was in the nature of a bond, and that the document should have been stamped as a bond, and called upon the plaintiffs to pay the extra stamp-duty required, and also the penalty under s. 34 of the Stamp Act of 1879, and on the plaintiffs' refusing to do this, he dismissed their suit.

The plaintiffs appealed to the District Judge, who was of opinion, that the document required a bond stamp, but did not consider that the Munsif was justified in dismissing the suit ; but that he should have entered into the merits of the case, and have awarded a sum not exceeding 100 rupees, the

* Civil Reference under s. 617 of Act X of 1877, No. 13 of 1881, by Baboo Brojendra Coomar Seal, District Judge of Bancoorah.

amount covered by a bond for which the stamp-duty is eight annas, if the plaintiffs should have been found entitled to a decree. But inasmuch as there were conflicting rulings as to the correct denomination of agreements containing damage clauses, he referred the following questions to the High Court under s. 617 of Act X of 1877 :—

First.—Whether considering the nature of the agreement it required a bond stamp?

Second.—Whether the Court was, under the circumstances, justified in dismissing the whole suit?

[286] No one appeared for the parties in the High Court.

The **Opinion** of the Court (GARTH, C.J. AND McDONELL, J.) was given by

Garth, C.J.—I am of opinion that the instrument in question is not a bond within the meaning of the Stamp Act of 1869; and that it requires (so far as I can see) an eight-anna stamp only.

The definition of a bond in s. 5 of the Act is precisely what we understand by a bond in England, and it is an obligation of a different character from a covenant to do a particular act, the breach of which must be compensated in damages.

Whether a penal clause is attached to such a covenant or not, the remedy for the breach of it is in form and substance a suit for damages; and by s. 74 of the Indian Contract Act, the English rule with regard to liquidated damages is abolished, and the plaintiff in such a suit has no right under any circumstances to claim the penalty itself as such. He can only recover such compensation, not exceeding the amount of the penalty, as the Judge at the trial considers reasonable; but he is entitled to that compensation, whether he proves any actual damages or not.

The remedy upon a bond is very different. The plaintiff in the case of a simple money-bond recovers the sum named in the bond, or in the case of a bond conditioned for the performance of covenants, he recovers the actual damage which he can prove that he has sustained. In either case not only is the bond a contract of a different form and nature from a covenant with a penal clause, but the remedy upon it, and the amount recoverable for the breach of it, is also different.

I therefore agree with Mr. Justice PHEAR's judgment in the case of *Robert and Charriot v. Shircore*, (7 B. L. R., 510); and with all deference to the majority of the High Court of Allahabad, in the Full Bench case of *In the matter of a Reference by the Board of Revenue, N. W. P.* (I. L. R. 2 All., 654), I think that the view taken by the learned Chief Justice in that case was the correct one.

If the majority of the Court were right, it would seem to follow that every covenant or agreement containing a penal [287] clause must be a 'bond' within the meaning of the Stamp Act.

In that particular case, it is clear that if the Mittra defendants had been guilty of any breach or breaches of their contract, the Collector could not have sued for the Rs. 5,000, but only for such reasonable compensation as the Court thought fit to allow.

If the Legislature had intended that the word 'bond' should include a covenant with a penal clause, I presume that they would have said so. As it is, we can only deal with the definition according to its ordinary and legal meaning.

I think, therefore, that the case should go back to the Court of First Instance, with directions, that the plaintiffs are entitled to such compensation for the defendant's breach of contract, not exceeding Rs. 200, as the Munsif may consider reasonable, and that such compensation may be given, although the plaintiffs are unable to prove any actual damage.

Case remanded.

NOTES.

[BOND—STAMP DUTY.—

For similar rulings, see 15 Mad., 14; 9 All., 585 (589) **F. B. Contr.** 2 All., 654; *Jagannatha Iyer*, Stamp Act (1906) II Edn. p. 292.]

[8 Cal. 287]

CIVIL REFERENCE.

The 8th December, 1881.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE McDONELL.

Ratan Krishen Poddar.....Plaintiff

versus

Raghoo Nath Shaha and others.....Defendants.*

Mofussil Small Cause Courts Act (XI of 1865), s. 21 —Practice—Notice—New trial—Review—Civil Procedure Code (Act X of 1877), s. 623.

The notice-clause in s. 21, Act XI of 1865, is applicable only to those cases where a new trial cannot be applied for within seven days after the judgment, in consequence of there being no sitting of the Court. Where the application is made within seven days, the notice is unnecessary.

If the grounds upon which the new trial is moved are proper grounds for granting a review, the applicant is entitled to proceed under s. 623 of the Code of Civil Procedure without resorting to Act XI of 1865.

THIS was a reference, under s. 617 of the Civil Procedure Code, from the First Munsif of Sudharam, the terms of which are as follows :—

“ This is an application for a new trial of suit No. 209 of 1881, which was governed by the Small Cause Court Procedure and was decided on the 1st of August 1881 against the plaintiff. **[288]** The application was made on the 5th August 1881, *i.e.*, within seven days of the disposal of the suit, but without any such notice to the Court as is prescribed by s. 21 of the Small Cause Court Act, XI of 1865. The plaintiff argues that, as this Court is the Court of a Munsif vested with powers of a Small Cause Court Judge up to Rs. 50, it has no regular sittings (like those of a regular Small Cause Court Judge constituted under Act XI of 1865) fixed and published in the Gazette by the Judge himself; and so the provisions of s. 21 of Act XI of 1865, so far as they relate to “ notice to be given to the Court at its next sitting,” do not apply to it; and that, granting notice is necessary, it is

* Civil reference under s. 617 of Act X of 1877, No. 14 of 1881, made by Baboo Korunamoy Banerjee, First Munsif of Sudharam.

dispensed with in this case by the application itself, which was made within seven days of the decision of the suit. He further argues that, as s. 623 of the Civil Procedure Code, which relates to reviews, applies to Small Cause Courts also, he is at liberty to apply for a review, or rehearing, or new trial (whatever term we may apply to it) according to the provisions relating to reviews, which do not prescribe any notice to be given to the Court. The argument of the plaintiff thus resolves itself into the following points :— (i) whether notice under s. 21 of the Small Cause Court Act is necessary in an application for a new trial of a suit decided by a Munsif with powers of a Small Cause Court Judge, when the suit is governed by the Small Cause Court Procedure? (ii) whether any such notice is necessary in an application for a new trial sought on any of the grounds mentioned in s. 623 of the Civil Procedure Code, which applies to Small Cause Courts also? (iii) whether, where the application is made within seven days, any such notice is necessary?

“ With reference to the first point I am of opinion that, according to s. 14 of Act XI of 1865, it is only where any Judge is the Judge of two or more Courts of Small Causes that he is required to fix and publish in the Gazette the dates of his sittings in the several Courts of which he is the Judge; but as this Court is a Small Cause Court Judge sitting only at the sadar station of the district, it is not required to fix and publish in the Gazette the dates on which it will take up Small Cause Court cases. According to the practice of this Court, Small [289] Cause Court cases are taken up every Monday, though for special reasons one or two cases are sometime postponed to some other day of the week; but as s. 14 of the Small Cause Court Act does not apply to it, this Court is not bound to fix and publish in the Gazette any particular day for the trial of Small Cause Court cases. Section 21 of the Small Cause Court Act seems to be a general section, and applies equally to different Small Cause Courts presided over by a single Judge, and also to a Small Cause Court Judge holding Court at one place only. The application of this section has nothing to do with the fact that this Court is a Munsif with powers of a Small Cause Court Judge; when this particular suit is governed by the Small Cause Court Procedure, s. 21 must apply to it.

“ As regards the second point I am of opinion that, as it has been held in the case of *Shumsher Ally v. Kurkut Shah* (I. L. R., 6 Cal., 236), that both the procedures, prescribed by s. 623 of Act X of 1877 and s. 21 of Act XI of 1865, are still in force, a plaintiff, applying for a review of the decision of a case governed by the Small Cause Court Procedure, can do it under s. 623 of Act X of 1877 without any notice prescribed by s. 21 of Act XI of 1865. This state of things presents an anomaly no doubt, and it is very probable, as remarked by the Chief Justice in that reference, that, at the time when the provisions relating to reviews were extended to Small Cause Courts, the operation of s. 21 of Act XI of 1865 did not receive sufficient attention.

“ As regards the third point I am of opinion that, if an application for a new trial of a suit be made within seven days of its decision, the application itself serves as a notice to the Court and no additional notice is necessary.”

Neither party appeared on the reference.

The **Opinion** of the Court (GARTH, C.J., and McDONELL, J.) was delivered by

Garth, C.J.—In this case, I think that the Munsif has taken a correct view of both points.

[290] The notice-clause in s. 21 of Act XI of 1865 appears to me to be applicable only to those cases where a new trial cannot be applied for within

seven days after the judgment, in consequence of there being no sitting of the Court. Where the application itself is made within seven days, the notice appears quite unnecessary. Then again, if the grounds upon which the new trial is moved are proper grounds for granting a review, I agree with the Munsif that the plaintiff has a right to apply under s. 623 of the Civil Procedure Code without resorting to the Act of 1865. In that case no notice would be required.

NOTES.

[See also (1881) 10 Cal., 297 (298).]

[8 Cal. 290]

APPELLATE CIVIL.

The 12th January, 1882.

PRESENT:

MR. JUSTICE PRINSEP AND MR. JUSTICE BOSE.

Saroda Prosad Gangooly and another.....Plaintiffs

versus

Prosunno Coomarr Sandial and others.....Defendants.*

Damages for neglect to pay road Cess or public works Cess- -Beng.

Act X of 1871, s. 25— Beng Act VIII of 1869, s. 44.

Tenants are liable in damages for neglect to pay road and public works cesses.

THIS was a suit to recover damages for failure on the part of the defendants, who held certain land from the plaintiffs under a mourasi tenure, to pay road and public works cesses. The Munsif gave the plaintiffs a decree for the amount claimed. The lower Appellate Court reversed this decree, holding that the plaintiffs were not entitled to damages on account of the arrears of road cess and public works cess at all. The plaintiffs appealed to the High Court.

Baboo *Taruck Nath Dutt* for the Appellants.

Baboo *Saroda Churn Mitter* for the Respondents.

The **Judgment** of the Court (PRINSEP and BOSE, JJ.) was delivered by

Prinsep, J.—In our opinion the Subordinate Judge sitting in appeal is clearly wrong in holding that the plaintiffs [291] were not entitled, under any circumstances, to recover damages on account of arrears of road and public works cesses due from the defendants. The terms of s. 25 of Beng. Act X of 1871 are clear on this point, and permit the zemindar, or the holder of an estate or tenure, to recover such cesses in the same manner and under the same penalties as if the same were arrears of rent in respect of land in respect of which such sums were payable. Under s. 44 of the Rent Law damages would have been payable had the claim been for arrears of rent, and, therefore, the present claim being for cesses, the defendants are liable to pay such damages.

* Appeal from Appellate Decree, No. 2831 of 1879, against the decree of Baboo Jibun Kristo Chatterjee, Subordinate Judge of Pubna, dated the 28th August 1879, modifying the decree of Baboo Moti Lall Haldar, Munsif of Shazadpore, dated the 25th June 1879.

It has been pressed upon us by the respondents' pleader, that we ought to remand the case to the lower Appellate Court for a finding as to the amount at which damages should be assessed; but the terms of the decision of the first Court, which have not been displaced in any way by the judgment of the lower Appellate Court, coupled with the admission of the defendants in their written statement, that, on a previous occasion, they were made by this Court to pay damages on account of arrears of the very same cesses, leave no doubt in our minds that the order of the first Court was perfectly correct, and that we should not be justified in putting the parties to the expense of further proceedings.

We set aside the order of the lower Appellate Court, restore that of the Munsif, and direct that the defendants do pay costs both of this Court and of the lower Appellate Court.

Appeal allowed.

[8 Cal. 291]

APPELLATE CIVIL.

The 20th January, 1882.

PRESENT :

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

Gour Chunder Biswas.....Judgment-debtor

versus

Chunder Coomar Roy.....Decree-holder.*

Sale in execution of decree Setting aside sale—Irregularity.

At a sale in execution of decree certain property was knocked down to a bidder, who made default in payment of the purchase-money. Subsequently the Judge again put the property up for sale, and resold it at a lower price. The decree not being satisfied, the Judge put up other property which had [292] been advertised for sale with the property abovementioned without getting from the defaulter the difference between the price obtained at the second sale and that obtained at the first. On an application by the judgment-debtor to have the sale of the second property set aside,

Held, that no sufficient cause was shown for setting aside the sale.

Joy Chunder Biswas v. Kaly Kishore Dey (8 C. L. R., 41) distinguished.

Khiroda Mayi Dasi v. Golan Abardari (13 B. L. R., 114; C.S., 21 W. R., 149) followed.

THE facts of this case are stated in the judgment of the lower Court, which is as follows:—"This is an application by the judgment-debtor, under s. 311 of the Civil Procedure Code, for the setting aside of the auction-sale of Hat Jogodal, belonging to him, on the allegation that no sale-proclamation was served upon it, and that, in consequence, it has fetched a very low price. From the evidence of the serving-peon and the other circumstances in this case, I am perfectly satisfied that the sale-proclamation was duly served upon the property.

* Appeal from Original Order, No. 240 of 1881 against the order of Baboo Prossunno Coomar Ghose, Munsif of Magoorah in Jessore, dated the 2nd May 1881.

It is in evidence in this case, that the hat in dispute, together with several other jamas situated in village Rupoty, were advertised for sale together, and that the sale-proclamation was served at a place which was adjoint both to Rupoty and Jogodal. It also appears that the hat in question had been advertised for sale twice, that the judgment-debtor's gomasta, Gobind Chunder Bose, was all along present in Court during the sale, and that many men of the judgment-debtor's village bid at the sale. Hence I have no doubt that the sale-proclamation was duly served, and that intending purchasers had due notice of the sale. As regards the judgment-debtor's objection as to low price, I have to say that he has no evidence in this case to substantiate it. A hat is a property of a very fluctuating income, and it appears in this case that it has been sold at eleven times its annual rent. Hence I am of opinion that the price of Rs. 1,000, at which it has been sold, is not inadequate. For these reasons I hold, that the petitioner has failed to make out his case, and that he has falsely put in this petition with the object of frustrating the execution of this decree."

The judgment-debtor appealed on the following grounds:—(i) that the lower Court ought first to have sold the property [293] which was previously put up for sale, and then, if the proceeds of each sale had been inadequate, to have sold the property in dispute; (ii) that the property in dispute ought not to have been put up for sale before trying to realize the amount of the previous sale from the defaulting purchaser; (iii) that the lower Court was wrong in saying there was not sufficient evidence to sustain his objections as to low price; (iv) that the lower Court was wrong in holding that the sale-proclamation had been duly served.

Baboo *Surendranath Motilal* for the Appellant.

Baboo *Grija Sunker Mozoomdar* for the Respondent.

The **Judgment** of the Court (McDONELL and FIELD, JJ.) was delivered by

Field, J.—In this case the two points which appear to have been raised before the Munsif were: *first*, that no sale-notification had been published upon the property sold; and *secondly*, that because the jama had been originally put up to sale and default made in payment of the purchase-money, the Court was bound, having ordered the resale of the jama upon such default, to carry out such resale and to recover the difference between the amount bid upon the sale and the amount bid upon the resale from the defaulter before the decree-holder could proceed to sell the other property, *viz.*, the hat. A third point is now taken before us, *viz.*, that the publication of the sale-notification was insufficient, because such notification was not posted upon any place in the hat itself or adjacent thereto; and it is said that the place where the notification was published was a mile-and-half distant from the hat.

As to the first ground taken before the Munsif we think that his decision is correct. As to the additional point raised before us, we think that the appellant cannot be permitted to raise this point, which was not raised specifically in the Court below. It remains to deal with the third point. The facts appear to be these. The jama and the hat were attached under the original application for execution. On the 15th January, the jama was sold for Rs. 350, which amount was sufficient to satisfy the [294] decree. The person who was the successful bidder at this sale having made default in paying the balance of the purchase-money, a re-sale of the jama was then directed. On the 17th March the jama was put up for resale, and the highest bid was Rs. 15. This amount being insufficient to satisfy the decree, the hat was then sold for Rs. 1,000. It appears that the sale of the jama was then cancelled.

It has been said in the course of argument, that of this fact there is no evidence upon the record ; that this was done out of kindness to the judgment-debtor, inasmuch as the price bid for the hat was sufficient to satisfy the decree. Now, it is contended in the first instance that, until the difference between the 15 rupees, which was bid for the jama on the resale, and Rs. 350, the amount for which the defaulter purchased at the sale, was realized from the defaulter Dhanunjoy, the decree-holder was debarred from proceeding with the sale of the other property, which had been attached upon the original application. In support of this contention the case of *Joy Chunder Biswas v. Kali Kishore Dey Sircar* (8 C. L. R., 41) has been quoted. It does not appear from the report whether the sixteen annas of the property sold in that case upon the second occasion, instead of the five gandas sold upon the first occasion, were included in the original application for execution and were attached under that application. It is therefore not possible for us to say that that case is on all fours with the present case. There is, however, a decision in the case of *Khiroda Mayi Dasi v. Golam Abarduri* (13 B.L.R., 114; s.c., 21 W.R., 149), which is exactly on all fours with the present case, for there both properties were attached under the original application for execution. We think that we ought to follow this last-quoted case, which, we may further add, is in accordance with our view of the law. Were it otherwise, we think that, inasmuch as the appellant did not make to the Munsif any application under the second part of s. 293 to have the difference between the proceeds of the sale and the resale recovered from the defaulter, he ought not to be allowed to succeed upon the point which he has raised upon this appeal; and we may further observe that, [295] in the petition of objection which he put in before the Munsif, he silently acquiesced in the cancelment of the resale of the jama. The effect of canceling that sale was to preclude the recovery from the defaulter Dhanunjoy of the difference between the amounts bid at the sale and resale. On all these grounds we think that this appeal must be dismissed with costs.

Appeal dismissed.

[8 Cal. 295 6 Ind. Jur. 413.]

APPELLATE CIVIL.

The 9th December, 1881.

PRESENT :

MR. JUSTICE MORRIS AND MR. JUSTICE PRINSEP.

Jadoomony Dabee and others.....Decree-holders

versus

Hafez Mahomed Ali Khan.....Judgment-debtor.*

*Mesne profits—Amount claimed in plaint—Larger amount found due
by Ameen—Objection under Civil Procedure Code (Act X of 1877), s. 244—
Execution of decree.*

Where a plaintiff, in bringing a suit for possession and for mesne profits approximately estimates the amount of such mesne profits at a certain sum, and obtains a decree which leaves the amount due as mesne profits to be ascertained in execution, he is not bound down to the amount claimed in his plaint; but if more is found due to him, he is entitled on payment of further court-fees to recover the larger amount so found due.

Baboojan Jha v. Bijnath Dutt Jha (I. L. R., 6 Cal., 474) distinguished.

A Court, in execution-proceedings, cannot look behind the decree when the decree does not limit the amount of wasilat to be awarded.

JADOOMONY DABEE and others brought a suit to obtain possession of certain properties and to obtain mesne profits, stating in their plaint that the amount of such mesne profits amounted approximately to Rs. 1,200. The court-fee paid as the valuation was sufficient as the suit was then framed.

The plaintiffs obtained a decree for possession, and the question of mesne profits was left to be determined in execution. In execution of this decree the Court Ameen, who had been deputed to determine the amount of mesne profits, found, that the amount due to the plaintiffs from the date of their dispossession up to the date of their recovery of possession was Rs. 9,214. The judgment-debtor objected to the plaintiffs obtaining an [296] amount larger than that claimed in their plaint, and stated the amount found due by the Ameen to be exorbitant.

The Subordinate Judge held that the Ameen's computation was correct, but that the decree-holders were not entitled to get a larger amount of wasilat than they had claimed in their plaint, and awarded to them Rs. 1,200.

The decree-holders appealed to the High Court.

Baboo Mohiney Mohun Roy and Baboo Kishory Mohun Roy for the Appellants.

Baboo Sreenath Doss and Baboo Jogesh Chander Roy for the Respondent.

The **Judgment** of the Court (MORRIS and PRINSEP, JJ.) was delivered by **Morris, J.**—The plaintiffs, in their plaint, stated Rs. 1,200 as approximately the amount of the mesne profits to which they were entitled, and paid court-fees on that amount. The decree for possession and mesne profits which they

* Appeal from Original Order, No. 238 of 1881, against the order of Baboo Jibun Kristo Chatterjee, Subordinate Judge of Pabna, dated the 7th May 1881.

obtained left the determination of the amount of the mesne profits to be settled in execution without referring to the amount specified in the plaint or in any way limiting plaintiffs' claim.

The Subordinate Judge in execution has refused to allow plaintiffs anything beyond the amount stated in their plaint.

Baboo *Sreenath Doss* for the respondent, by an ingenious calculation, endeavours to show that the rate per annum was definitely settled by the plaintiffs, and that the word 'approximately' (annumanik) used in the plaint, in connection with the estimated amount of claim, had reference only to the duration of the suit and the interval which might elapse before possession was obtained. We are not inclined to adopt this view, which is purely conjectural.

The case of *Baboojan Jha v. Byjnath Dutt Jha* (1. L. R., 6 Cal., 474), on which the Subordinate Judge relies, seems to us to be not in point, and to differ in a very essential particular from this case. In that case, as appears from the judgment delivered, the annual rent [297] of the land which formed the measure of mesne profits was 'deliberately claimed,' in the plaint; whereas here it is only estimated approximately. The plaintiffs having, therefore, obtained a decree which left the amount due as mesne profits to be ascertained in execution, would not be limited by the amount stated in their plaint, and as pointed out by DWARKANATH MITTER, J., in the case of *Pearee Soondree Dossie v. Eshan Chunder Bose* (16 W. R., 302), the Court in execution of a decree cannot look behind the decree when that decree does not limit the amount of wasilat to be awarded. In this view, as we understand the lower Court to agree with the Ameen who made the local enquiry that the actual mesne profits of the period in question amount to Rs. 9,214-1, and this is not a matter in dispute in this appeal, we give a decree in favour of the appellants, declaring them entitled to the sum of Rs. 9,214-1-0, but in accordance with s. 11 of Act VII of 1870, execution for the realization of this sum cannot be taken out until the decree-holders pay into Court the fee which the law requires upon the difference between the mesne profits now ascertained and determined and the mesne profits originally claimed by them upon which court-fees have been paid. The plaintiffs will then be allowed to realize in execution the full amount of Rs. 9,214-1. The order of the lower Court is, therefore, amended and modified accordingly. Appellants are entitled to their costs in this Court.

Order amended and modified.

NOTES.

[MESNE PROFITS.—

See also 8 L. A. 197; 8 Cal., 178; 9 Cal., 112; 6 Cal., 472 when the amount or rate is not stated approximately; 15 Bom., 116 as regards Court Fees.]

[8 Cal. 297 10 C. L. R. 111]

APPELLATE CIVIL.

The 2nd November, 1881.

PRESENT :

MR. JUSTICE MORRIS and MR. JUSTICE PRINSEP.

Dewan Ali.....Decree-holder

versus

Soroshibala Dabee.....Judgment-debtor.*

Execution of decree—Civil Procedure Code (Act X of 1877), s. 230 — ‘Passing of the Act’—Meaning of the expression ‘granted’ in s. 230.

Under s. 230 of Act X of 1877, an application for execution is said to be ‘granted,’ when it is made regularly and formally. The expression, ‘granted’ is equivalent to the expression ‘admitted’ as used in s. 215.

[298] Where, therefore, an application for execution under s. 230 of Act X of 1877 is not ‘granted,’ a subsequent regular and formal application under the same section may be allowed if made within time.

ONE Dewan Ali obtained a decree against Soroshibala Dabee on the 29th May 1865, which decree was affirmed on appeal on the 9th December 1865. The decree-holder applied for execution of this decree in September 1877, before the Civil Procedure Code of 1877 came into force. This application, it appears for some reason, was not granted, and the decree-holder applied again on the 30th January 1880; but this second application was rejected as being informal. The decree-holder again applied for execution on the 11th September 1880. The judgment-debtor then contended that the application was barred by limitation under s. 230 of Act X of 1877; the words used in that section ‘passing of the Act’ having reference to the time at which the Act received the assent of the Governor-General in Council, *viz.*, on the 30th March 1877. The District Judge held that time commenced to run from the 30th March 1877, and refused to grant the application.

The decree-holder appealed to the High Court.

Baboo *Aukil Chunder Sen* for the appellant contended that, under the provisions of s. 3 of Act X of 1877 and the General Clauses Act, s. 230 of the Code had no application to the case; that the words the ‘passing of the Act’ in that section meant the time at which the Act came into operation, *viz.*, the 31st October 1877, and that there had been no previous application for execution under Act X of 1877, which had been granted, and, therefore, s. 230 did not apply. And further that the present application was merely a continuation of the previous application for execution made within two years from the time when Act X of 1877 received the assent of the Governor-General in Council.

No one appeared for the Respondent.

The **Judgment** of the Court (MORRIS and PRINSEP, JJ.) was delivered by

Prinsep, J.—The objection taken against the order of the [299] District Judge, disallowing the application for execution of decree, is, that s. 230 of the Civil Procedure Code, under the last paragraph of which the Judge has acted, does not apply. The facts have not been stated by the Judge

* Appeal from Original Order, No. 144 of 1881, against the order of F. Rees, Esq., Officiating Judge of Noakhally, dated the 8th February 1881.

in his judgment, but, as represented by the decree-holder's pleader, they appear to be as follows :—

The decree was passed on the 29th May 1865, and was confirmed on appeal on the 9th December of the same year.

The previous application for execution was made in September 1877, that is before the Code of 1877 came into force. The next application for execution was made on the 30th January 1880, but from the order passed on that application it would seem that it was not admitted, but rejected, because it was informal. The present application, which was made on the 11th September 1880, was, under such circumstances, not a second application within the meaning of the section (230) of the Code. That section provides, that if an application for execution has been made under that section and granted, no subsequent application to execute the same decree shall be granted after the expiration of twelve years from (in the present case) the date of the decree. Taking the facts in the present case to be, that the only application which has been made under s. 230 is the application of the 30th January 1880, it seems that, although that application was made under s. 230, it was not granted so as to render the subsequent application now before us an application within the terms of that section. The expression "granted" in the 3rd paragraph of s. 230 would seem the equivalent to the term "admitted" as used in s. 245,—that is to say, when the application has been found to be formal and regular, it is admitted or granted and made the basis of proceedings towards execution of the decree.

The order of the lower Court must, therefore, be set aside.

The decree-holder will be at liberty to continue the proceedings in execution on the application which is now before us.

The appellant is entitled to his costs.

Appeal allowed.

NOTES.

[STATUTORY CHANGE.—

In the C. P. C. 1908, sec. 48, the words '*and granted*' in the previous Codes were omitted ; thus making the rule in the new section applicable whether the previous application for execution was made under it or not and whether the application was granted or not.

In (1889) 16 Cal., 744 it was pointed out, that the word 'granting' included the issue of a process for execution of the decree.]

[- 11 C. L. R. 274]

[300] APPELLATE CIVIL.

The 20th January, 1882.

PRESENT:

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

In the matter of the Petition of Radhabullubh Sil :

Presidency Banks (Act XI of 1876), s. 4 -Act XXVII of 1860—Registration of guardian as proprietor of shares—Power to negotiate.

A, the mother and guardian of a minor, obtained a certificate under Act XXVII of 1860. Part of the property of the minor consisted of shares in the Bank of Bengal. A obtained

* Appeal from Original Order, No. 213 of 1881, against the order of J. P. Grant, Esq., Judge of Hooghly, dated the 21st April 1881.

power under her certificate to draw the dividends due upon the shares. After the passing of the Presidency Banks Act, 1876, I applied under s. 4 of that Act to be registered as proprietor of the shares. The Bank refused to register her name as proprietor, and I then applied to have her certificate amended by empowering her to negotiate the shares.

Held that she was not entitled to have such a power inserted in the certificate.

THE facts of this case sufficiently appear from the **Judgment** of the Court (McDONELL and FIELD, JJ.), which was delivered by

Field, J. -The appellant in this case, Oomamoni Dasseo, is the guardian of her minor son Radhabullubh. She holds a certificate under Act XL of 1858, and she has also obtained a certificate under Act XXVII of 1860. It appears that certain Bank of Bengal shares form a portion of the property belonging to the minor, and the appellant obtained power, under the certificate granted to her under Act XXVII of 1860, to draw the dividends falling due upon those shares. After the passing of the Presidency Banks Act, XI of 1876, she applied to be registered under the provisions of s. 4 of that Act. The portion of this section, which is material to the present case, is as follows :—

“The several persons who are then proprietors and shareholders of each of the present Banks of Bengal and Madras, or executors or administrators of such proprietors and shareholders respectively, shall be entitled to be registered as proprietors and holders of a like quantity of stock and a proportionate number of shares, as is or are then registered in their [301] names respectively, or in the names of the persons whom they represent respectively in the books of each of the said present Banks of Bengal and Madras.”

It appears that the appellant applied to the Bank of Bengal to have the name of her deceased husband or her own name registered under these provisions. The Bank refused to register the name of her husband on the ground that deceased persons cannot be registered as proprietors of shares. The bank also refused to register her name, and we think properly, seeing that she is neither a proprietor, nor a shareholder, nor the executor or administrator of a proprietor or shareholder. She then applied to the District Judge of Hooghly to have the certificate under Act XXVII of 1860 amended by giving her power to negotiate the shares. Having regard to the fact that these shares belonged not to Oomamoni Dasseo, but to her son, we think that the District Judge rightly refused to give her authority to negotiate the shares, more especially as we do not find that any proposal was made to give security for the corpus of the estate, which, if this prayer had been granted, would have come into her hands without any check upon the exercise of her responsibility.

Then it is further contended that this power of negotiation was necessary in order to obtain the registration of her name under the provisions of the section above quoted. We think that the insertion of a power of negotiation in the certificate granted under Act XXVII of 1860 would not have had the effect of converting the appellant into a proprietor or share-holder or the executor or administrator of a proprietor or shareholder : and we therefore are of opinion that the District Judge was right in refusing the application made to him. We must therefore dismiss this appeal without costs, no one appearing for the respondent.

Appeal dismissed.

NOTES.

[See 24 Bom., 350 as regards the right of the surviving coparcener to the share registered in the name of a deceased coparcener, under the Presidency Banks Act 1876.

Under Act XI of 1876 sec. 58 the guardian may vote.]

The 29th and 30th June and 12th November 1881.

PRESENT:

SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH AND SIR A. HOBHOUSE.

Padmakumari Debi Chowdhurani and another.....Plaintiffs

versus

The Court of Wards (Representing Jagatkishor Acharjia Chowdhry)
and another.....Defendants.

[On appeal from the High Court of Judicature at Port William in Bengal.]

Adoption—Termination of authority to adopt—Succession of adopted son to collaterals in gotra not that of father by adoption.

An instrument of permission (*ammati patra*) to a Hindu wife to adopt should she be left a widow, provided that “*dattaka* (adopted) son shall be entitled to perform your and my shraddh and that of our ancestors, and to succeed to the property.” The husband and wife had a son born, who survived his father, succeeded to the property, and died before his mother, leaving a widow, who, as heir, took possession of it for her widow’s estate. The mother then professed to exercise the above power, and in the suit arising thereupon — *Mussamut Bhoo. bunnoyee Debia v. Ramkishore Acharj Chowdhry* (10 Moore’s I.A., 279)—it was decided that the son’s widow, having acquired a vested interest, a new heir could not be so substituted for her.

Held, that although such a substitution might have been disallowed without the adoption being held invalid for all other purposes, the above decision had determined that, upon the vesting of the estate in the widow, the power of adoption was incapable of execution, and was at an end; and that this would have been the conclusion if the question of the validity of the power had been raised without any previous decision upon it.

An adopted son occupies the same position in the family of the adopter as natural-born son, except in a few instances, which are accurately defined both in the *Dattaka Chandrika* and *Dattaka Mimansa*, governing authorities in the Bengal School.

An adopted son succeeds not only lineally, but collaterally to the inheritance of his relations by adoption.

Sumblockunder Chowdhry v. Naraini Debch (3 Knapp. P.C. 55; s.c., 1 Suth. P. C. Judgments, 25) referred to and followed.

Held in this case, that the adopted son of the maternal grandfather of the deceased, though the gotra into which he was adopted was not the same as the latter’s, was an heir nearer to him than such maternal grandfather’s grandnephew.

APPEAL from a decree of the High Court (6th May 1879), affirming a decree of the Second Subordinate Judge of Mymensingh (10th August 1876).
[303] The principal questions on this appeal related to two adoptions by widows, either of which, if held good, would defeat the claim of the appellant Padmakumari. She claimed as the widow of the grandnephew (deceased since the commencement of this suit in which he was a plaintiff) of the maternal grandfather of Bhowanikishor who died in 1840. The estate in dispute was the ancestral property of Gourkishor Acharjia Chowdhry, a zamindar of the Acharjia family of Muktagachia, in Zilla Mymensingh, who died in 1821, leaving a widow, Chandraboli, and one son, Bhowanikishor abovenamed. Gourkishor, in his

lifetime, had executed to Chandraboli an 'anumati patra,' empowering her to adopt a son, which power she professed to exercise in 1844 by adopting the late Ramkishor Chowdhry, whose son, Jagatkishor, a minor, was represented by the Court of Wards, the first respondent on this appeal.

The other of the adoptions now questioned had been made by the widow of the father of Chandraboli as far back as 1810, when Gogunchandra, the second respondent on this appeal, was adopted. He, accordingly, was wife's brother to Gourkishor, and maternal uncle to Bhowanikishor.

In reference to the adoption made by Chandraboli, it was questioned whether her power remained in force after the succession of Bhawanikishor, followed by that of his widow, had altered the state of things in the family. And, in connection with this, the correctness of the construction placed by the High Court on the judgment in *Mussamut Bhoobunmoyee Debia v. Ramkishore Acharj Chowdhry* (10 Moore's L. A., 279) was disputed.

As to the other adoption, the principal question was, whether the adopted son of the maternal grandfather of the deceased, not having been adopted into the gotra of the latter, but into the gotra of his mother's father could succeed as an heir nearer than the maternal grandfather's grandnephew.

The **Judgments** given by the High Court (L. S. JACKSON, McDONELL, and MITTER, JJ.), upholding the dismissal of the suit by the first Court, the Second Subordinate Judge of Mymensingh, are given in the report of the case before the High Court (I. L. R., 5 Cal., 615) where the facts of the case also fully appear.

[304] Mr. J. F. Leith, Q. C., Mr. R. V. Doyne, and Mr. C. W. Arathoon for the Appellants.

Mr. T. H. Cowie, Q.C., and Mr. J. T. Woodroffe for the Respondent, the Court of Wards.

Mr. J. D. Mayne for the respondent Gogunchandra Chowdhry.

For the appellants it was argued, that the correct construction had not been put upon the decision of the Judicial Committee in *Mussamut Bhoobunmoyee Debia v. Ramkishore Acharj Chowdhry* (10 Moore's L. A., 279) in the judgment of the Court below. Padmakumari, as widow of Jaikishor, was the nearest heir to Bhowanikishor, living at the time of the death of his widow, Bhoobunmoyee, and was entitled to succeed him, unless either Ramkishor or Gogunchandra could be shown to have had a valid title. This could not be done in the case of either of them. As to Ramkishor, his adoption had been already successfully impugned. Although the judgment in the case above cited, having been given between parties other than those concerned in this appeal, was in one sense not binding on the appellants, yet, in so far as it established a principle, it was conclusive against there having been an adoption by Chandraboli. Properly construed, it decided, that the power to adopt, given to the widow Chandraboli could not last indefinitely. All spiritual as well as temporal purposes for which the power had been given were fulfilled by the natural-born son, on whose death the estate vested in his widow. Thereupon the power to adopt was invalidated for all purposes. As regards the other adoption alleged, Gogunchandra, as the adopted son of Krishnanath, to whom he was adopted by Doyamoyi, was adopted into a gotra different from that of Bhowanikishor. This was the objection to his title; and to the latter he could not be heir. Though he might be a bandhu, he was not a sagotra bandhu: he was an asagotra bandhu, and by Hindu law could not be heir.

On the position of the adopted son, reference was made to Menu's Institutes, IX, 158; Dayabhaga, chap. X, paras. 7, 8, 9; Mitakshara, chap. i, s. 11;

Dattaka Chandrika, s. 5; [306] Macnaghten's Hindu Law, Vol. I, chap. vi, 'of adoption'; Vol. II, 'of adoption,' prececl. xiii, p. 188; Strange's Hindu Law, chap. iv, division 4; and the cases of *Gunga Mia v. Kishen Kishore Chowdhry* (3 Sel. Rep., S.D.A., 128), *Uma Saiker Moitra v. Kalikomul Mozumdar* (I. L. R., 6 Cal., 256) and *Chinnara Makristna Aggar v. Minatchi Ammal* (7 Mad. H. C. Rep., 245). On the question whether an adopted son can succeed to relations outside the gotra into which he has been adopted, Shammachurn Sircar's *Vayavashtha Darpana*, *vayavashtha* 632, 633 were cited; also *Naramu Dibeh v. Hurkishor Rai* (1 Sel. Rep., S.D.A., 39), *Shamchunder v. Naramu Dibeh* (1 Sel. Rep., S. D. A., 209), *Sambhoochunder Chowdhry v. Naramu Dibeh* (3 Knapp. P. C., 55; s.c., 1 Suth. P. C. Judgments, 25), *Gourhurree Kubraj v. Massanvat Rutnasuree Dibia* (6 Sel. Rep., S. D. A., 203), *Lokenath Roy v. Shamsounduree* (S. D. A., 1858, p. 1863), *Kasheshuree Debia v. Greeschchunder Lahoree* (W. R. for 1864, p. 71), *Kishennath Roy v. Hureegobind Roy* (S. D. A., for 1859, p. 18), and *Teencowree Chatterjee v. Dinonath Banerjee* (3 W. R., 49).

For the respondent, the Court of Wards, representing Jagatkishor, it was contended, that the decision in *Bhoobunmoyee's case* (10 Moore's I. A., 279) had only determined that no new heir could be substituted for her by adoption so as to defeat the estate vested in her. It had not been held that the adoption made in 1844 by Chandraboli was an act invalid for all purposes. Now that there was no longer any estate vested in Bhoobunmoyee, there could no longer be any question of substituting another heir for one already existing. So that the adoption of Rankishor, although it might have been ineffectual for the purpose of ousting the widow, was not, therefore, invalid for the purpose of securing his succession after her death. For this it had been a valid adoption. Reference was made to Mayne's Hindu Law, 161, *Raja Vellanku Venkata Krishna Roy v. Venkata Rama Lakshmi Narsayya* (L. R., 4 I. A., 1; I. L. R., 1 Mad., 178), *Bykant Monee Roy v. Kisto Soonduree Roy* (7 W. R., 392), [306] *Ramsoonder Singh v. Surbanee Dosser* (22 W. R., 121) and *Kalpirossonno Ghose v. Gocoolchunder Mitter* (I. L. R., 2 Cal., 295).

Mr. J. D. Mayne, for the Respondent Gogunchandra Chowdhry, was not called upon; nor were counsel for the Appellants called upon to reply in respect of Rankishor's adoption.

On the 12th of November 1881, their Lordships' **Judgment** was delivered by

Sir R. Couch. - The suit in this case was brought by Jaikishor Surma Chowdhry against Rankishor Acharjia Chowdhry and Gogunchandra Chowdhry, for the possession of certain zamindaries, taluks, and other properties mentioned in the schedules to the plaint, which formerly belonged to Bhowanikishor Acharjia Chowdhry, who died without issue on the 28th of August 1840, leaving a widow Bhoobunmoyee. Jaikishor having died during the suit, his widow, the first appellant, was made a party to it in his place.

The property in dispute originally belonged to Gourkishor, who died in 1821, leaving Bhowanikishor, his only son, and a widow, Chandraboli, the mother of Bhowani. Chandraboli was the daughter of Krishnanath and granddaughter of Ranchandra Chowdhry. The plaintiff, Jaikishor, was the great-grandson of Ranchandra, and he claimed to succeed as the heir of Bhowanikishor on the death of Chandraboli, who had succeeded to the estates on the death of Bhoobunmoyee in 1867, and died in April 1870.

In 1808, Gourkishor, being then childless, executed a deed of permission to Chandraboli to adopt a son. Bhowanikishor was born in December 1817, and in November 1819, Gourkishor executed another deed of permission. On the death of Bhowanikishor an instrument was set up as being his will, by

Chandraboli and Bhoobunmoyee, by which power to adopt a son was given to the latter, and until such adoption, the income of the estates was given to Chandraboli and Bhoobunmoyee. The two ladies took possession of the estates and remained in enjoyment of them for nearly four years.

[307] In December 1843, Bhoobunmoyee professed to exercise the power alleged to be given to her by the instrument already referred to, and adopted a boy called Rajendrokishor. Thereupon Chandraboli alleged that the supposed will of Bhowanikishor was a forgery, and had not been made till after his death, and that Bhoobunmoyee had no power of adoption; and in May 1844 she adopted, or professed to adopt, Ramkishor, the first original defendant, as the son of Gourkishor, her late husband. The first of the now respondents is his minor son.

The second defendant and respondent Gogunchandra Chowdry, it is now admitted, is the adopted son of Krishnanath by an adoption made by his widow Doyamoyee, having been given in adoption to her by his father Gokulkishor and his mother Hurrosundari Debi. It will be seen, therefore, that the plaintiff cannot succeed if either Ramkishor or Gogunchandra has a valid title by adoption. Both the lower Courts have held that Ramkishor and Gogunchandra were heirs of Bhowanikishor in preference to Jaikishor, and the plaintiffs' suit has been dismissed. Their Lordships will first consider the case of the former.

Bhoobunmoyee, on behalf of Rajendrokishor, her adopted son, having obtained possession of all the property of Bhowani, a suit was brought in 1862 by the next friend of Ramkishor, on his behalf, against them and other persons, the plaintiff claiming, as the adopted son of Gourkishor, the whole property, ancestral and acquired, of Bhowani. To this suit Chandraboli was made a defendant. It was dismissed by the Sadr Amin, and there was an appeal from his decision to the Sadr Dewany Adalat at Calcutta. The case was heard upon several different occasions. Finally, the Judges were unanimously of opinion that the adoption of Rajendro was invalid, and that the will of Bhowani, purporting to give the power of adoption, was a forgery. They were also unanimous in holding that the deed of permission by Gourkishor was a genuine and valid instrument, and that if the power to adopt continued at the time when Chandraboli professed to execute it there had been a valid adoption. One of the Judges was of opinion that the power was gone, and that the adoption **[308]** was invalid. The other two were of opinion, that the power existed at the time of the adoption, and a decree was made, therefore, in favour of the plaintiff as to the ancestral property of Bhowanikishor, but not as to his self-acquired property.

From this decree there was an appeal to Her Majesty in Council, and the question in this appeal as regards Ramkishor is what was then decided. The judgment of this Committee on that occasion is not and cannot be relied upon in this suit as binding the parties to it, the now plaintiff not being a party to the former suit; but it is treated as a decision upon the law which should be considered as binding.

In that judgment their Lordships say:—

“The next question is as to the validity of the adoption of Ramkishor. We see no reason to dissent from the opinion of the Court below upon the facts of the case, *viz.*, that the anumati patra of Gour is a genuine instrument, and that supposing the powers given by it to have been in force when the adoption under it took place, the adoption was good; but we think it unnecessary to examine into the genuineness of this instrument, as we are of

opinion that at the time when Chandraboli professed to exercise it, the power was incapable of execution."

The judgment then, after stating the words of the instrument, and saying that it was not of a testamentary character, but merely a deed of permission to adopt, proceeds—

"How, then, is the deed to be construed when we regard it merely as a deed of permission to adopt? What is the intention to be collected from it, and how far will the law permit such intention to be affected? It must be admitted that it contemplates the possibility of more than one adoption; that it shows a strong desire on the part of the maker for the continuance of a person to perform his funeral rites, and to succeed to his property: and that it does not in express terms assign any limits to the period within which the adoption may be made. But it is plain that some limits must be assigned. It might well have been that Bhowani had left a son natural-born or adopted, and that such son had died himself leaving a son, and that such son had attained his majority in the lifetime of Chandraboli. It could hardly have been intended that, after the lapse of several successive heirs, a son should be adopted to the great grandfather of the last taker, when all the spiritual purposes of a son, according to the largest construction of them, would have been satisfied.

[309] "But, whatever may have been the intention, would the law allow it to be effected? We rather understand the Judges below to have been of opinion that if Bhowani had left a son, or if a son had been lawfully adopted to him by his wife under a power legally conferred upon her, the power of adoption given to Chandraboli would have been at an end.

"But it is difficult to see what reasons could be assigned for such a result which would not equally apply to the case before us."

After saying that, on the death of Bhowani, his wife succeeded as heir to him, and would have equally succeeded in that character in exclusion of his brothers, if he had any, and that she took a vested estate as his widow in the whole of his property, their Lordships say:—

"The question is, whether the estate of the son being unlimited, and that son having married and left a widow his heir, and that heir having acquired a vested estate in her husband's property as widow, a new heir can be substituted by adoption, who is to defeat that estate, and take as an adopted son what a legitimate son of Gourkishor would not have taken.

"This seems contrary to all reason, and to all the principles of Hindu law, as far as we can collect them."

The substitution of a new heir for the widow was, no doubt, the question to be decided, and such substitution might have been disallowed, the adoption being held valid for all other purposes, which is the view that the lower Courts have taken of the judgment, but their Lordships do not think that this was intended. They consider the decision to be that, upon the vesting of the estate in the widow of Bhowani, the power of adoption was at an end, and incapable of execution. And if the question had come before them without any previous decision upon it, they would have been of that opinion. The adoption intended by the deed of permission was for the succession to the zamindari and other property, as well as the performance of religious services, and the vesting of the estate in the widow, if not in Bhowani himself, as the son and heir of his father, was a proper limit to the exercise of the power. The words at the end of the instrument are "that dattaka (adopted) son shall be entitled to perform your and my *sradh*, etc., and that of our ancestors, and

also to succeed to the property." Their **[310]** Lordships are therefore of opinion that Rankishor had no title.

They have now to decide upon the title of Gogunchandra Chowdhry.

It may here be stated that Chandraboli, after the death of Bhowani, and whilst she was in possession of the property, executed a deed of relinquishment in favour of Rankishor, dated the 10th of September 1869, and put him in possession. And by a deed, dated the 30th of December 1869, reciting this, Gogunchandra agreed that neither he nor any of his heirs or representatives should be able to advance any manner of claim against Rankishor's right, and against any of the conditions of the aforesaid deed of relinquishment of rights. It is not necessary in this suit to determine what is the effect of this deed. If Gogunchandra is entitled, the plaintiff cannot succeed.

Gogunchandra, it has been stated, is the adopted son of Krishnanath, the maternal grandfather of Bhowani, and is not of the same gotra as Bhowani, whose gotra is that of his father Gourkishor; and it is objected that, although Gogunchandra as an adopted son may inherit collaterally, it must be in the same gotra, and consequently he is not heir to Bhowani. This was held by the Subordinate Judge, who quoted a gloss upon a text of Manu by Kalluka Bhatta as his authority. The High Court has held the contrary, and one of the learned Judges (Mr. Justice MITTER) said of the gloss in question, which is to be found in Colebrooke's Digest, Book 5, ch. 4, s. 1, art. 178: -

"In the original, phrase 'gotra-dayada' stands for 'heirs to collaterals.' 'Dayada' is equivalent to heirs, and 'gotra' to family name. It is said that 'gotra-dayada' means heirs of the persons bearing the same family name. It may be that this would be the meaning of the phrase above alluded to if the letters are strictly adhered to. But it appears to me from the context that these words are intended to include all the collateral members of the family who stand in the relation of sapinda, etc., to the adopted son. But granting that the literal construction should be adhered to, does the text in question support the conclusion of the lower Court? It lays down simply that the first six kinds of sons are heirs to the kinsmen sprung from the same family. It is not necessarily implied thereby that any one of these six descriptions **[311]** of sons is not entitled to inherit to the estate of kinsmen sprung from a different family."

The limitation of the right of an adopted son to succeed to his collateral relations now contended for is contrary to the whole theory of the Hindu law of adoption. An adopted son occupies the same position in the family of the adopter as a natural-born son, except in a few instances, which are accurately defined both in the Dattak Chandrika and Dattaka Mimamsa, the authorities that govern the decision of questions of adoption arising in the Bengal school. And no text has been produced to show that an adopted son cannot succeed to the estate of such relatives of his father as are sprung from a different family. The author of the Dattaka Chandrika, after referring to the contradictory doctrines on the subject of the adopted son being heir to his father's kinsmen, and stating his way of reconciling them, says, s. 5, para. 24: "Therefore, by the same relationship of brother and so forth, in virtue of which the real legitimate son would succeed to the estate of a brother or other kinsmen, where such son may not exist, the adopted son takes the whole estate over." The doctrine in the Dayabhaga, ch. 10, v. 8, that adopted sons are not heirs of collateral relations (sapindas, etc.), which is in opposition to the text of Manu, was considered by this Committee in *Sunbhoochunder Chowdhry v. Narain Dibe* (3 Knapp's P. C., 55; S. C., 1 Suth. P. C. Judgments, 25), and it was held that an adopted son succeeds not only lineally but collaterally to the inheritance of his relations by adoption. And it has been pointed out by

the High Court, and has not been disputed before their Lordships, that Gogunchandra and Bhowanikishor are related to one another as sapindas.

For the above reasons their Lordships are of opinion that Gogunchandra is a preferential heir of Bhowanikishor to Jaikishor, and that, on this ground, the decree of the High Court affirming the decision of the Subordinate Judge, who dismissed the suit, is right. And their Lordships will, therefore, advise Her Majesty to affirm that decree and to dismiss this appeal. The costs will be paid by the appellants, [312] one set of costs only to be allowed by the Registrar on taxation.

Appeal dismissed.

Solicitor for the Appellants: Mr. T. L. Wilson.

Solicitor for the Respondent, the Court of Wards: Mr. H. Treasure.

Solicitors for the Respondent Gogunchandra: Messrs. Barrow and Rogers.

NOTES.

[I. POWER TO ADOPT TIME LIMIT TO ITS EXERCISE]

1. An adoption is invalid when the estate had vested in any person other than the adopter, as an estate once vested cannot be divested. — 10 M. L. A. 279; (1884) 9 Bom., 91; (1887) 11 Bom., 381; (1890) 11 Bom., 163; (1894) 19 Bom., 331; (1896) 22 Bom., 116.

2. *An exception* is the case of joint families: — 1 Mad., 174.

3. The power of adoption comes to an end for all purposes—even if by the adoption the widow should divest no estate—but her own, the estate having since been vested in her; (1906) 33 Cal., 1306; 11 C. W. N. 12; 1 C. L. J. 357—in all cases where she is not the immediate heir to the last male owner (as his mother or his widow), and it is not revived.

It makes no difference whether the power to adopt makes express provision for such a contingency or whether such power is conferred by the husband (1905) 32 Cal., 861; 1 C. L. J., 270; (1906) 33 Cal., 1306; 12 C. W. N. 12; 1 C. L. J., 357; or by the Sapinda (1887) 10 Mad. 205 P.C. 14 L. A. 67 on appeal from 7 Mad. 101; 33 Mad., 228; or by the law, (1892) 17 Bom., 161; (1884) 9 Bom. 94; (1887) 11 Bom., 381; (1894) 19 Bom., 331; (1896) 22 Bom., 416; 32 Bom., 199 (applied to Jains—*contra*, (1889) 17 Cal., 518, which is erroneous); (1902) 26 Bom., 526.

4. Where the adopter is not the immediate heir, and the estate had vested in such other person (i.e., other than the adopter or her son, natural or adopted, as the case may be), the adoption is invalid whether it had been made before its vesting in such adopter (8 Cal., 302 P. C.) or after it (33 Cal., 1306).

5. The consent (valid otherwise) given by the full owner may, it was suggested in the earlier Bombay cases, operate to validate an adoption which was invalid by the operation of the above rules.—(1898) 23 Bom., 250, 327; (1895) 21 Bom., 319, etc.

But this is not the correct view.—(1900) 34 Mad., 228; 8 M. H. C., 108; (1902) 26 Bom., 526; (1904) 28 Bom., 161; 6 Bom. L. R., 161; (1905) 29 Bom., 400.

6. Effect of the son having married and dying a widower—this makes no difference where the mother is the immediate heir on his death.—(1900) 25 Bom., 306; 27 Bom., 492.

II. RIGHTS OF INHERITANCE AS REGARDS ADOPTED SON—

1. An adopted son is, as regards inheritance, on the same footing as an aurasa son (except in competition with 17 Mad., 122, or as regards the share in the presence of an aurasa son.—*Vasishtha's Text*).

2. Thus, he succeeds to—(1) his adoptive father's relations—whether lineal or collateral, 2 Knapp., 55; 6 Cal., 289; 9 C. L. R., 379;

(2) his adoptive mother and her relations.—1 B. H. C., A C., 191; 1 All., 256; 6 Cal., 265; 10 Cal., 232; 1 C. L. R., 538, 9 Cal., 70, 33 Cal., 917 (reversed on another point, 35 Cal., 896);

See also the doubts expressed by Sir G. D. Banerjee in his *Marriage and Stridhan* as regards *stridhan*;

(3) he loses his rights in his natural family except such as had been vested in him before his adoption:—1 C. W. N., 121; 29 Mad., 137 (right in joint family property which vests at birth is an apparent exception—he suffering a civil death in his natural family).

3. And, conversely, all those relations are heirs to the adopted son:—12 M. L. J., 64; 33 Bom., 404; 23 Mad., 1, 5 C. W. N., 20; 8 All., 319; 2 Mad., 91.

4. An adopted son cannot renounce his status as such:—19 Bom., 239.

5. The status as member of the adoptive family extends to those sons (natural or adopted) who were born after his adoption:—1 C. L. J., 388; but not to those born before his adoption:—33 Bom., 669.]

[8 Cal. 312]
ORIGINAL CIVIL.

The 13th January, 1882.

PRESENT :
MR. JUSTICE WILSON.

Miller

versus

Nasmyths Patent Press Company, (Limited).

*Lien for work done on goods—Entire contract - Wharfinger's lien—
Contract Act (IX of 1872) ss. 170, 171.*

Where a person does work under an entire contract with reference to goods delivered at different times such as to establish a lien, he is entitled to that lien on all goods dealt with under that contract.

Chase v. Westmore (5 M. & S., 180) followed.

The fact that a manufacturer has a wharf upon which he receives goods brought to him by customers, does not entitle him to claim a lien as a wharfinger upon such goods.

THIS was a suit by the Official Assignee, as the assignee of the estate of Messrs. Rushton Brothers, for the recovery of certain jute which, at the time of the insolvency, was in the possession of the defendant Company, and which the defendant Company declined to give up to the plaintiff; or, for the recovery of Rs. 15,000 in lieu thereof; and for compensation for such loss and damage as the plaintiff might have sustained by the detention of the goods.

On the 10th March 1881, the date of the insolvency of Rushton Brothers, there were some 600 bales of jute on the premises of the defendant Company, which had been delivered to them for the purpose of being baled. It appeared that Messrs. Rushton Brothers had been the Secretaries of the [313] defendant Company, and that they also dealt with the Company, and furnished the Company with jute to bale. Prior to the beginning of 1881, the Company had been baling jute for Rushton Brothers on terms which it is not necessary to state. Subsequently an agreement was made, which was embodied in certain entries in the Minute Book of the Directors of the Company. The first entry, which was made by Messrs. Rushton Brothers on the 13th January 1881, was as follows: "We have a chance of working some jute, provided the Company can undertake it at an all-round rate of Re. 1-2-6 per bale." On behalf of the Company the Directors replied: "Before accepting or stating any rate, please state quantity likely to be screwed and name of person or firm offering." On the 14th January Rushton Brothers noted: "We cannot state the exact quantity. It depends entirely on the market. It will probably be about 5,000 bales. A reply is required to-day, as otherwise the work cannot be put through. The offer is made by our firm." The answer to that was—"With a guarantee of at least 4,000 bales I agree to accept Re. 1-2-6 for jute and Re. 1-4-6 for cuttings. If below that quantity the rates of the season to remain in force." The final acceptance dated the 20th January was as follows: "Messrs. Rushton Brothers accept the rate, and if the quantity does not reach the 4,000 bales, will pay the old rate for the work done."

In pursuance of that arrangement a large quantity of jute was sent to the screw-house of the defendant Company to be baled. Part of it was baled before the insolvency, and remained baled, and part unbaled, in the possession of the defendants at the time of the insolvency.

The Official Assignee claimed the unbaled jute, but the defendant Company refused to deliver it, on the ground, at first, that they had a general lien over the goods for the amount due to them from the insolvents' firm for their baling charges, not only for the goods in their hands but also for other goods which had been baled and delivered to the insolvents' firm, and afterwards on the ground that these particular goods formed part of a larger quantity which had been pressed by the Company under the above stated agreement, and that the Company [314] had a particular lien over these particular goods in respect of the balance due to them for the entire quantity pressed under the agreement. They also set up a claim for a lien as wharfingers.

The Official Assignee contended that the defendant Company was entitled to a lien on the goods in question only for their charges for work done to those goods, and ultimately tendered to the Company the sum of Rs. 655-8-6, the amount of such charges. This tender was refused.

Mr. Hill and Mr. Trevelyan for the Plaintiff.

Mr. Phillips and Mr. Stokoe for the Defendant Company.

The facts being undisputed, the defendants began.

Mr. Phillips. The defendants claim a lien under s. 170 of the Contract Act as artificers, and under s. 171 of the same Act as wharfingers. The plaintiff admits a lien for screwing charges on particular bales; the dispute is, whether the lien extends to the whole of the jute baled under the contract of the 13th January 1881. It was an entire contract, and the lien attaches in respect of the whole balance *Blake v. Nicholson* (3 M. & S., 167), *Chase v. Westmore* (5 M. & S., 180). A wharfinger has a lien on goods brought to his wharf for the balance of a general account *Naylor v. Manques* (1 Esp., 109), *Spears v. Hartly* (3 Esp., 81). The balance of a general account means everything in account between the parties. He also referred to *Holderness v. Collinson* (7 B. & C., 212).

Mr. Hill for the Plaintiff.—The claim for lien as wharfingers cannot be supported. There is nothing in the Memorandum or Articles of Association which authorizes the Company to carry on the business of wharfingers, and the fact that they have erected a wharf for the convenience of their customers does not make [315] them wharfingers as to the claim for a general lien. The goods must be given for purposes for which such lien can attach. If for special purposes, a general lien does not attach; for example, if special monies are deposited with a banker for a special purpose, in such a case his general lien does not attach. —*Brandao v. Barnett* (3 C. B., 519, at p. 531). These goods were not deposited to be kept in a warehouse, but to have special work done upon them. A factor can only claim a lien for his general balance, upon goods which come to his hands as factor *Dixon v. Stansfeld* (10 C. B., 398). The goods were not received by the Company as wharfingers, but as balers of jute. A general lien can only attach upon goods deposited under an entire contract. There was no such contract in this case.

Wilson, J. (after stating the facts of the case, continued as follows):—The question is, what lien are the defendants entitled to. The Official Assignee contends, that they are only entitled to a lien on each bale of jute for costs of baling of that specific bale. The defendants first claim a general lien under s. 171 of the Contract Act, on the ground that they are wharfingers. To me it

*[Sec. 170:—Where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in

Bailee's particular lien. respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain such goods until he receives due remuneration for the services he has rendered in respect of them.]

seems clear that they are not wharfingers. They have a wharf as an accessory to the screw-house. Occasionally jute is brought to the screw-house in carts. All that is purely ancillary to the pressing business, and they are not wharfingers. They are not entitled to a general lien in that sense.

They further contend that they are entitled to a lien on all jute delivered under the agreement of January 1881 for charges on jute baled and delivered under the agreement. In that contention I think they are right. The case of *Chase v. Westmore* (5 M. & S., 180) appears to me an express authority for the proposition that where a person does work under an entire contract with reference to goods delivered at different times, such as to establish a lien, he is entitled to that lien on all goods dealt with under that contract. The head-note correctly states the case: "a workman, having bestowed his labour upon a chattel in consideration of a price fixed in amount by his agreement with the [316] owner, may detain the chattel until the price be paid, and this though the chattel be delivered to the workman in different parcels and at different times, if the work to be done under the agreement be entire." The word 'entire' seems to me to mean 'under one contract.' What Lord ELLENBOROUGH says is this: "This case was argued before us last term and stood over for our consideration upon the single question whether a workman, having bestowed his labour upon a chattel, in consideration of a price or reward fixed in amount by his agreement with the owner, at the time of its delivery to him, can by law detain the chattel until the price be paid or must seek his remedy by action, no time or mode of payment having been appointed by the agreement. We were all of opinion, upon the argument, and still are, that if a right to detain exists in the general case that I have mentioned, the present defendants have all right to detain the goods in question for the money due to them for grinding all the wheat; because we consider the whole to have been done under one bargain, although the wheat was delivered in different parcels and at different times."

That case seems to me precisely on a par with this. That was a case for the grinding of wheat delivered in different vessels at different times. The decision was that the goods could be detained till the work done was paid for.

Here a series of parcels of jute were delivered at various times to be baled, but under one contract. The lien attaches to all. The case has never been questioned, and is strictly in accordance with common sense. The law here is not different from what it is in England. Section 170 of the Contract Act is as follows:—"Where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain such goods, until he receives due remuneration for the service he has rendered in respect of them."

It appears to me the law is the same here as in England, and the defendants have a right to retain their lien on all goods in their hands delivered to them under the agreement of January 1881 for charges in respect of any of the goods delivered under [317] that agreement. Of course, if it appears that any goods came to their possession otherwise than under that agreement, the lien will be in respect of each bale of such goods for work done on each such bale. The parties can by reference to the books tell what these goods are, and if any difficulty arises the case can be mentioned again.

Defendants to have their costs on scale 2. Costs to come out of insolvents' estate.

Attorneys for the Plaintiff: Messrs. *Dignam and Robinson*.

Attorneys for the Defendant Company: Messrs. *Sanderson & Co.*

[8 Cal. 317]
ORIGINAL CIVIL.

The 14th February, 1882.

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE PONTIFEX.

In the matter of the Indian Companies Act.

In the matter of the Petition of Luchmee Chund and another.

Luchmee Chund and another

versus

The Bengal Coal Company.

*Companies Act (X of 1866), s. 34 --Blank transfer -- Right of transferee under blank transfer to registration--Discretion of directors--Discretion of the Court to refuse to hear the case under s. 34--
Power-of-attorney--Option of holder to refuse to appear in suit against principal.*

The power given to the Court by s. 34 of the Indian Companies Act of 1866 is discretionary, and the Court will not order a transfer to be registered, where the alleged transferor is not before the Court, and there is any real doubt as to the validity or *bona fides* of the transaction.

A person holding a power-of-attorney, even if authorized by the power to appear and defend suits on behalf of his principal, is at liberty to refuse to accept service of summons and appear in a suit brought against his principal, but may either act upon the power or not as he may think proper.

APPEAL from an order made by Mr. Justice CUNNINGHAM, dated the 29th August 1881, in an application under s. 34 of Act X of 1866.

An application was made under s. 34 of the Indian Companies Act (X of 1866) by two persons, named Luchmee Chund and Konnyloll, on a petition verified by their Gomasta, to have their names entered on the register of the Bengal Coal Company, Limited, as the owners of two shares in the Company.

[318] It appeared that, on the 25th September 1880, one Colonel Mowbray Thomson had deposited these shares with Messrs. Nicholls and Co., for safe custody, and had given to them a power-of-attorney authorizing them, amongst other things, to deal with all or any of his shares generally.

On the 17th December 1880, George Augustus Thompson (one of the members of the firm of Nicholls and Co.), under this power-of-attorney, transferred to Luchmee Chund and Konnyloll these shares under a blank deed of transfer, in the body of which neither the names of the transferor or transferee, the consideration, the number and designation of the shares or the date of the transfer appeared, although the transferor's name was signed at the foot of the instrument.

On the 10th February 1881, Messrs. Nicholls and Co. were adjudicated insolvents: and on the same day Luchmee Chund and Konnyloll requested the Company, to register the transfer. The Company, however, refused to recognize the transfer on account of the insolvency of Nicholls and Co., whereupon

Messrs. Watkins, and Watkins who were the attorneys of Luchmee Chund and Konnyloll, filled in the blank transfer deed under instruction given by the Gomasta of Luchmee Chund and Konnyloll, making it appear thereby, that the transferee was one "Luchmee Chund and Konnyloll," and sent it, together with the bill acknowledging receipt of the consideration-money, to the Company, calling upon them to register. Several letters then passed between Messrs. Watkins and Watkins and the Company, the result of which was that the Company refused to register the shares, on the grounds (i) that the shares and transfer deed were not presented for registration till after the failure of Messrs. Nicholls and Co.; (ii) that the transfer, when first presented, bore no date; (iii) that the transfer deed purported to transfer the shares to one "Luchmee Chund Konnyloll," which was not the name of any single individual, whereas Messrs. Watkins and Watkins had in filling up the transfer styled 'Luchmee Chund Konnyloll' as being a single individual, 'a banker of great respectability'; (iv) that no proper transfer deed had been presented for registration; (v) that the Company had received a notice from Messrs. Grindlay [319] and Co. (the then agents of Colonel Thomson) requesting them not to register any transfer of the shares in question.

The Superintendent of the Company stated in his affidavit that the Directors had been informed and believed that although there was a firm of the name of "Luchmee Chund Konnyloll," there were no persons, members of that firm, named "Luchmee Chund and Konnyloll."

Under art. 31 of the Articles of Association of the Bengal Coal Company, the Company were not obliged to register the name of any transferee, unless such transferee should be approved of by the Directors.

Luchmee Chund and Konnyloll, on a petition verified by their Gomasta, although it did not appear that he had obtained leave to verify the petition, applied to the Court under s. 34 to compel the Company to register, on notice of motion to the Coal Company and to Grindlay and Co. (Notice to the latter, however, was served on an assistant in the office, who gave no acknowledgment on the original notice).

Mr. T. A. Apcar and Mr. Trevelyan for the Applicants.

Mr. Allen and Mr. P. O'Kinealy for the Bengal Coal Company.

Cunningham, J.—This is an application under s. 34 of the Indian Companies Act of 1866.

The question raised "is as to the right of two persons, Luchmee Chund and Konnyloll, trading as bankers under the style of 'Luchmee Chund Konnyloll,' to be registered as the transferees of two shares, Nos. 94 and 95, in the Bengal Coal Company, Limited, in virtue of a transfer purporting to have been effected on the 17th December 1880 by Colonel Mowbray Thomson, through his attorney, George Augustus Thompson, to Luchmee Chund Konnyloll, his executors and representatives."

This transfer was, the petitioners say, executed in blank, the signature of George Augustus Thompson, as attorney for Colonel Mowbray Thomson, attested by H. Phillips, and of the petitioner's firm unattested, being affixed to a document in which neither the names of transferor or transferee, the [320] consideration, the number, and designation of the shares, or the date of the transfer, appeared.

Early in February 1881, the petitioners requested the Company to register the transfer, and on the Company's refusal on the 10th February, instructed their attorneys, *Watkins* and *Watkins*, to obtain registration. *Watkins* and

Watkins accordingly filled in the names of the transferor and transferee, the consideration, the number and designation of the shares, but not the date, they also supplied the attestation of the Nagree signature to the document which was before unattested, and on the same day, 10th February 1881, presented the transfer-deed, then filled up, to the Company for registration. On the 12th February, the Superintendent of the Company addressed Messrs. *Watkins* and *Watkins*, declining, with reference to the insolvency of Nicholls and Co., which occurred on the 10th February and appeared in that day's *Exchange Gazette*, to register the transfer; thereupon Messrs. *Watkins* and *Watkins'* clerk filled in the date "17th December 1880," this date being entered with reference to a receipt purporting to have been given by Nicholls and Co., to the petitioners for the purchase-money on that date; and on the 15th February, *Watkins* and *Watkins* again asked for registration, pointing out that the sale took place on December 17th, 1880, and producing the receipt to that effect.

On the 18th February 1881, the Company in reply pointed out that the date had been added since the transfer was first sent to the office, and must be initialled either by Colonel Mowbray Thomson or the Official Assignee of Messrs. Nicholls and Co., and inquired who Luchmee Chund Konnyloll was, the Company not being obliged to register a transferee unless he should be approved of by the Directors.

To this Messrs. *Watkins* and *Watkins* reply, "Luchmee Chund Konnyloll is a banker having his residence" etc., and repeated the demand for registration.

On the 26th March, Messrs. Grindlay and Co., as agents for Colonel Mowbray Thomson, addressed the Company, saying that the certificates of the two shares were left with Messrs. Nicholls and Co., for safe custody; that they could not be [321] found among their effects, and requesting the Company not to register any transfer without further communication.

On the 14th May, the Superintendent, in reply to an enquiry of Messrs. *Watkins* and *Watkins*, informed them that the Directors based their refusal to register not only on the objection raised by Colonel Mowbray Thomson's agents, but on the grounds—(i) that the shares and transfer were not presented for registration till after Nicholls' insolvency; (ii) that the transfer-deed, when presented for registration, was undated; (iii) that the transfer purported to be to "Luchmee Chund and Konnyloll, having his place of business in Rammohun Mullick's Street," and that no such person could be found.

To this Messrs. *Watkins* and *Watkins* reply that the sale took place on the 17th December 1880; that Luchmee Chund and Konnyloll are both merchants of great respectability, and demanded registration in their names.

There have been some differences of opinion in the English Courts as to the duties and power of the Court under s. 35 of the English Act, which corresponds to our s. 31. The observation of COLERIDGE, C.J., in *Ex-parte Shaw* (L. R., 2 Q. B. D., 463, at p. 478), in reviewing the rulings on the jurisdiction conferred by s. 35 of the English Act, makes it, I think, clear that, under s. 34 of the Indian Act, the Court has jurisdiction to make an order in a case where there is a dispute not only between the Company and an alleged shareholder, but in a case in which there are two rival claimants to be shareholders, and according to L. J. Brett, as a matter of judicial discretion, where there is a real dispute, and the amount depending is large, or if the facts are complicated, or any general principle involved, the Court, instead of proceeding in a summary way at once, should direct an issue or some other proceedings.

In the same case it was laid down that the mere non-production of the transfer, in a case in which it was proved that a sale had been completed and

the transfer executed, could not be taken advantage of by the Company as a ground for refusing to register. Following that case, I think that I have jurisdiction [322] to go into the question of the real ownership of the shares, and that the mere absence of the transfer would not be fatal to the transferee's claim, provided I am satisfied that it ever was executed, and that a *bona fide* sale took place, and that if, when a *prima facie* case has been made out, any point still requires elucidation I ought to frame an issue upon it.

This would certainly be necessary before the petitioners' claim could be allowed. The whole case is redolent of fraud. G. A. Thompson is a fraudulent bankrupt, and has decamped with the plunder which the misguided confidence of his constituents placed within his reach. The transfer is never completed or presented for registration till after his bankruptcy. If it was a *bona fide* transfer, why did not the petitioners take steps to establish their title by registration during the period from December 7th to February 10th, the very day on which Nicholls' insolvency was declared. The inference is, that they knew the alleged transfer to be fraudulent, and concealed it till the very last moment, and till a moment when G. A. Thompson having escaped, its exposure would no longer do him any harm. This violent presumption of fraud would have to be rebutted by irresistible evidence of their *bona fides*, of consideration having really passed, and of the transaction having been in every particular regular and valid. There are, however, two considerations which make any such issues unnecessary.

The case of *Ex-parte Shaw* (L. R., 2 Q. B. D., 463) has been much relied on as corresponding with the present, and it resembles it in so far that there was in each a fraudulent agent who bolted with the proceeds. It differed from it in two important respects: *first*, there was in that case no doubt at all of the purchaser having '*bona fide*' bought the shares and paid the purchase-money to the vendor's agent, or as to vendor and purchaser having executed the transfer.

If the present case, there was never any such transfer, Thompson and the vendees' Gomasta signed a blank from which the alleged vendees' attorney has subsequently filled up, but there is nothing to show the Gomasta's authority so to sign, nor was the document in any sense of the word such a transfer as is [323] required by art. 9, table A, in the schedule to the Act, before registration can be demanded.

But the present case differs from *Ex parte Shaw* (L. R., 2 Q. B. D., 463) in another important respect. There it does not appear (see p. 466) that the Articles of Association reserved to the Directors any discretion as to the approval of new transferees: no reference at any rate to any such discretion is made throughout the whole argument. In the present case the Company is not obliged (art. 31) to register the transferee "unless he be approved by the Directors."

Now the discretion thus conferred on Directors is no mere form.

In *the Gresham Life Assurance Society* (L. R., 8 Ch. App., 446, at p. 449), Lord Justices JAMES and MELLISH laid down that where a settlement-deed provided that no transfer should be made except to a person approved by the Directors, before the Court could interfere with the discretion exercised by the Directors, it must be made out that the Directors have been acting from some improper motive or arbitrarily or capriciously. Lord Justice MELLISH observing that the fact that the Directors declined to give their reasons for refusing was no ground to infer that they are acting arbitrarily. If, therefore,

it be shown that the Directors have fairly considered the matter, the Court will not sit in appeal on the propriety of their decision, nor will it compel them to disclose the grounds on which it rests.

In the present case the Directors' objections to the proposed transferees may be summed up by saying, that they do not approve of them. Much reliance was placed by Mr. Allen on the contention that a firm could not be a transferee of a share; but here the two individuals composing the firm are disclosed, and it is clear from the Registers 46 and 47 of table A, sched. i of the Act, that several persons may be jointly interested in a share or shares. The Directors, however, disapprove of Luchmee Chund Konnyloll as transferees, and it appears to me, that, in the absence of evidence, that they are acting capriciously or *malà fide*, I cannot examine into the propriety of their decision. Excellent reasons at once present themselves if it were necessary for their conduct. They may have suspicions as to their solvency or not without reason of their [324] honesty, both excellent reasons for not admitting them as shareholders; but highly inconvenient to be publicly alleged. In any case, the Directors have a perfect right, in my opinion, to refuse to register the transfer, if they disapprove of the transferee, and no one has a right to contest the propriety of their disapproval except by showing that it is capricious or *malà fide*, which is not attempted here. On this ground, I think, that the petition must be refused, and that it is unnecessary to frame issues on the various points, which, supposing the petitioners to be entitled to insist on registration as transferees, would have to be established before their claim as *bonà fide* purchasers could be admitted. The petition is dismissed with costs.

From this judgment the petitioners appealed, and the Bengal Coal Company at the same time filed the following objections to the judgment under s. 561 of Act X of 1877—(i) that the Judge had erred in holding the petitioners to be the only members of the firm of Luchmee Chund and Konnyloll; (ii) that he should have held, that the application for registration did not disclose the names of all the persons, members of the firm; (iii) that the Company were not bound by law to register the name of a firm.

Mr. Bonnerjee and Mr. Tiercelyan for the Appellants.—The case of *Walker v. Bartlett* (18 C. B., 845), is an authority to show that a transferee has power to fill up a blank form of transfer. Where an owner of shares borrows money on share certificates and deposits the shares, and the transfers signed by him, leaving the date and the name of the transferee in blank, the lender has implied power to fill up the blanks, and the transfers will pass the legal interest, if the Articles of Association do not require a deed. *In re Tahiti Cotton Company Ex-parte Sargent* (L. R., 17 Eq., 273); see also *Davies's case, In re Tees Bottle Company* (33 L. T., 834), where the instrument of transfer was unstamped and in blank, and in precisely the same position as our present transfer. [PONTIFEX, J.—Under the Act the Court may determine matters between you and Colonel Thomson, but Colonel Thomson is out of the country, and has not therefore appeared in this [325] application under the summary procedure allowed by s. 31. Is it reasonable that the Court should allow the summary procedure to be carried out under these circumstances, instead of letting the parties bring a regular suit to have their rights established?] There is not much difference between the summary procedure and an ordinary suit: in the former Colonel Thomson could answer by affidavit, in the latter by written statement. The summons was served upon Grindlay and Co., who are Colonel Thomson's constituted attorneys, and they have not appeared. [GARTH, C.J.—The

fact that Grindlay and Co. stated that they were Thomson's attorneys is no evidence against Thomson; it does not follow that they had power to appear for Thomson in suits; and the attorney is not bound to appear and answer, although he may have power to do so; and moreover the summons was not signed by Grindlay and Co. [PONTIFEX, J. —Even supposing Grindlay and Co. had a full power-of-attorney enabling them to appear, or even supposing Colonel Thomson were present, it is in either case discretionary in the Court to allow the summary procedure to be used, and in all the cases you have cited, the person in the position of Colonel Thomson was before the Court.]

Mr. *Phillips*, Mr. *Evans*, and Mr. *P. O'Kinealy*, who appeared for the Bengal Coal Company, were not called upon.

The **Judgment** of the Appellate Court (GARTH, C. J., and PONTIFEX, J.) was as follows :—

We think that the appeal should be dismissed. Without going into the grounds upon which the Court below disposed of the application, we think that, in the exercise of our discretion, we ought not to order the Bengal Coal Company, under s. 34 of the Indian Companies Act, to register the transfer. That transfer was made in the absence from this country of Colonel Mowbray Thomson, who was the registered owner of the shares. It was made by a Mr. Thompson, a member of the firm of Nicholls and Co., who held a power-of-attorney from Colonel Mowbray Thomson: and it is conceded, that not only was the transfer made in blank, but that the Company knew it. It was made, moreover, by Mr. Thompson very shortly before [326] Messrs. Nicholls and Co., became insolvent: and it was brought to the Company to be registered on the very day when the insolvency took place.

The Company were then served with a notice by Messrs. Grindlay and Co., on behalf of Colonel Mowbray Thomson, not to register the transfer, and there appears to be a question between Colonel Mowbray Thomson and the transferee of the shares, whether the transfer was *bona fide*, whether Thompson had a right to make it, and whether it was valid as against the Colonel. That gentleman is not before the Court: and, under such circumstances, we think we ought not to make the order in his absence. It appears that in all the cases to which our attention has been called by the appellants, both parties to the transfer, as well as the Company, were before the Court.

Mr. *Bonnerjee* contends, that because Messrs. Grindlay and Co., may hold a general power-of-attorney from Colonel Mowbray Thomson, we ought to give the applicants an opportunity now, at this stage of the case, to call upon Messrs. Grindlay and Co. to produce that power-of-attorney; and not only so, but to order Messrs. Grindlay and Co. to accept service of the process of the Court for Colonel Mowbray Thomson, so as to make him a party to the proceedings.

It is possible, no doubt, that Messrs. Grindlay and Co., may have such a power-of-attorney. We do not know whether they have or not. But even if they have, we think that we ought not, at this stage of the proceedings, to allow Mr. *Bonnerjee's* client to do that, which he ought to have done, if at all in the first instance.

But apart from this objection, we think, as at present advised, that if Messrs. Grindlay and Co. do hold a power-of-attorney, they would be at liberty, if they thought fit, to refuse to appear in this suit; or, in other words, they might act upon the power or not, as they might think proper.

We think, therefore, that the appeal should be dismissed with costs on scale No. 2.

Appeal dismissed.

Attorneys for the Appellants : Messrs. *Watkins and Watkins*.

Attorney for the Respondents : Mr. *Upton*.

NOTES.

[As regards appeal, see (1899) 26 Cal., 944.]

[327] APPELLATE CIVIL.

The 31st January, 1882.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE BOSE.

Hamidoolla.....Plaintiff

versus

Faizunnissa.....Defendant."

Mahomedan Law—Divorce by wife.

Under the Mahomedan law, a husband may give his wife the power to divorce herself from him according to the form prescribed by that law for divorce by the husband.

BY an instrument of kabinnama executed by the plaintiff upon his marriage with the defendant, the plaintiff agreed to allow the defendant to be taken to her father's house four times a year, and to erect a house for the defendant and live with her there, should any disputes arise between her and the persons living in the same mess with the plaintiff. He also agreed not to beat or ill-treat the defendant, and also agreed to pay her Rs. 400 on account of dower-money on demand. The agreement further stipulated that, if the plaintiff violated any of the conditions contained in it, the defendant should have the power of divorcing herself from him. This power the defendant exercised, alleging ill-treatment and a refusal to pay the dower-money. The plaintiff now sued for restitution of conjugal rights. The Munsif gave the plaintiff a decree, considering that the Mahomedan law did not give the wife the power of divorce. This decree was reversed by the Subordinate Judge, who, on the authority of *Mir Ashruf Ali v. Mir Ashraf Ali* (16 W. R., 260) and *Badarannissa Bibi v. Mafiattala* (7 B. L. R., 442), held, that a Mahomedan husband can vest his wife with the power of dissolving the marriage. The plaintiff appealed to the High Court.

Munshi *Serajul Islam* for the Appellant.

Baboo *Aukhil Chunder Sen* for the Respondent.

* Appeal from Appellate Decree, No. 358 of 1880, against the decree of Baboo Mothura Nath Gupto, First Subordinate Judge of Chittagong, dated the 28th November 1879, reversing the decree of Baboo Donesh Chunder Roy, Munsif of Hathazari, dated the 5th August 1879.

The **Judgment** of the Court (PRINSEP and BOSE, JJ.) was delivered by

Prinsep, J.—The plaintiff in this case sues for restitution of conjugal rights. The defendant, his wife, pleads that, under [328] the conditions of the kabinnama, which was entered into between herself and her husband before marriage, she received the power to divorce her husband under certain contingencies, and that, on their occurrence, she has exercised that power, and duly divorced him under the Mahomedan law.

In second appeal it has been argued by Munshi *Serajul Islam*, who appears for the husband, the plaintiff, that the delegation of such power by the husband to the wife is contrary to Mahomedan law. We are unable to find any authority for this contention. The Mahomedan law on the subject which has been laid before us provides for the delegation of the power of divorce by the husband to the wife on certain occasions by word of mouth, but it in no way, so far as it has been laid before us, limits the exercise of that power to those occasions. It would seem rather that, by providing how the wife should act, it recognizes her power to divorce her husband, if he should give her the power to do so. All the occasions specially provided for are what I may term casual. We are aware of no reason why an agreement entered into before marriage between parties able to contract under which the wife consented to marry on condition that, under certain specified contingencies, all of a reasonable nature, her future husband should permit her to divorce herself under the form prescribed by Mahomedan law, should not be carried out. We may observe, too, that the conditions under which it is stipulated that this power should be exercised by the wife are certainly not opposed to the Mahomedan law on the subject.

We, therefore, dismiss this appeal with costs.

Appeal dismissed.

NOTES.

[MAHOMEDAN LAW—DIVORCE BY WIFE—

Sir R. K. Wilson (Muhammadan Law (1908) III Ed., p. 141) is of opinion that it is immaterial whether such an agreement as in this case is ante-nuptial or post-nuptial. The Calcutta High Court has however drawn the distinction, and is of opinion that the texts of the Muhammadan Law relating as they do to *post-nuptial* contracts, do not, at any rate, necessitate the exercise by the wife, of the option of divorce, on the first occurrence of the contingency stipulated for in the *ante-nuptial* contract.—(1908) 36 Cal., 23; 12 C. W. N., 907; see also 3 C. L. J., 19. As regards when such agreements are void, see (1905) 7 Bom. L. R., 602. See I.L.R. (1872-1873) Vol. I, 206.]

[329] APPELLATE CIVIL.

The 30th January, 1882.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE BOSE.

Raj Chundra Chuckerbuddy and others.....Plaintiffs

versus

Kinoo Khan and others.....Defendants.*

Suit to set aside sale for arrears of Government Revenue—Limitation Act (XV of 1877), sched. ii, art. 12.

A suit to set aside a sale for arrears of Government revenue must be brought within one year from the date when the sale becomes final and conclusive.

THIS was a suit to annul the revenue-sale of a share in a certain taluq. The sale took place on the 30th of July 1877. No appeal was preferred to the Commissioner within the sixty days prescribed by s. 2 of Beng. Act VII of 1868; and under s. 27 † of Act XI of 1859, as modified by s. 4 of Beng. Act VII of 1868, the sale became final and conclusive on the 27th of September 1877. The plaintiffs instituted their suit on the 10th of February 1879, alleging fraud, and also that no portion of the revenue payable in 1877 on account of the taluq was in arrear. The Munsif dismissed the suit, holding that it was barred under Act XV of 1877, sched. ii, art. 12,† and this decision

* Appeal from Appellate Decree, No. 333 of 1880, against the decree of H. W. Gordon, Esq., Officiating Judge of Pubna, dated the 29th November 1879, affirming the decree of Babu Shumbhoo Chunder Nag, Munsif of Seragunge, dated the 8th July 1879.

† [Sec. 27 : - All sales of which the purchase money has been paid up as prescribed in section XXIII of this Act, and against which no appeal shall have been preferred, shall be final and conclusive at noon of the thirtieth day from the date of sale, reckoning the said day of

sale as the first of the said thirty days. And sales against which an appeal may have been preferred, and dismissed by the Commissioner, shall be final and conclusive from the date of such dismissal, if more than thirty days from the date of sale, or if less, then at noon of the thirtieth day as above provided.]

† Art. 12 :

Description of suit.	Period of limitation.	Time from which period begins to run.
To set aside any of the following sales :— (a) Sale in execution of a decree of a Civil Court ; (b) Sale in pursuance of a decree or order of a Collector or other officer of revenue ; (c) Sale for arrears of Government revenue, or for any ; demand recoverable as such arrears ; (d) Sale of a patni taluq sold for current arrears of rent.	One year	When the sale is confirmed or would otherwise have become final and conclusive had no such suit been brought.
<i>Explanation :—</i> In this clause ' patni ' includes any intermediate tenure saleable for current arrears of rent.		

was affirmed by the Subordinate Judge. The plaintiffs appealed to the High Court.

Baboo *Lall Mohun Doss* for the Appellants.

Baboo *Kally Churn Banerjee* for the Respondents.

The **Judgment** of the Court (PRINSEP and BOSE, JJ.) was delivered by

Prinsep, J.—In both the lower Courts this suit has been dismissed, on the ground that it was barred by limitation, being a suit to set aside a sale for arrears of Government [330] revenue, and not being brought within one year from the date on which the sale became final.

We are of opinion that, having regard to the terms of the plaint and the case that was made before the lower Courts, the suit has been rightly dismissed. The learned pleader who appears for the appellants, has attempted to show that the plaintiffs were entitled to relief on the ground of fraud, and next he has attempted to maintain, on the authority of the judgment of the Full Bench case of *Baijnath Sahu v. Lala Sital Prasad* (2 B. L. R., F. B., 1), that the suit does not come within cl. 12 of the 2nd schedule of the Limitation Act of 1877, because it being alleged that no arrear of revenue was due, the proceeding of the Collector was *ultra vires*, inasmuch as the sale was not properly held under Act XI of 1859, and that the suit was governed by another provision of the Law of Limitation.

It appears to us, that both these points are untenable. They are entirely new points set up here for the first time, and no part of the case made in the lower Courts. The circumstances of the case as disclosed by the proceedings seem to show that the plaintiffs have suffered considerable hardship, and we should have been glad to have been able to direct a trial of the suit on the merits, but unfortunately the plaintiffs, by their own laches, have placed it out of our power to do so.

The appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[See also 28 Cal. 475 ; 29 Cal. 395 ; 25 Cal. 833 ; 12 Mad. 168, and the notes to 3 Cal., 300 ; 5 Cal. 110 in the **Law Reports Reprints.**]

The 28th February, 1882.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

— . . .
The Empress

versus

Shasti Churn Napit.

Escape from custody while being taken before a Magistrate—Subsequent conviction for such escape—Penal Code (Act XLV of 1860), ss. 224, 225.

An escape from custody when being taken before a Magistrate for the purpose of being bound over to be of good behaviour, is not punishable under either s. 224 or s. 225 of the Penal Code.

ONE Shasti Churn Napit was arrested preliminary to being brought up before a Magistrate for the purpose of being bound over under s. 505 of the Criminal Procedure Code to be of good behaviour. Before he was produced before the Magistrate he escaped from custody.

He was, however, re-arrested and tried before the same Magistrate for this escape, and was sentenced to six months' rigorous imprisonment under s. 224 of the Penal Code.

The Magistrate of the District was of opinion that the conviction was illegal, inasmuch as s. 224 was not applicable, the man not being in custody for 'an offence'; and that s. 225 would not apply, as the custody was only preliminary to asking for an order to furnish security. He, therefore, referred the matter to the High Court.

The **Opinion** of the Court (MITTER and MACLEAN, JJ.) was given by

Mitter, J. The conviction seems to be illegal. Assuming that Shasti Napit was legally arrested under s. 94 of the Criminal Procedure Code, he was not lawfully detained in custody for any offence, and could not therefore be punished under s. 224 of the Penal Code; nor could he have been punished under s. 225A, as he had not failed to furnish security for good behaviour.

The conviction must be set aside and the warrant for his imprisonment cancelled.

Conviction set aside.

— . . .
NOTES.

[See also (1881) 7 All., 67 4 A. W. N. 267.]

* Criminal Reference, No. 29 of 1882, and letter No. 306, from the order of H. Mosley, Esq., Officiating Magistrate of Murshedabad, dated Berhampore, the 24th February 1882.

[332] PRIVY COUNCIL.

The 8th November. 1881.

PRESENT :

SIR B. PEACOCK, SIR M. E. SMITH, SIR R. P. COLLIER, SIR R. COUCH, AND
SIR A. HOBHOUSE.

Hurro Durga Chowdhuri.....Judgment-debtor.

versus

Surut Sundari Debi.....Judgment-creditor.

(On appeal from the High Court of Judicature at Fort William
in Bengal.)*Interest on mesne profits—Execution of decree—Practice—Costs—Grounds
of appeal.*

The term 'mesne profits' means the amount which might have been received from the land deducting the charges for collection; and does not include damage resulting from their not having been paid as they became due, or loss of interest year by year.

A decree stated that mesne profits were to be recovered, "with interest from the date of their ascertainment." *Held*, that the Court executing this decree had no authority to allow interest year by year, upon the collections which ought to have been received.

If grounds of appeal which are absolutely untenable are joined with grounds which are tenable, in order to bring a case within the rule as to the value authorizing an appeal as of right, this matter may be considered in regard to the question of costs.

APPEAL from a decree of the High Court (22nd November 1878), dismissing an appeal from a decree of the Subordinate Judge of Mymensing (8th April 1878), and allowing a cross-appeal from the latter.

The question raised on this appeal was as to the allowance of interest on mesne profits, to which the respondent was entitled under a decree of the High Court of the 27th March 1872, affirming, on appeal and cross-appeal, a decree of the Subordinate Judge of Mymensing in favour of the present respondent's husband, against Kalichandra Chowdhry, whose estate was represented in this suit by the present appellant, as his widow, and as the guardian of his minor son. The decree of 1872 awarded possession of a ten-anna share of seven mehals of zamindari land in Mymensing, with mesne profits to be ascertained in execution of decree, and to be calculated from the 1st Assin 1273, corresponding to the 16th September 1866, to the date of delivery of possession, with interest on such *pro* [333] fits from the date of ascertainment at the rate of six per cent. per annum. An appeal to Her Majesty against the above decree was dismissed on the 13th November 1875, and in execution took place the proceedings out of which this appeal arose.

On the 10th March 1878, after several intermediate proceedings, an Amin was deputed to inquire and report as to the amount of the mesne profits. After objections to his report had been heard, the Subordinate Judge, on 17th June 1878, made his final order in execution, fixing Rs. 13,359 as the amount of mesne profits, which he allowed with costs.

On an appeal, the judgment of the High Court (MORRIS and PRINSEP, JJ.) disposed of two objections: the *first*, against the assessment of mesne profits as being excessive, and on a contention that the Subordinate Judge should have

allowed the appellant more time to produce her papers ; and the *second*, that the mesne profits should have been calculated only down to July 1873, when, as the appellant insisted, the respondent obtained possession. Both these objections were held untenable. The respondent had not obtained possession till July 1874—a delay owing to the objections of those whom the appellant represented.

On the respondent's cross-appeal the judgment of the High Court will be found reported in I. L. R., 4 Cal., 674.

As the result, by the decree of the High Court, the present appellant was ordered to pay to this respondent the aggregate sum for principal and interest of Rs. 19,104-3-2, of which Rs. 13,359-4-7 was for principal, and Rs. 5,744-14-7 for interest. This appeal was thereupon preferred against the whole decree.

Mr. T. H. Coote, Q.C., and Mr. H. Cowell appeared for the Appellant.

Mr. R. V. Dwyne for the Respondent.

For the appellant it was argued, that the High Court was wrong in ordering, in execution, interest upon each year's mesne profits up to the date of the decree of the lower Court. There was no authority for giving 'rests' which could only be [334] derived from the decree. The cases cited in the judgment of the High Court did not apply. *Sadasiva Pillai v. Ramalinga Pillai* (I. R., 2 I. A., 219 ; s.c., 15, B. L. R. 383) was referred to.

For the respondent it was contended that the expression mesne profits, or wasilat, 'with interest thereon,' used in the decree, was sufficient to authorize the interest that had been allowed on the collections.

Reference was made to *Hogg v. Dinonath Srimani* (8 W. R., 447). Also to the decrees made by the Sadr Dewany Adalat in *Bamundas Mookerjee v. Mussamat Tarini* (7 Moore's I. A. 169), and *Raja Lelaland Singh v. The Government of Bengal* (9 Moore's I. A., 479).

Their Lordships' **Judgment** was delivered by

Sir B. Peacock.—The respondent in this case was the plaintiff in the Court below. She sued the husband of the present appellant to recover possession of certain lands, together with the sum of Rs. 3,617-10-9, the estimated amount of mesne profits for two years ten months and twenty days, from the 1st Assin 1273 to 20th Srabun 1276. In that suit a decree was made for the plaintiff to recover possession of the lands, and also the mesne profits, not from a time previous to the date of the suit, as claimed, but from the date of the suit to the date of recovery of possession, to be ascertained by inquiry at the time of the execution of the decree, with interest from the date of the ascertainment at six per cent. per annum. From that decree there was an appeal to the High Court. The High Court, by its decree, amended the decree of the lower Court by giving the mesne profits from the 1st Assin 1273 to the 20th Srabun 1276, in addition to those which had been awarded by the lower Court. The High Court also stated that the mesne profits were to be recovered, with interest from the date of ascertainment. Therefore, according to both decrees, the mesne profits were to carry interest only from the date of ascertainment. It is clear that the Court, in executing the decree, could not vary or add to it by awarding anything beyond that [335] which was originally decreed. When the decree came to be executed it was referred to an Amin to ascertain the amount of mesne profits, and he ascertained what was the rent which might have been obtained from the estate. That he treated as the mesne profits of the estate, but he added no interest year by year upon the amount. The mesne profits so ascertained amounted to Rs. 13,359 and some odd annas, and the lower Court made an order

in execution for that amount. Upon that there was an appeal to the High Court by both parties, first, on the ground that the assessment was excessive; and secondly, on the part of the plaintiff, that, in assessing the mesne profits, the Court below ought to have allowed interest year by year upon the amount which could have been collected and further interest upon the aggregate amount from the date of its order. The High Court, upon that appeal, having heard the argument of counsel, thought that the lower Court was wrong in not having allowed interest upon the rental year by year, upon the ground that the decree-holder was entitled, not merely to the rental less the collection charges, but also to interest thereon year by year as compensation for the loss he had sustained by not having the use of his money during the period he was kept out of possession. The question is, whether the High Court, which by its decree was merely executing the original decree of the High Court, did not, by giving that interest, really add to and alter the decree which was to be executed. Now that depends really upon the question what was the meaning of the term 'mesne profits.'

In their Lordships' opinion, the amount which might have been received from the land, deducting the collection charges, was the profits of the land. The loss of interest year by year upon those profits was merely damages sustained by the plaintiff in consequence of her having been prevented from receiving the profits as they became due. But the original decree did not award those damages, and the High Court, by awarding them, added to the decree which was in the course of execution.

Several cases were cited to show that the High Court was right in giving interest year by year, and several of those cases were referred to by the High Court themselves in their judgment. Amongst others the cases of *Protap Chunder Borooah v. Rance Surnomoyee* (14 W. R., 151) was cited. When that case comes to be examined, it will be found that it was not an appeal from a decree in execution, but from a decree in an original suit; and in that appeal it was contended that the lower Court ought, in the original suit, to have given the plaintiff a decree, not only for the mesne profits, but for interest upon those mesne profits to be calculated from year to year. The High Court in that case thought that, under certain circumstances, a plaintiff might be entitled to interest upon mesne profits from year to year; but they said that, inasmuch as that interest had not been claimed in the suit, they could not interfere in the case, and the plaintiff merely recovered the mesne profits without interest. That is a very different case from the present. There it was contended that the original decree of the Court ought to be altered; here it is contended, not that the original decree of the Court ought to be altered by awarding interest year by year, but that the decree of the High Court in the execution of the case, in awarding such interest, was in accordance with the original decree. The case cited, however, is an authority to show that it was not so: for in that case the mesne profits and the interest thereon were treated as two distinct subjects, and the Court refused to allow the interest as well as the mesne profits, because the loss of the interest had not been claimed as damages.

If the present contention is correct, the term 'mesne profits' in that case included interest thereon year by year, although the Court refused to allow it. It appears to their Lordships that the decision of the lower Court in executing the decree was in accordance with the decree, and that the decision of the High Court by adding the interest from year by year exceeded the original decree.

Under these circumstances, their Lordships think that the decree of the High Court ought to be reversed.

It appears that the total amount which the High Court has given by way of interest in excess of the decree is Rs. 5, 744. If that had been the only objection, the case would [337] have been under the appealable value; but the appellant, in order to gain a *locus standi*, appealed also upon the ground that the amount awarded for mesne profits was excessive; and the greater portion of the record, about 240 pages, relates to that part of the case upon which there was no chance of the plaintiff's succeeding. The decisions of the Amin of the lower Court and of the High Court were concurrent with reference to that point. The only possible ground of appeal was, that the Court had allowed interest from year to year.

Their Lordships cannot encourage the joinder of grounds of appeal which are absolutely untenable with grounds which are tenable in order to bring a case within the rule as to value which authorizes an appeal as of right. In the present case the effect of so doing has been a large increase of costs to the respondent. The appellant has thereby disentitled herself to the benefit of the rule under which a successful appellant is ordinarily entitled to the costs of the appeal.

Their Lordships will, therefore, humbly advise Her Majesty to reverse the decree of the High Court, but they make no order as to costs.

Appeal allowed.

Solicitors for the Appellant: Messrs. *Barrow and Rogers*.

Solicitor for the Respondent: Mr. *T. L. Wilson*.

NOTES.

[DEFINITION OF MESNE PROFITS INTEREST -

This decision was under the Code of 1859, which did not define 'mesne profits.' The C. P. C. of 1877 gave a definition which was extended by the C.P.C. of 1882, s. 211, so as to include *interest*. The C.P.C. of 1908 sec. 2 (12) *retains* that definition, but excludes therefrom profits due to improvements made by the person in wrongful possession.

By virtue of this definition, the award of mesne profits carries with it interest thereon unless it is expressly refused: (1905) 33 Cal. 329; (1903) 30 Cal. 506; 7 C.W.N. 437; (1900) 27 Cal. 951; (1891) 15 Mad. 203; Contra (1900) 22 All. 262 following 8 Cal. 332; 343; which however were decisions under the C.P.C. of 1859. See also (1896) 22 Bom. 42. As regards collection charges being disallowed, see (1901) 23 All. 252 on appeal from 22 All. 262.]

[8 Cal. 337 4 Sar. P.C.J. 307: 9 I.A. 58: 6 Ind. Jur. 150]

PRIVY COUNCIL.

The 11th November 1881.

PRESENT:

SIR B. PEACOCK, SIR M. F. SMITH, SIR R. P. COLLIER, SIR R. COUCH, AND
SIR A. HOBBHOUSE.

Sujan Singh.....Defendant

versus

Gunga Ram and another.....Plaintiffs.

[On Appeal from the Chief Court of the Punjab.]

Surety—Lex loci contractus.

Under a contract, made and to be performed in the territory of an Independent State, between the State and contractors, the latter received an advance of money, for the payment

whereof, in case the contract should fail, a third party became surety to the State. The contract failed, and was terminated by the State, to which the surety repaid, on its demand the money advanced, with some deduction on account of a part performance.

For this amount the surety sued the principals, who were subject to the jurisdiction of the Courts in British India. In deciding whether the contract had or had not failed within the meaning of the suretyship undertaken by [338] the plaintiffs,—*held*, that not the law of British India, but what was in the contemplation of the parties as to the result of the contract when they entered into it, must be regarded.

APPEAL from a decree of the Chief Court of the Punjab (7th July 1875), reversing a decree of the Commissioner of the Multan Division (15th April 1875), which reversed a decree of the Extra Assistant Commissioner of the Multan District (5th January 1875).

The question raised on this appeal was as to the right, under the circumstances of the case, of a surety to recover from the principal money claimed by the former as paid by him under the contract to which they were parties. The contract of suretyship was made in 1869, at Bahawalpur in the Punjab, and the principals contracted to deliver timber to the Bahawalpur State, which acted through the Superintendent, Colonel Minchin. The principals Nand Singh and Makhan Singh received an advance of Rs. 10,000, which Hurdial Singh, who was then in the service of the State, agreed to repay, in case the contract should fail. In 1870, the State held, that the contract had failed, put an end to it, and giving credit for certain timber delivered, claimed from Hurdial Singh the balance of the advance, Rs. 8,860-7. This he paid; and afterwards, Nand Singh having died, and his representative Sujan Singh, together with Makhan Singh, being resident in British territory, Hurdial sued them for the amount in the Court of the Extra Assistant Commissioner, of Multan. For the defence it was denied that the contract to supply timber had failed, and it was disputed that the State had rightly exacted payment from the surety.

The facts are fully stated in their Lordships' judgment. The Court of first instance decided that, at the stage at which the contract was rescinded, the State was not justified in putting an end to it, and dismissed the claim. This decision was reversed by the Commissioner of the Multan Division, who remanded the suit for trial on the merits with reference to the question whether the State terminated the contract on good grounds.

On an appeal to the Chief Court by Sujan Singh, and on cross objections preferred by the surety Hurdial Singh, the [339] Commissioner's decree was reversed and the surety's claim was decreed with costs. A review, under s. 378 of the Code of Civil Procedure, having been dismissed with costs, Sujan Singh brought the present appeal, pending which Hurdial Singh died. The latter was represented by his heirs, the respondents.

Mr. J. D. Mayne appeared for the Appellant.

The Respondents did not appear.

Their Lordships' Judgment was delivered by

Sir R. Couch.—The suit in this appeal was brought by Hurdial Singh, who has since died and is now represented by the respondents, against Makhan Singh and the appellant Sujan Singh, to recover a sum of money which the plaintiff said he had paid as surety, and was entitled to recover from them.

Makhan Singh is since dead, and his representative has not joined in the appeal. Sujan Singh is the son and representative of Nand Singh, who died before the suit.

The circumstances under which the plaintiff became surety are, that, on the 12th of November 1869, Nand Singh and Makhan Singh, through their agent Gormukh Singh, entered into a contract with the Political Agent of the State of Bahawalpur to supply timber, the contract being that the timber should be supplied clear and without knots; that, on its arrival at Multan, it was to be examined there by a mistree appointed by the Political Agent, and after inspection was to be forwarded to Bahawalpur; that, though the timber should be forwarded, yet, notwithstanding the approval of the mistree, the contractors would take back any timber which was disapproved of by the State at Bahawalpur. Another clause, as to the place of depositing it, is not material; and the fifth was, that the Political Agent would purchase the timber brought by the contractors to Bahawalpur, and rates of payment for it were specified. Nothing was said as to the quantity of timber which was to be supplied, nor as to the time during which the contract was to remain in force. It was only a contract to supply timber, and [340] allowed the Political Agent, who represented the State of Bahawalpur, to take it or not according to his approval of it. It would appear that, shortly after the making of the contract, the contractors were desirous of obtaining an advance of money, and they applied to the Political Agent for it. The plaintiff has given his account of the transaction; but as the Political Agent, Colonel Minchin, has also stated what took place, it will probably be better to refer to what he said. He was examined as a witness, and said, in answer to the question "On whose security did Nand Singh and Makhan Singh obtain an advance of Rs. 10,000 from the Bahawalpur State?" "On the security of the plaintiff, who was at that time confidential agent attached to my Court; the defendants were introduced to me by the plaintiff, who stated that they were the agents for the sale of timber belonging to the Maharaja of Cashmere and Cashmere subjects;" "I at once accepted him as security, on the understanding that if the defendants failed to carry out their contract, the plaintiff should make good the balance of advance." In answer to a question in cross-examination he said, "The plaintiff was in no way responsible for the fulfilment of the contract, but only for the repayment of the advance in case the contract should fail." The plaintiff's statement was, that he had a letter from the defendants, asking him to obtain an advance on account of the contract; that the agent Gormukh Singh asked for Rs. 25,000, and he suggested that Rs. 10,000, might be advanced; and that he went to Colonel Minchin on the day he received the letter. Colonel Minchin refused to advance the money unless on security, and the plaintiff said he would be surety, and requested him to advance Rs. 10,000, for the present to enable the contractors to open their work. The money was advanced. The period for the supply of timber appears to have been during the cold season, when only it could be floated down the river, as it had to be for a considerable distance. The contractors supplied some timber. Part of it was received and part rejected; and complaints were made no doubt as to the quality of it. In September 1870, Colonel Minchin called upon the plaintiff to pay the balance which then remained of the advance of Rs. 10,000, after giving credit for [341] the timber which had been received by the State, and which balance amounted, as Colonel Minchin says, to Rs. 8,860-7. He gave directions that this amount should be recovered from the plaintiff; and it was recovered from him, in the first instance, by his giving up jewels and different securities, which were valued at the sum to be recovered, which was ultimately realized

from them. The plaintiff was, in fact, obliged to pay the amount, as being the balance remaining of the advance; and this is what he now seeks to recover from the defendants. The question is, whether he is entitled to do so. The lower Courts have decided that he is entitled. When the case first came before the Chief Court, one of the learned Judges was of opinion that, applying, according to his view, the law of British India to the case, there had been a breach of contract which justified the payment of the money by the plaintiff; and therefore he, as surety, was entitled to recover it. The other learned Judge was of opinion that the act of Colonel Minchin, as an act of State, could not be inquired into; and that, on this ground, the plaintiff having been thus obliged to pay the money, he was so entitled. Consequently a decree was made in the plaintiff's favour. There was then an application for a review, upon which the learned Judge, who had in the first instance thought the contract had been broken, after a discussion of the evidence, came to the contrary conclusion, and thought that the contract had not been broken, and therefore that the plaintiff was not entitled to recover. The other learned Judge adhered to his opinion that the act of Colonel Minchin could not be disputed, and on its being referred to a third Judge, he took the same view. The application for a review was, therefore, dismissed, and the decree was confirmed.

Their Lordships have now to consider whether this decree in favour of the plaintiff ought to stand.

The contract under which the plaintiff became the surety, and which is the contract that must really be considered in this case, was made in Bahawalpur, and the parties must be considered to have made it according to the liabilities that would be incurred there. Their Lordships do not concur in the view that, when the surety comes to enforce his rights against the [342] principals, the law of British India is to be looked at. They must see what was in the contemplation of the parties when they entered into the contract at Bahawalpur, and the evidence of Colonel Minchin puts it as high as it can be put in the defendants' favour. He says, that the plaintiff was to be responsible for the repayment of the advance in case the contract should fail. The question is, whether the contract to supply timber has not failed within the meaning of the contract of suretyship. It is clear that when Colonel Minchin, in September 1870, directed that the balance should be recovered from the plaintiff, the contract had failed. It was put an end to by a power which neither the defendants nor the plaintiff, the surety, could dispute. Colonel Minchin had power to put an end to the contract; and if we look not merely to the power which he might have as Political Agent, but to the terms of the contract for the supply of timber, it would appear that he was entitled to do so. The contract was one which, being indefinite in point of time, it would seem might be put an end to by either party. It was really only a contract to pay for timber supplied and accepted according to certain rates. Therefore, in this respect, if it were necessary to go into that question, he had power to put an end to the contract. Moreover, if their Lordships had thought it necessary to go into the question whether Colonel Minchin was justified in what he did, there is evidence that the contract had failed through the acts of the contractors; that they had, according to Colonel Minchin's evidence, after offering a quantity of timber which had been rejected, as there was power to do, abandoned the contract, and they do not seem to have taken any steps insisting on the timber being received or to have sent other timber in its place. The evidence is, and there is no reason to doubt that it is true, that they had in fact done in the way of abandoning the contract what would have justified the Political Agent in treating it as at an end, and saying that the balance ought

to be repaid to the Government. The Agent had, under those circumstances, declared the contract at an end. In any view of the case, therefore, the balance of the advances ought to be repaid by the surety. And the surety, having been compelled [343] to pay the money, is entitled to recover it from the defendants.

Their Lordships think that the decree which was made in the first instance by the Chief Court, and confirmed upon the application for a review, was right; and they will humbly advise Her Majesty to dismiss the appeal.

Appeal dismissed.

Solicitor for the Appellant: Mr. T. L. Wilson.

NOTES.

[See Dicey's Conflict of Laws (1908) 11 Edn. p. 563 *et seq.*]

[8 Cal. 343]

APPELLATE CIVIL.

The 17th January, 1882.

PRESENT :

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

Rajendro Coomar Roy and others.....Decree-holders

versus

Madhub Chunder Ghose and others.....Judgment-debtors.

Interest—Damages—Mesne profits—Wasilat—Presumption—Onus.

Interest calculated upon yearly rests of rent may, when claimed by the plaintiff in his plaint, be given as an essential portion of the damages, which are recoverable by a person wrongfully kept out of possession of immoveable property.

Protap Chunder Borooah v. Rance Surnomayee (14 W. R., 151) followed.

The term 'mesne profits' does not include interest year by year in those profits.

Hurro Durga Chowdhram v. Surut Sundari Debi (*ante*, p. 332) followed.

In suits for mesne profits, when the defendants have been on possession of the property as wrong-doers, it lies upon them to show what were the sums realized as rent during the time of their possession.

Principles stated on which the calculation of mesne profits should be based.

THIS was an application for execution of a decree. The decree-holders sought to realize the amount of wasilat due to them under a decree of the Court of the Subordinate Judge of Dacca, dated the 30th of January 1860, in respect of certain estates of which they had been kept out of possession by the judgment-debtors since the 27th of October 1846. They recovered possession of those estates in 1874 in execution of their decree, and it was for this entire period of dispossession, extending over twenty-seven years and some months (to the [344] date of this application) that wasilat was claimed. An Amin was

* Appeal from Original Order, No. 159 of 1881, against the order of Baboo Gunga Churn Sircar, Subordinate Judge of Dacca, dated the 31st March 1881.

appointed for the purpose of making a local investigation, who submitted his report on the 10th of January 1881, awarding to the decree-holders the sum of Rs. 35,737-13 as mesne profits. At the hearing before the Subordinate Judge, both sides took exceptions to the report.

In respect of one taluk, called Ram Narain Ghose, the decree-holders claimed to have a larger amount of wasilat for the first seven and-a-half years of dispossession than was granted by the Amin. The Subordinate Judge, for reasons recorded by the Amin, found that the collection papers of this taluk for those years were untrustworthy, but stated that there was no better evidence on the point, and he took the highest amount of *sheet* shown by the judgment-debtors' papers for any one year, and calculated the wasilat for the seven and-a-half years on this basis. The wasilat of the taluk for the remaining years of dispossession was based on collection papers filed by one Nurbux, who had been a shareholder of the taluk from 1261 (1854); this part of the report was, with some unimportant variations, confirmed.

The Subordinate Judge went on to say: "The decree-holders are entitled to have a further sum of Rs. 186 on account of the wasilat of taluk Guru Dass Roy. It is an admitted fact that Kismat Bangla and Manikertak appertain to this taluk; but it appears from the papers forwarded by the Amin that he has not included in his account any wasilat in respect of these two kismats. The judgment-debtors say that, as they were never in possession of the said kismats, they cannot be held liable for the wasilat thereof. It, however, appears from their own *taluk haki* of 1262 (1855), that they were in possession of Kismat Manikertak, which was charged with a jama of Rs. 16 per year. Under such circumstances, I am clearly of opinion that the decree-holders are entitled to the wasilat of this kismat for the period of dispossession at the rate of Rs. 16 per annum, minus the collection charges, *i.e.*, to Rs. 186. There is no evidence on the record which can enable the Court to award any wasilat on account of Kismat Bangla.

"With regard to taluk Chunder Narain Ghose, the amount [346] of wasilat fixed by the Amin partly on the testimony of witnesses, and partly on the papers filed by the judgment-debtors, is Rs. 6,242-5. The pleaders for the decree-holders contend, that, in fixing this sum, the Amin has committed a mistake by debiting against their clients Rs. 111, as being the amount of *khasta*, or loss, said to have been sustained by the judgment-debtors in respect of this taluk from 1253 to 1263 (1846—1856). This contention is supported by the account papers prepared by the Amin, in which the amount of *khasta* has been deducted against the decree-holders. In my opinion this deduction should not be made, for it is not reasonable to hold that, because for some years the amount of collection made by the judgment-debtors fell short of the amount of revenue and collection charges, the decree-holders, in the realization of their wasilat, must suffer a loss likewise."

After referring to the *gass mehal* in Kamalpur, the Subordinate Judge said: "There is another sowkar, that is, the sowkar of the village called Khagan. The pleaders for the decree-holders urge, that the wasilat of this sowkar, from 1256 to 1269 (1849 - 1862), should have been fixed at Rs. 3,010, according to the evidence of Kasinath Dey, who says, that his father held that sowkar under a farming settlement at a jama of Rs. 215; but that as the Amin has fixed this amount at Rs. 282 only, the decree-holders are entitled to get Rs. 2,728 more than what has been ascertained by the Amin on this point. This contention appears to be well founded. The Amin, in ascertaining the wasilat of this sowkar, has relied on certain papers filed by the judgment-debtors, in

which two persons, named Uday and Ramsunder, have been mentioned as farmers of the said sowkar; but it appears from the deposition of Ramsunder himself and of Barku, a son of Uday, that those persons were not the ijaradars of the said sowkar. Under such circumstances, the judgment-debtors' papers relating to this property do not appear to be trustworthy, and I am of opinion that the testimony of Kasinath, whose father was admittedly the ijaradar, ought to be relied on."

The decree-holders appealed to the High Court, the judgment-debtors filing a cross-appeal.

[346] Mr. *Evans*, Baboo *Srinath Dass*, and Baboo *Doorga Mohun Dass* for the Appellants.

Mr. *Branson* and Baboo *Upendro Nath Mitter* for the Respondents.

The **Judgment** of the Court (McDONELL and FIELD, JJ.) was delivered by

Field, J. - In this case there is an appeal by the decree-holders, and a cross-appeal by the judgment-debtors, against an order of the Subordinate Judge of Dacca, passed in certain execution-proceedings, and dealing with the assessment of mesne profits, which, under the terms of the original decree, were left to be settled by the subsequent proceedings in execution. Several grounds have been taken in the petition of appeal, but the learned counsel for the appellants has only pressed one of these grounds upon us; and that is the first ground, which is, that the lower Court has erred in not giving the decree-holders interest on the yearly amounts of wasilat from the end of the years for which such amounts were allowed respectively up to the date on which such wasilat was ascertained. The question whether interest upon the sums allowed as mesne profits for each year, such interest to be calculated from the close of the years in respect of which such sums have been allowed respectively up to the date of instituting the suit in which they were decreed, can be recovered as damages, has been raised in several cases which have, from time to time, come before this Court on appeal. In the case of *Protap Chunder Borooah v. Rance Surnomoyee* (11 W. R., 151), the law is laid down by COUCH, C.J., and the result of the decisions appears to be that such interest may be given by way of damages; in other words, that interest calculated upon yearly rests of rent may be given as an essential portion of the damages, which are recoverable by a person wrongfully kept out of the possession of immoveable property. We think there can be no doubt that this principle has been well settled by a number of cases which have been decided by the Courts in this Presidency;

[347] but at the same time it is to be observed that, in the majority of these cases, interest has been treated in the plaint and afterwards in the proceedings, not as an essential portion of the damages, but as interest; and in point of principle no distinction has been drawn between interest before the date of institution and interest after the date of institution. If the subject had been more accurately treated in all cases, the interest allowed upon yearly rests of rent before the institution of the suit or before the making of the decree would have been dealt with as damages, while the interest allowed after institution or after decree would be that interest which is ordinarily given upon an unliquidated claim reduced to a liquidated form, for the time between decree and recovery.

The principle which was recognized in the case of *Protap Chunder Borooah v. Rance Surnomoyee* (11 W. R., 151) has been recognized and acted upon in America also. We find in Mr. Sedgwick's work on Damages, that interest is commonly allowed in that country by way of punishment, for any illegal conversion or use of another person's property (see p. 470 of the sixth

edition). In another passage Mr. Sedgwick says:—"There is considerable conflict and contradiction between the English and American cases; but as a general thing, it may be said that while the tribunals of the former country restrict themselves generally to those cases where an agreement to pay interest can be proved or inferred, the Courts of the United States, on the other hand, have shown themselves more liberally disposed, making the allowance of interest more nearly to depend on the equity of the case, and not requiring either an express or implied promise to sustain the claim" (p. 473). And further on (p. 476) he shows from the decisions that the rule of allowing interest by way of damages in actions of trespass brought for the recovery of property has been adopted almost generally by the tribunals in the States. Even in England there are many cases in which interest, though not recoverable as such, may be recovered as damages for the detention of money; see Mr. Mayne's work on Damages, third edition, pp. 135, 136, 178, [348] and 179. In this country it may well be held to be in accordance with justice, equity, and good conscience to allow interest upon the yearly rents or profits which the person wrongly kept out of the possession of real property would have received at the close of each year, as part of the damages which such person is entitled to recover from the wrong-doer who has prevented him from enjoying those profits from year to year. The principle being then settled and admitted, we have to apply it to the facts of this case now before us. We were at first pressed with the case of *Hurro Durga Chowdhurani v. Surut Sundari Debi* (I. L. R., 4 Cal., 674; s.c., in App. to P. C., ante, p. 332). There is, however, an essential difference between that case and the case of *Protap Chunder Borooah v. Rancee Surnomoyee* (14 W. R., 151). The latter case was a case of regular appeal against an original decree, while the case of *Hurro Durga Chowdhurani v. Surut Sundari Debi* (I. L. R., 4 Cal., 674; s.c., in App. to P. C., ante, p. 332) was a case arising out of the execution of a decree. The case now before us is, like the case last mentioned, a case of execution; but in that case no question appears to have been raised or argued as to whether interest before institution was claimed in the original plaint: and this, we think, makes an important difference between that case and the case with which we have to deal. The decree adopting the language of the plaint leaves the 'mesne profits' to be ascertained in the execution-proceedings. If it can be successfully contended that the term 'mesne profits,' unrestricted or unlimited by anything in the context, includes interest on the yearly rents and profits, there is no room for this argument where the context excludes the supposition that the plaintiff intended to claim such interest as part of the damages to which he is entitled. The learned counsel for the appellants has drawn a distinction in his argument to-day between interest on the mesne profits before the institution of this suit on the 1st of July 1858, and interest on the mesne profits subsequent to the institution of the suit and up to the date on which possession was given in execution of the decree. As to interest on the mesne profits antecedent to the institution of the suit, we were prepared to decide that even if it can [349] be successfully contended that the decree-holders are entitled to have interest on yearly rests of rent as part of the mesne profits, still, because in their original plaint they introduced a figured statement of the amount which they claimed as mesne profits, such figured statement not including interest upon yearly rests, they have precluded themselves from obtaining such interest upon the ordinary principle that a plaintiff cannot obtain by the decree of Court more than he asked in his original plaint. As to the interest on mesne profits after the institution of the suit and up to the date of obtaining possession, we think that, upon the construction of the original decree, the question really must come to this, whether the term 'mesne profits' can be construed to mean

and include interest upon yearly rests of rent by way of damages. It is not necessary for us now to express our own opinion upon this question, because it has been concluded by the judgment of the Privy Council of the 8th November 1881, in the case of *Harro Durga Chowdhurani v. Surrut Sundari Debi* (*ante*, p. 332), where their Lordships reversed the decision of the learned Judges of this Court (I. L. R., 4 Cal., 674), substantially holding that the term 'mesne profits' does not include interest year by year upon those profits, the loss of which interest, if claimed, might be damages fairly recoverable in the action. The decree-holders' appeal must, therefore, fail.

We now turn to the cross-appeal. Four points have been pressed upon us. The first is concerned with the mesne profits in respect of taluk Ram Narain Ghose, No. 360, for seven and-a-half years, being the period from 1253 to 1260 (1846—1853) inclusive. The judgment-debtors produced in respect of these years certain books of account, which have been disbelieved and rejected by the Subordinate Judge. Against the Subordinate Judge's rejection of these account-books no appeal has been preferred. Now, there can be no doubt that, as the judgment-debtors were, as wrong-doers, in possession of this property, it lay upon them to show what were the sums realized by them as rent during the time of their possession. They have produced certain account-books which have been rejected as fabricated, and the [350] Subordinate Judge, in assessing the damages for these seven and-a-half years, has taken the highest amount of the annual *stheet* for a single year as shown in their accounts; and upon this basis of calculation has allowed mesne profits for the whole seven years and-a-half. It may be observed that, in respect of the period subsequent to these seven and-a-half years, certain account-books produced by one Nurbux, who was the proprietor of the remaining ten-anna share of the same taluk, have been accepted without challenge as the basis of calculation. For the disputed seven and-a-half years Nurbux did produce certain account-books, but as those accounts referred to a period antecedent to that which was within his own knowledge, they have been rejected by the Subordinate Judge. It is contended before us on appeal, that if the Subordinate Judge was prepared to take any portion of the accounts filed by the judgment-debtors and base his calculation of mesne profits thereupon, he was bound to treat these books on the principle applicable to admissions, and take the whole of them together. No doubt, according to the usual rule, a Court is bound to take the whole of an admission together, but a Court is not bound to give equal weight to all portions of it; and we think we cannot say that the Subordinate Judge was in error in the present case in adopting the *stheet* for a single year as the basis of his calculation, and refusing to accept the *stheet* shown in the same accounts for the other six years and-a-half. In coming to this decision we are influenced by the peculiar circumstances of the case. A reasonably strong presumption may fairly be made against a person who, having been in the possession of property, and being therefore presumably able to produce the accounts of the collections made by him, has produced accounts wilfully falsified for the purpose of misleading the Court. Having regard to those circumstances, we think that the Subordinate Judge's decision may be supported, and that there is no ground for interfering with the principle upon which he has calculated the mesne profits of the seven and-a-half years - 1253 to 1260 - in respect of taluk Ram Narain Ghose.

The next point which was argued by the learned counsel for the cross-appellants is in respect of Rs. 486, which have been [351] added by the Subordinate Judge to the Amin's calculation of mesne profits in respect of Manikartak. Now, it is admitted that there is an arithmetical error in the

calculation of the Subordinate Judge in respect of this item, and that the true amount ought to be Rs. 424 and not Rs. 486, being the amount of mesne profits for twenty-six-and-a-half years at Rs. 16 per annum. This error must, of course, be corrected. In respect of this item, the Subordinate Judge says :—"The judgment-debtors say that as they were never in possession of the said kismats, they cannot be held liable for the wasilat thereof. It, however, appears from their own *talab baki* of 1262, that they were in possession of Kismat Manikartak, which was charged with a jama of Rs. 16 per year. Under such a circumstance, I am clearly of opinion, that the decree-holders are entitled to the wasilat of this kismat for the period of dispossession at the rate of Rs. 16 per annum, minus the amount of collection charges, that is Rs. 486." It has been contended before us, that it lay upon the judgment-creditors to show that the judgment-debtors have, as a matter of fact, collected this sum of Rs. 16 annually. We are unable to accede to this argument. It is shown that a jama of Rs. 16 was payable in respect of this property; and we think that upon the principle to which we have already referred, it lay upon the judgment-debtors to give some explanation or offer some evidence to show that, as a matter of fact, and for causes over which they had no control, this sum had not been realized by them. They have given them no explanation, have produced no evidence, and we think that, upon the usual presumption to be made against a wrong-doer, the Subordinate Judge was correct in adding this amount.

The third point is connected with the mesne profits of taluk Chunder Narain Ghose. It is objected that the Subordinate Judge was wrong in allowing the decree-holders credit for a sum of Rs. 411, which the Civil Court Amin had deducted as being the amount of *khasta*, or loss, said to have been sustained by the debtors for the years 1253 to 1263. Here also we think that the same principle applies. There is nothing to show that the land was not let to tenants, or that the judgment- [352] debtors were, for reasons over which they had no control, unable to realize the rents; and we think that, as soon as the ordinarily realizable rents were shown to amount to a certain amount, it was for the judgment-debtors to offer some explanation as to the reason why they were unable to collect this amount. No such explanation has been offered, and we think, therefore, that, in respect of this item also, the decree of the Subordinate Judge is correct.

The fourth and last point is concerned with the mesne profits of the sowkar or grass mehal in a village called Kamalpur. The argument which has been addressed to us on this point is that there is really no evidence upon which the mesne profits of this mehal for the years 1256 to 1269 inclusive can be calculated. It is said that the deposition of Kasinath is the only evidence as to the mesne profits of this mehal; and that, although Kasinath was able to speak from his personal knowledge as to the years subsequent to 1269 (in respect of the mesne profits of which years the order of the Subordinate Judge is not challenged), yet, as to the years 1256 to 1269, this witness speaks from hearsay merely, and that therefore there is no legal evidence upon which the mesne profits of these years can be calculated. It has, on the other side, been argued that the judgment-creditors having proved that the rent payable in respect of this grass mehal was a certain amount in a certain year, it may reasonably be presumed, under the particular circumstances of this case, and with advertence to the principles already referred to, that the same rent had been realized for the antecedent years. Upon the ordinary presumption of continuance, if the years in dispute were years subsequent to the year in respect of which the evidence has been offered, we might reasonably presume, in the

absence of evidence to the contrary, that the same annual rent continued to be paid; but we should have some difficulty in carrying back this presumption to an anterior period. Having, however, heard the whole of the deposition of the witness Kasinath, we think that it can scarcely be said that he speaks from hearsay merely as to the period antecedent to 1270. He says that he saw his father pay a rent of Rs. 215, and the passage in his cross-[353] examination upon which the learned counsel for the cross-appeal has relied, is to this effect, that he heard from his father that the annual jama was this amount. We think that when the witness said that he had heard that the annual jama was Rs. 215, this may well be taken in connection with his statement that he saw his father pay a rent of Rs. 215; nay, in other words, be taken as explaining an act which he himself saw done. If the hearsay statement stood alone, it certainly could not be treated as proving the antecedent rent; but taking it with the further statement of the witness that he had seen a particular amount paid, we are of opinion that although exceedingly weak, it still is some evidence of the fact that this amount of annual rent was paid before the year 1270; and having regard to the principle to which we have already so often alluded, as the judgment-debtors have not produced their accounts, or rather have produced accounts which have been found to be false and manufactured, we think that we ought not to say that upon this evidence, weak as it is, the Subordinate Judge was not justified in finding as he did in respect of the mesne profits of this mahal. The result is, that the appeal will be dismissed and the cross-appeal also will be dismissed, and each party will bear his own costs.

Appeal dismissed.

NOTES.

[As to the extent to which the onus lies on the plaintiff, see 5 C.W.N. 720. The defendant is entitled to amounts paid by him which the owner ought to have paid:— 21 Cal. 142. See also 17 Mad. 251. As regards the point as to *interest*, etc., see the Notes to 8 Cal. 332 supra.]

[8 Cal. 353 10 C.L.R. 331]

APPELLATE CIVIL.

The 26th January, 1882.

PRESENT:

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

Jogendro Chunder Ghose.....Plaintiff

versus

Nobin Chunder Chottopadhyya and others.....Defendants.*

Co-sharers—Parties—Enhancement of rent Separation of shares—

Act XI of 1859, s. 10.

Two co-sharers, joint owners of a zamindari, caused their shares to be separately registered in the Collector's office under s. 10, Act XI of 1859. Subsequently one of the co-sharers sued certain persons (who held ryoti tenures in the co-sharers' zamindari) for enhancement of rent without making the other co-sharer a party.

* Appeal from Appellate Decree, No. 921 of 1880, against the decree of J. F. Browne, Esq., Officiating Judge of the 24-Pargannas, dated the 7th April 1880, affirming the decree of Baboo Roma Nath Seal, First Munsif of Satkhira, dated the 30th August 1879.

Held, that no such suit would lie.

Guni Mahomed v. Moran (I. L. R., 4 Cal., 96) followed.

[354] THE facts of this case and the contentions of the parties are set out in the judgment of the Court of First Instance, the material portion of which is as follows :

" In these two suits the plaintiff sues to recover from the defendants the arrears of rent for 1283 (1876) and 1284 (1877) at the old rate, and for 1285 (1878) at an enhanced rate, after service of notice. The defendants admit the arrears for 1283 and 1284, but they object to the enhanced rent, on the ground that the plaintiff, being a shareholder of the estate in which the defendants' jama or jamas are situated, has no right to enhance a portion of the rent payable by the defendants on their entire jamas. The defendants have raised other pleas also, but I have considered it proper to decide the preliminary objection first. The issue on this point is whether the plaintiff, being a co-sharer of the estate in which the defendants hold their tenures, is entitled to enhance his share of the rent ?

" It is admitted by both parties that the one-anna zemindari, in which plaintiff holds a durpatni of a three-fourths share, has specific lands allotted to it, and that originally the proprietors of the three-fourths and one-fourth share of the zemindari of one-anna were joint co-sharers, and defendants were their joint tenants. Subsequently the two co-sharers separated and got their shares separately registered in the Collector's towzee, but the land appertaining to the two shares remained joint as before. The lands appertaining to the jamas held by the defendants consequently remained undivided as before. It is argued on plaintiff's side that, as two separate estates have been created by the two co-sharers opening separate accounts with the Collector for their separate shares of the revenue, plaintiff, as durpatnidar in one of the two estates, is entitled to enhance the rent payable to him by the tenants. But this argument does not hold good. The two separate accounts have been opened with the Collector by the two co-sharers agreeably to a private arrangement between themselves, and for their own convenience. Defendants were no parties to this arrangement, and therefore it does not affect them. Neither does the separate registration of the names of the co-sharers in the Collectorate rent-roll alter the nature of the relationship which existed between the plaintiff and the defendants. As a matter of convenience, or by a private arrangement, they pay their rent to the two co-sharers, or their representatives in interest, separately, according to their shares. This does not render their jamas two separate jamas, one each under the two co-sharers. Besides, their tenures have not been split up into two portions according to the shares **[355]** of the two co-sharers, and the rent apportioned to them. Consequently, they hold joint jamas under the two co-sharers, and according to the Full Bench Ruling in *Guni Mahomed v. Moran* (I. L. R., 4 Cal., 96), plaintiff's suits for enhancement will not lie, they being for enhancement of portions of the entire rent.

" It has been argued by the plaintiff's pleader that the defendants already pay him enhanced rent on his share, which the co-sharer of the one-fourth share does not get, the rent being paid to him at the old rate according to his share ; but this does not make any difference in the nature of the present suits, inasmuch as the defendants pay but one jama for their respective tenures to the two co-sharers, according to their shares, though by private arrangement, or otherwise, the plaintiff has got a slight increase to his share. As I understand the Full Bench Ruling, it is applicable to all cases of enhancement of rent by a co-sharer. If the plaintiff has succeeded in obtaining a slight increase to his

share of the rent by the consent or otherwise of the defendants, his suits for further enhancement cannot be entertained in the face of the Full Bench Ruling."

The Munsif gave a decree for arrears of rent at the old rate, and dismissed the claim for arrears of rent at the enhanced rate. The plaintiff appealed to the District Judge, but his appeal was dismissed. He then appealed to the High Court.

Mr. *Evans*, Baboo *Hem Chunder Banerji*, Baboo *Rash Behary Ghose* and Baboo *Umakali Mookerjee* for the Appellants.

Baboo *Lall Mohan Das* for the Respondents.

The **Judgment** of the Court (McDONELL and FIELD, JJ.) was delivered by

Field, J. --The plaintiff in this case is the durpatnidar of the twelve-anna share of a certain estate. It appears that this estate was originally a one-anna or one-sixteenth of a larger estate; but that point is not material to the question with which we have now to deal, and for the purposes of this case, this one-anna share is taken as sixteen annas or a whole estate. This three-fourths share is registered on the Collectorate towzee under a separate number, 652, while the remaining one-fourth share is registered under number 654. Now it would [356] appear that this separate registration is merely for the purposes of the payment of the Government revenue; and it is admitted that the lands of the three-fourths or twelve-anna share and of the one-fourth or four-anna share have never been separated by metes and bounds. The plaintiff, as durpatnidar of the three-fourths share, measured the land in the occupation of the defendants, and served notice of enhancement under the provisions of the Rent Act. The Munsif and the District Judge have held that this case falls within the purview of the Full Bench decision in *Gani Mahomed v. Moran* (1 L. R., 4 Cal., 96).

It has been contended before us by the learned counsel for the appellant, that the twelve-anna share constitutes a separate tenure, that the tenant has made a separate agreement for the payment of the rent thereof, and that therefore this twelve-anna share ought to be regarded in the light of a separate tenure or tenancy, the whole rent of which is payable to the plaintiff; and that the plaintiff is, therefore, entitled to enhance the rent so payable to him as in respect of a separate tenure or holding.

We have carefully considered the argument addressed to us and the cases which have been quoted. With reference to these cases we think that most, if not all, of them refer not to holdings of cultivating ryots, but to intermediate interest existing between the zemindar at the top and the cultivating ryot at the bottom. The present case is one of a cultivating ryot, and it is sought to put into operation the enhancement provisions of the Rent Law. It appears to us that, as the lands have never been separated by metes and bounds, insuperable difficulties would be created if the owner of a twelve-anna interest in undivided lands were allowed, under the provisions of the Rent Act, to enhance the rent of such share without making the proprietor of the remaining share a party to the suit. We are, therefore, of opinion that the decision of the Courts below is correct, and we dismiss the appeal with costs.

Appeal dismissed.

NOTES.

[See the Notes to 1 Cal. 96 in the Law Reporter's Reprints; also (1885) 11 Cal. 615 (617); 644 (616); (1900) 24 Bom. 539 (516) 2 Bom. L. R. 235; (1901) P.L.R. 68.]

[6 Ind. Jur. 523]

[357] APPELLATE CIVIL.

The 1st February, 1882.

PRESENT:

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

Bepin Behari Bundopadhyas.....Defendant

versus

Brojo Nath Mookhopadhyas.....Plaintiff.*

Mortgage Decree Execution—Revival of suit Res Judicata—Power of adoption Construction.

A mortgagee brought a suit on his mortgage against his mortgagor and against A, a person who had purchased the right, title, and interest of the mortgagor in execution of a money-decree obtained against him subsequently to the mortgage. Pending the mortgage-suit, and before decree, A died, but the suit was not revived against his representatives. The usual mortgage decree was passed in favour of the mortgagee, who, in execution thereof, sold a portion of the mortgaged property to B. In a suit brought by B against the representatives of A for the property purchased and for general relief—

Held, that the decree in the mortgage-suit was not binding on the representatives of A; nor, under the provisions of Act VIII of 1859, did the failure to revive such mortgage-suit prevent B from bringing the second suit against A's representatives.

A Hindu gave a power of adoption to his wife, directing that so long as the wife should live she should remain in possession of all his property, moveable and immoveable, ancestral as well as self-acquired.

Held, that the widow took a life-interest in her deceased husband's property with remainder to the adopted son.

Mussamat Bhagbuti Dace v. Choudhry Bholanath Thakoor (L. R., 2 I.A., 256) followed.

Form of decree discussed, where a person who, at a sale in execution of a mortgage-decree, has purchased a portion of the mortgaged property, brings a suit for that portion against the assignee in possession as a mortgagor.

THIS was a suit by one Brojo Nath Mookhopadhyas, praying for a declaration of right to certain land, for possession thereof, and for general relief. The plaintiff alleged that the property in dispute had formerly been the property of one Nemy Churn Haldar, who died leaving two sons, Shib Chandra and Bhairab Chandra, who succeeded to the estate of their father and continued in possession of it as members of a joint Hindu family. Bhairab Chandra died leaving as his sole heir a widow, Lukhimoni, who continued to live in the joint family dwelling-house, with the other members of the family. Subsequently, Shib Chandra [358] died leaving his only son, Doorga Coomar Haldar, his sole heir. Doorga Coomar died on the 12th of January 1842, leaving him surviving two widows, Komal Padma and Prosonomoyi. On the day previous to his death, Doorga Coomar executed an *anumati pattro*, whereby he gave to each of his wives power to adopt a son, directing that, so long as the wives should live, they should remain in possession of all his (Doorga Coomar's) properties, moveable and

* Appeal from Appellate Decree, No. 992 of 1880, against the decree of J. F. Browne, Esq., Officiating Judge of the 24-Parganas, dated the 31st of March 1880, affirming the decree of Baboo Janaki Nath Dutt, Additional Munsif at Alipore, dated the 19th May 1879.

immoveable, ancestral as well as self-acquired. Under this power Prosonnomoyi adopted Shukmoy Haldar as her son, and, afterwards, Komal Padma adopted successively Kaliprosonno Haldar and Biresnur Haldar as her sons. Lukhimoni died on the 29th of November 1864, and on her death Shukmoy took and held possession of the whole estate, as next heir in reversion on the death of Lukhimoni and as son of Doorga Coomar Haldar. On the 16th of September 1873, Shukmoy borrowed from Radha Mohun Mondol the sum of Rs. 3,000 on giving a mortgage of an eight-anna share of certain property (including the disputed land) as collateral security for repayment. The mortgage deed, which was in the form of a conditional sale, recited that the property mortgaged had been acquired by Shukmoy as heir of Doorga Coomar. On the 3rd of June 1874, one Umesh Chandra Banerji purchased the property in dispute at a sale in execution of a money-decree which he had obtained against Shukmoy and Prosonnomoyi for money which they had borrowed from him. In 1875, Radha Mohun Mondol brought a suit upon his mortgage, making Umesh Chandra Banerji a party. Umesh Chandra died pending the suit and before decree, but the then plaintiff took no steps to have the suit revived as against his representative. The suit was decreed, and in execution the mortgaged properties (including the disputed land) were sold to the plaintiff on the 6th of November 1876. The latter, having failed to get actual possession, instituted the present suit, on the 11th of November 1878, against the tenants in actual possession of the land and against Bepin Behari Banerji, the heir and representative of Umesh Chandra Banerji.

Various defences were set up on the foregoing state of facts. The Munsif decided that Bepin Behari's rights were not affected [359] by the decree passed in the mortgage-suit *Syed Enam Momtazooddeen v. Raj Coomar Das* (14 B. L. R., 408; s.c., 23 W. R., 187), *Soobuns Sing v. Ishur Dutt Misser* (21 W. R., 150); that the plaintiff had succeeded to the rights of Radha Mohun Mondol *Syed Enam Momtazooddeen v. Raj Coomar Das*, (14 B. L. R., 408 s.c., 23 W. R., 187), *Gopee Bundhoo Shantha Mohapattur v. Kalepudo Banerjee* (23 W. R., 338), *Gupi Nath Sing v. Sheo Sahay Sing*, (B. L. R., Sup. Vol., 72; s.c., 1 W. R., 315); that the property in dispute was the ancestral property of Doorga Coomar and his uncle, Bhairab Chandra; that the family had always remained joint; and that the adoption of Kaliprosonno Haldar and Biresnur Haldar was invalid in law *Gopee Lal v. Mussamat Sree Chundradolee Buhoojee* (11 B. L. R., 391; s. c., 19 W. R., 12). The Munsif also remarked that "the fact of Shukmoy's reciting in the mortgage deed that he had acquired the property as heir of Doorga Coomar cannot in any way affect the plaintiff's right, for as it is found that Shukmoy had a valid right to the property, it is immaterial whether he asserted that right under a wrong or right title." The Munsif ordered "that the plaintiff do get a decree for Rs. 835, to be recovered from the disputed property with costs and interest at 6 per cent., with a declaration of lien for that sum over the disputed property." The District Judge on appeal upheld the Munsif's decision, and dismissed the appeal with costs.

The defendant Bepin Behari Banerji appealed to the High Court.

Baboo Sreenath Doss and Baboo Kashi Kant Sen, for the Appellant.

Baboo Mohesh Chunder Chowdhry and Baboo Traylokya Nath Mitter, for the Respondent.

The **Judgment** of the Court (McDONELL and FIELD, JJ.) was delivered by

Field, J.—The facts of this case are a little complicated, but when they are understood, we think that no real difficulty [360] will be experienced in

disposing of the points which have been argued before us. Bhairab Chandra Halder and Shib Chandra Halder were uterine brothers. Bhairab Chandra died first, leaving a widow Lakhimoni, who died in Aughran 1271 (29th November 1864). Shib Chandra died after the death of Bhairab Chandra and before the death of Lakhimoni, and was succeeded by a son Doorga Coomar Halder. This son subsequently died in Pous 1248 (12th January 1842), leaving him surviving two widows, Komal Padma Dabi and Prosonnomoyi. Doorga Coomar gave his widows a power to adopt a son; and in execution of this power Shukmoy was adopted by the younger widow, Prosonnomoyi. On the 16th September 1873, Sukhmoy Halder borrowed Rs. 3,000 from one Radha Mohun Mondol, and as security for the payment of this amount, he mortgaged an eight-anna share of the property specified in schedule A annexed to the plaint. On the 3rd June 1874, a portion of this property (including half a cotta of land which forms the subject of the present suit) was sold in execution of a money-decree obtained by one Umesh Chandra Banerji against Sukhmoy Halder and his adoptive mother Prosonnomoyi, and was purchased by Umesh Chandra Banerji, the decree-holder himself. The effect of this purchase was to make Umesh Chandra Banerji the assignee of the mortgagor. Umesh Chandra Banerji has since died, and defendant No. 3, who is the appellant before us, is his minor son and heir, and defends this suit by his mother and guardian Sreemati Nistarinee Dabi. Subsequent to this purchase by Umesh Chandra Banerji, Radha Mohun Mondol brought a suit upon his mortgage-bond in order to enforce his lien against the mortgaged property. The parties to that suit were Radha Mohun Mondol, the mortgagee, as plaintiff, and Sukhmoy Halder, the mortgagor, and Umesh Chandra Banerji, the assignee of the mortgagor, as defendants. Umesh Chandra Banerji died while the suit was pending; and no steps were taken to make his heirs or representatives parties to the suit in his place.

Now the first point which has been pressed upon us is, that the mortgage-suit is a bar to the present suit against the appellant, who is the heir and representative of Umesh Chandra [361] Banerji; inasmuch as Umesh Chandra Banerji was a party to the mortgage-suit, it is said that the claim under the mortgage has become *res judicata*; and that the mortgagee having omitted to make Umesh's representative a party to the suit so as to bind him by the decree is not now entitled to bring a second suit against such representative. We think that if the former suit on the mortgage-bond had been instituted after the present Code of Civil Procedure had come into operation, this contention would be sound, regard being had to the express provision of s. 371; but no such express provision was contained in the old Code, Act VIII of 1859; in other words, that Code did not expressly provide that when a suit abates, as regards the defendant or one of the defendants, no fresh suit shall be brought on the same cause of action. In the absence of these provisions, we cannot say that, under the former Code, the abatement of a suit had the effect which is now given to it by the express provision of s. 371 of the present Code. Without such express provision the

Effect of abatement on parties' rights.

* [Sec. 371 :—When a suit abates or is dismissed under this Chapter, no fresh suit shall be brought on the same cause of action.

But the person claiming to be the legal representative of the deceased bankrupt or insolvent plaintiff, may apply for an order to set aside the

Application to set aside abatement or dismissal.

order for abatement or dismissal; and if it be proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon

such terms as to costs or otherwise as it thinks fit.]

present suit can be barred only if the subject-matter of it is *res judicata*. In order to make such matter *res judicata*, it must have been decided or determined in the former suit between the parties to the present suit or parties under whom they claim. It is not possible to say that this matter was decided in such former suit between the mortgagee and Umesh, who was dead, or the representative and heirs of Umesh Chandra Banerji, who were not parties to such suit, at the time when judgment was delivered and the decree made. We think, therefore, that that former suit is not a bar to the present suit.

Radha Mohun Mondol having obtained a decree on his mortgage-bond as against the mortgagor only, proceeded to execute that decree; and on the 6th November 1876 the mortgaged property was sold in execution. It appears that the rest of the property, other than the half cotta of land with which the present suit is concerned, was purchased by the mortgagee, decree-holder, himself; and the plaintiff in the present case purchased half a cotta out of the nine bighas which were mortgaged under the bond. The plaintiff having endeavoured to take possession of the half cotta so purchased by him, was resisted by the appellant, who claimed a title to the property under the [362] auction-purchase of the 3rd June 1874 to which reference has already been made. Thereupon the plaintiff instituted the present suit; and, after setting forth the facts in his plaint, he asked, amongst other things, that he should be declared entitled to possession of this half cotta of land, and further that the Court would give him any relief to which he might be found to be entitled.

Several questions were raised and decided before the Munsif, and one of those questions was, that Sukhmoy Haldar had, at the time when he executed this mortgage-deed, no interest in the property. The Munsif has dealt with this point in the following manner: He considered that Sukhmoy Haldar was entitled to the eight-annas share which originally belonged to Bhairab Chandra Haldar, and which upon Bhairab Chandra's death descended to his widow Lakhimoni Debi; that, after her death in Aughran 1271 (November 1864), Sukhmoy Haldar, as her heir under Hindu law, was entitled to this moiety of the property. The mortgage-deed, as a matter of fact, specified that what was mortgaged under its provisions was the property which Sukhmoy had inherited from his adoptive father Doorga Coomar, and the Munsif was of opinion that, under the *neum puttro* as regards this moiety,—that is, the moiety which originally belonged to Shib Chandra and on his death belonged to Doorga Coomar,—Sukhmoy had no title thereto until the death of Prosonnomoyi (and admittedly Prosonnomoyi was alive at the time of the execution of the mortgage-deed); but inasmuch as Sukhmoy had a good title to the other moiety, that is the moiety which originally belonged to Bhairab Chandra, it appeared to the Munsif immaterial whether Sukhmoy mortgaged the moiety which he inherited from Lakhimoni, or the moiety which he would have inherited with absolute title on the death of Prosonnomoyi. It appears to us, that this was not a satisfactory way of dealing with the question. What Sukhmoy mortgaged was the moiety which he had inherited from his father Doorga Coomar; and if at the time of the execution of the mortgage-deed he had, as a matter of fact, no interest whatever in this moiety which he could alienate or encumber, there was nothing which could have passed to the mortgagee under the bond. [363] But it has been well contended upon the authority of the case of *Mussamat Bhagbutti Dace v. Chowdhry Bholanath Thakoor* (L.R., 2 I.A. 256), that the effect of the *neum puttro* was to give to the widow a life-interest in a moiety, and that Sukhmoy Haldar, being the remainder man, was entitled to deal with the property subject to the life-interest of the widow. We think

that this contention is correct, and it being admitted that Prosonnomoyi is now dead, we think that the appellant can derive no benefit from the objection taken before us on this point.

The other points which were raised in the lower Courts have not been seriously contested before us, and they are all concerned with questions of fact into which we cannot enter on second appeal.

The next question raised upon the appeal is concerned with the form of the relief granted by the decree of the lower Court. The decree of the Munsif gives to the plaintiff Rs. 835, which it directs to be realized from the disputed property, —that is, the half cotta, together with costs and interest at six per cent., and makes a declaration of a lien in respect of this sum upon the disputed property. Now it is first contended that, upon the plaint as originally framed, this is a relief to which the plaintiff is not entitled. It appears to us, that this contention ought not to succeed. The heirs of Umesh Chandra Banerji, the assignee of the mortgagor, are not bound by the decree passed in the original mortgage suit, and the present suit may fairly be regarded as in the nature of a supplementary suit brought for the purpose of binding the assignee of the mortgagor. In this view we think that it was properly directed that such portion of the mortgage-debt as might be fairly cast upon this half cotta of land should be declared to be a lien thereupon and recoverable by the sale thereof; and this in effect is what the decree of the Munsif has done. The property is in the possession of the assignee of the mortgagor who is entitled to redeem on paying off a fair proportion of the mortgage-debt; and this the decree of the Munsif gives the assignee an opportunity of doing. Then it is further contended that, the sum of Rs. 835 with costs and [364] interest, which is by the decree of the Munsif made recoverable from the half cotta of land, is not a fair apportionment of the mortgage lien upon this which is but a small portion of the whole property,—that is, nine bighas which formed the subject of the original mortgage. This of course is a matter which cannot be dealt with in the absence of the evidence. It has been contended before us, that the plaintiff's suit ought to be dismissed, because the other persons have not been made parties, and because there is no evidence upon the record upon which a fair apportionment can be made; but it appears to us that, having regard to the somewhat complicated nature of the matters involved, this would not be a reasonable course. As already pointed out, the plaint, as originally filed, contained a prayer for general relief; and we think that the relief which has been given by the Munsif's decree comes well within this prayer for general relief. But we think that when, at a late stage of the case, the Munsif decided to give this particular form of relief, he ought to have raised and tried an issue, which would have allowed the parties an opportunity of showing what was a fair apportionment of the mortgage lien upon the half cotta of land. It has been said in the course of the argument that the whole of the mortgage-debt was, or could have been, realized from the rest of the property; and that, under any circumstances, no more than a very small fractional share ($\frac{13}{16}$) of the debt ought to be chargeable upon this half cotta. That is a matter upon which, in the absence of evidence, we offer no opinion. We think that the reasonable course will be to remand the case to the Court of First Instance in order that the Munsif may raise and try an issue as to what sum is a reasonable apportionment of the mortgage-debt upon the half cotta of land. The appellant has expressed himself willing to abide by the ultimate result. If it should turn out that a larger amount than Rs. 835 ought fairly to be apportioned upon the half cotta of land, he will have to pay such larger sum; but if a lesser sum, he will be entitled to the benefit. In deciding this question, it may be well to

observe that the price actually realized by the sale of the mortgaged property under the mortgage-decree, [363] though good *prima facie* evidence of the respective values of the half cotta and the rest of the land is not conclusive. It may be that this half cotta is proportionally more valuable than the rest of the property. Then as regards the apportionment the time at which the respective values of the two portions of the property should be taken is the time of instituting the present case, in which the plaintiff seeks to obtain what is in effect a supplementary decree; and it may well be that the price realized at the sale under the former mortgage-decree for the half cotta of land is in consequence of the lapse of time or for other good reason not a fair apportionment of the total amount due under the mortgage. With these directions, the suit will be remanded to the Court of First Instance; and the costs of this Court will abide the result.

Case remanded.

NOTES.

[The explanation of Hukm Chand in his *Res Judicata* (1894) pp. 406, 407 is instructive. As pointed out in this case, the position would be different under the C. P. Codes from 1877, as another suit would be barred. As regards the point of title by estoppel (362, 363), see also 29 All. 163.]

As regards the reservation of life interest by deed of adoption, see also (1891) 13 All. 391 (393).]

[8 Cal. 365]

APPELLATE CIVIL

The 7th February, 1882.

PRESENT :

MR. JUSTICE CUNNINGHAM AND MR. JUSTICE TOTTENHAM.

Forbes.....Defendant

versus

Sree Lal Jha and others.....Plaintiffs.*

Beng. Act VIII of 1869, s. 27—Ejectment—Limitation.

Section 27 of Beng. Act VIII of 1869 applies only to such suits for possession as the Court is asked to decide irrespectively of any title, but simply on the ground that the plaintiffs have been ousted otherwise than by legal means.

IN this case the plaintiffs stated that they held in possession an ancestral jote of 201 bighas of land at Sultanpore in the district of Burdwan; that Mr. Forbes, the defendant, had instituted suits for arrears of rent, and for ejectment against one of the plaintiffs, Sri Lal Jha; that Forbes obtained decrees in those suits without the knowledge or information of the plaintiffs, "but, before carrying out the order of ejectment, and after it, the plaintiffs were recognized as tenants as before, and rent of those jotes was received and receipts granted and the decree was satisfied in full." The plaint further stated, that, "not-with-[366]standing the rent was received and the tenancy recognized, the

* Appeal from Appellate Decree, No. 854 of 1880, against the decree of F. Comley, Esq., Officiating Judge of Purneah, dated 7th 12th February 1880, modifying the decree of Baboo Hem Chunder Mitter, Munsif of Arrariah in Arrah, dated the 30th September 1879.

defendant instituted a criminal suit under s. 530* of Act X of 1872, with a view to destroy the jote jamas and to forcibly take possession of them from your petitioners. The Criminal Court by a summary trial, passed an order for possession in favour of the defendant on the 8th of March 1878, on account of which the jote-right of the plaintiffs is wholly affected." The present suit was instituted on the 5th of March 1879, praying that "possession be delivered by adjudication of right and cancellation of the order of the Deputy Magistrate of Basaulpore, dated the 8th of March 1878."

The Judge of the lower Appellate Court said:—"I have no hesitation in finding that the defendant was put into formal possession under the *ex parte* decrees obtained by him on or before the 15th of September 1877. That such was the case appears from the deposition of Posen Lal Putwari, and is consistent with the probabilities of this case. This view is corroborated by the finding as to actual possession from October 1867 to March 1878, but the very fact of proceedings in a Criminal Court having been necessary would also tend to indicate that the defendant's possession was much contested." As to the question in respect of which this case is reported, namely, whether the suit was not barred by limitation under s. 27 of Beng. Act VIII of 1869, the Courts below do not seem to have come to any distinct finding, though both Courts decided in favour of the plaintiffs.

Mr. C. Gregory for the Appellant.

Baboo Taruck Nath Sen for the Respondents.

The **Judgment** of the Court (CUNNINGHAM and TOTTENHAM, JJ.) was delivered by

Cunningham, J. (who, having stated the facts above set out, continued):—

As to the point of limitation, we are not prepared to hold that the lower Courts were wrong in deciding the point in favour of the plaintiffs. Looking to the course of decisions of this Court we think it is clear, that s. 27 of Beng. Act VIII of 1869 applies only to such suits for possession as the Court is asked to decide irrespectively of any title, [367] but simply on the ground that the plaintiffs have been ousted otherwise than by legal means. In the present suit, the plaintiffs allege a particular right, say that the defendant brought his ejection suits without the knowledge of most of them, and pray for an adjudication of their right and for possession. We are of opinion that, under the rulings of this Court, we are bound to hold

* [Sec. 530:—Whenever the Magistrate of the District, or a Magistrate of a division of a District or Magistrate of the first class, is satisfied that a dispute, likely to induce a breach of the peace, exists concerning any land, or the boundaries of any land, or concerning any houses, water, fisheries, crops or other produce of land, within the limits of his jurisdiction,

such Magistrate shall record a proceeding stating the grounds of his being so satisfied, and shall call on all parties concerned in such dispute to attend his Court in person, or by agent, within a time to be fixed by such Magistrate, and to give in a written statement of their respective claims, as respects the fact of actual possession of the subject of dispute.

Such Magistrate shall, without reference to the merits of the claims of any party to a

Party in possession to be continued until ousted by due course of law.

right of possession, proceed to inquire and decide which party is in possession of the subject of dispute. After satisfying himself upon that point, he shall issue an order declaring the party or parties to be entitled to retain possession until ousted by due course of law, and forbidding all disturbance of possession until such time.

Explanation.—Such Magistrate may satisfy himself of the existence of a dispute likely to induce a breach of the peace from a report or other information; but the question of possession must be decided on evidence taken before him.]

that this suit does not come within the rule of limitation contained in s. 27.
[The rest of the judgment is not material for the purposes of this report.]

Appeal dismissed.

NOTES.

[See (1890) 17 Cal. 926 (928) a decision under the Bengal Tenancy Act of 1885.]

[8 Cal. 367 10 C.L.R. 441]

APPELLATE CIVIL.

The 9th February, 1882.

PRESENT :

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

In the matter of the Petition of Bhagabuti Churn Bhattacharjee Chowdhry.

Bhagabuti Churn Bhattacharjee Chowdhry

versus

Bisheshwar Sen and others.

*Sale in execution of decree—Irregularity—Code of Civil Procedure
(Act X of 1877), s. 311.*

The words "any person whose immoveable property has been sold" in s. 311 of the Code of Civil Procedure, do not include a person who has purchased the same property at a prior execution-sale, such prior sale not having been confirmed.

THIS was an application to set aside a sale in execution of decree on the ground of irregularity. The property, which had formerly belonged to one Brojokishore Sen, was, in execution of a money-decree against him, sold to the applicant on the 21st of July 1880. Brojokishore had previously mortgaged the property to Sonatun Sha, and the existence of this lien was duly notified on the occasion of the applicant's purchase. In execution of a mortgage-decree obtained on this mortgage, the property was sold to Bisheshwar Sen, on the 20th of January 1881. The applicant objected to this sale, on the ground of irregularity in publishing and conducting it, though the sale to himself, on the 21st of July 1881, was not confirmed until the 19th of February 1881. The District Judge rejected the application, on the ground that the applicant had no *locus standi*. The latter appealed to the High Court.

[368] Baboo Kally Mohun Doss and Baboo Bynanth Nath Doss for the Appellant.—Section 311 should be read and construed with reference to ss. 313, 314, and 316 of the Code of Civil Procedure. The word 'had' in s. 313 seems to indicate that a purchaser gets the property as it exists at the date of sale, and not at the date of confirmation, and although under s. 316, the title of the auction-purchaser is not complete until the sale is confirmed, yet he is entitled to object to all irregular dealings with the property after the date of sale.

*Appeal from Original Order, Nos. 203 and 201 of 1881, against the order of Baboo Juggadurlabh Mozoomdar, Officiating Second Subordinate Judge of Furrirdpore, dated the 26th March 1881.

Even if the applicant is only in the position of a person claiming under a contract for sale, yet, under the existing law, he is entitled to ask for specific performance, and the right of property passes from the date of the contract, subject to the vendor's lien for non-payment of purchase-money—*Rajah Mohesh Narain Sing v. Kishraund Misser* (9 Moore's I. A., 324; s.c., 5 W. R., P. C., 7); *Mahadoo Begum v. Syud Hubechool Hossein* (15 W. R., 44); *Rajkishore Nag v. Mulhoosoodun Roy* (20 W. R., 385); *Kalee Churn Giree Gossain v. Lalla Muddun Kishore* (7 W. R., 317).

Baboo Srinath Doss and Baboo Issur Chunder Chuckerbutty for the Respondents.

The **Judgment** of the Court (McDONELL and FIELD, JJ.) was delivered by

McDonell, J.—This case has been argued at very considerable length, and a large amount of irrelevant matter has, we think, been introduced into the argument. The facts are very simple. The appellant purchased, on the 21st July 1880, at a sale held in execution of a money-decree. That sale was not confirmed till the 19th February 1881. Meanwhile, the same property was sold, on the 20th January 1881, in execution of a decree obtained upon a mortgage-bond, by which the property so sold was pledged, that decree declaring the lien and authorizing the mortgagee to enforce it. The appellant claims to come in under s. 311 of the Code of Civil Procedure, and he questions the regularity of the proceedings under which the sale of the 20th January 1881 took place.

[369] Now, the only question which has to be decided is, whether the appellant, who had been the successful bidder at the sale of 21st July 1880, but the sale to whom was not confirmed till the 19th February 1881, can be said to be, within the meaning of s. 311, a "person whose immoveable property was sold" upon the 20th January 1881.

It appears to us that this question must be answered in the negative. There can be no doubt that the words "any person whose immoveable property has been sold" are not to be restricted to the judgment-debtor alone. That has been decided in *Krishnarav Venkatesh v. Vasudev Anant* (11 Bom. H. C. Rep., p. 15) and the same point has been several times decided in the same way in this Court. But we think it impossible to say, that a person the sale to whom has not been confirmed is, within the meaning of s. 311, a "person whose immoveable property has been sold." In the case of *Khaja Putthanji* (I. L. R., 5 Bom., 202) it was held that the purchaser's right to a sale-certificate accrues when the sale is confirmed; and in the case of *Tukaram v. Satvaji Khanduji* (I. L. R. 5 Bom., 206), it was held that a purchaser who has not obtained a certificate is not entitled to ask the Court to put him in possession of the property. Now, on the 20th January 1881, the appellant could not have obtained a certificate, because the sale to him had not on that date been confirmed. He was, therefore, not in a position to ask the Court to put him in possession of the property; and we think that the words "any person whose immoveable property has been sold" must be understood to refer to property *de facto* and not to property *de jure*. Were it to be otherwise decided, it would follow that any person who alleges that he has a good title to property which is in the possession of another person, might claim to come in and object under s. 311, and the result would be, that the Court would have to enter upon an enquiry which ought to form the subject of a separate suit. We think this could not have been the intention of the Legislature: and we are of opinion, therefore, that the appellant was not entitled to come in under s. 311, and question the

regularity of [370] the proceedings under which the sale of the 20th January 1881 was held. As to what may be his rights in a separate suit, we pronounce no opinion.

This appeal must be dismissed with costs.

Appeal dismissed.

NOTES.

[WHO MAY APPLY TO SET ASIDE AN EXECUTION-SALE—

The C. P. C. 1908 O. 21 r. 90 (1) mentions the decree-holder, or any person *entitled to share in a rateable distribution of assets, or whose interests are affected by the sale*. This altered provision gives legislative recognition to previous decisions to that effect: see also (1885) 13 Cal. 345; (1888) 15 Cal. 488; 10 Cal. 496. Persons claiming by a paramount title are not within the rule, as their right is unaffected by the rule:— (1898) 23 Bom. 450; 181. See also (1912) 17 C. W. N. 80; (1911) 38 Cal. 418; (1906) 33 Cal. 639; (1909) 13 C. W. N. 654.]

[8 Cal. 370. 10 C.L.R. 346]

APPELLATE CIVIL.

The 10th February, 1882.

PRESENT :

MR. JUSTICE MORRIS AND MR. JUSTICE O'KINEALY.

Muttyjan and others.....Plaintiffs

versus

Ahmed Ally and others.....Defendants.*

Mahomedan Law—Administration—Creditor's suit—Party to suit—Suit against heir in possession, assets.

After the death of a Mahomedan, several of his creditors sued his widow and daughter, and obtained decrees against the assets of the deceased, which assets had come into the possession of the mother and daughter. In execution of these decrees portions of the property were sold; thereupon two married sisters of the deceased, who lived with their husbands apart from the widow and daughter, sued as heirs of the deceased to recover their shares of the property sold.

Held, that the property of the deceased having been attached and sold in payment of his debts, the plaintiffs' suit must be dismissed.

When a creditor of a deceased Mahomedan sues the heir in possession, and obtains a decree against the assets of the deceased, such a suit is to be looked upon as an administration-suit, and those heirs of the deceased who have not been made parties cannot, in the absence of fraud, claim anything but what remains after the debts of the testator have been paid.

Mussamut Nuzeerun v. Moulvie Ameeroooldeen (21 W. R., 3), *Assamathemnessa Bibee v. Roy Lutchncepoot Singh* (I. L. R., 4 Cal., 142), *Kishwar Khan v. Jewan Khan* (1 Sel. Rep., 25), *Khajah Hidayutollah v. Rai Jan Khanum* (3 Moore's I. A., 295), *Buzajet Hossein v. Dooli Chunil* (I. L. R. 4 Cal., 402) referred to.

THE facts of this case are set forth in the Judgment of the lower Appellate Court, which is as follows:—

"Mahomed Wasil died, leaving one widow, the defendant Misrijan one daughter, the plaintiff Nuzima, and two sisters, the plaintiffs Muttyjan

* Appeal from Appellate Decree, No. 1172 of 1880, against the decree of Baboo Mothura Nath Gupta, Subordinate Judge of Chittagong, dated the 7th April 1880, reversing the decree of Baboo Dinesh Chunder Roy, Munsif of Hat Hazaree, dated the 10th September 1879.

and Jibunnessa. After his death, the defendant Bhola Gazi obtained one decree, and the defendants Kamdar Ali and Asgar Ali, [371] another decree, against the assets of Mahomed Wasil deceased, who, in the suits in which those decrees were passed, was represented by his widow and daughter. When those decrees were being executed, and the assets of the deceased Mahomed Wasil attached, the plaintiffs instituted the present suit, alleging that the defendants had fraudulently and collusively obtained decrees, and that the plaintiffs were not bound by those decrees. During the pendency of this suit, the disputed properties were put up to sale and purchased by the defendant Kasim Ali, who was added to the number of defendants, and who contended, *inter alia*, that the decrees were not collusive ones, and that the sales could not be set aside even if the decrees were to be reversed. The Munsif held, that the minor Nuzima was not properly represented in the former suit; that there was not any doubt as to the extent of the shares of the plaintiffs; and that the former decrees were not free from suspicion. Against this decree an appeal has been preferred, and the points for decision are: (i) were the decrees obtained fraudulently, and (ii) are the plaintiffs entitled to have the sales cancelled.

"As to the first issue, there is not an iota of evidence to show that the decrees were fraudulently and collusively obtained by Misrijan and the judgment-creditor, defendants. It is one of the fixed principles of law that fraud cannot be presumed. But in the present suit, there is no reason whatever to suspect that all the defendants are in the same boat. The subject-matter of the suit is not a valuable property, and that so many persons would combine for a property of small value, is not very probable, though not impossible.

"One of the reasons set forth by the Munsif for suspecting the vainness of the actions of the judgment-creditors is, that all the heirs of Mahomed Wasil were not made parties to the former suit. The creditors of Mahomed Wasil had made his widow and daughter parties to those suits. The sisters of Mahomed Wasil were not in possession of the property left by him, nor were they living in their father's or rather brother's house. They were married women, and were living with their husbands. That being so, there was nothing suspicious in the former suits. The mere fact of omission of the names of the first and second plaintiffs, as the heirs of Mahomed Wasil, does not go to show that it was done fraudulently.

"The other reason assigned by the Munsif is, that the plaintiff Nuzima was not properly represented in the former suits. One of [372] those suits was decided on the 2nd Novembe. 1878, by the present Munsif, and if he found that one of the defendants in that case was not properly represented, he should have removed the name of such person from among the defendants, or should have appointed the minor's mother guardian *ad litem* of her minor daughter. Misrijan was defendant for self and her minor daughter, and decrees were passed against them both. It may safely be inferred from the above, that Misrijan was allowed to represent her minor daughter, though through the laxity of procedure or oversight no order was passed on the subject.

"The plaintiffs aver that the defendant Jafur Ali has been inducing Misrijan to marry the former's son, Ahmed Ali. If these defendants were in collusion with each other, they could contract a marriage between themselves and Misrijan could bestow her daughter in marriage to Ahmed Ali, and thus could secure the interests of both the mother and the daughter, because the defendants Misrijan and Jafur Ali must have been in collusion when the former suits were brought, and Nuzima was surely unmarried at the time. She is

still a minor, and the present suit has been brought by her husband in collusion with her mother and aunts. Be that as it may, I do not see any reason to suppose, nor any evidence to prove, that the former judgments were fraudulently obtained by some of the defendants.

"As to the second point, it is neither alleged nor made out that the execution-decree-sales were brought about by fraud. The plaintiffs preferred petitions of objection and they were rejected. The subject-matter of the case was brought to sale with the knowledge of the first plaintiff, and some of their witnesses were present at the time and place of the sale. But the plaintiffs did not take any step to save the property from sale.

"It is true that there is no dispute as to the shares of the plaintiffs; but, according to the tenets of Mahomedan law, out of the property of a deceased Mahomedan, his burial and funeral expenses should be defrayed first, then his debts should be liquidated. If all the assets of a deceased person be consumed in paying his debts off, his heirs-at-law can certainly get nothing."

The Subordinate Judge then reversed the decision of the Munsif and dismissed the suit with costs. The plaintiffs appealed to the High Court.

Mr. *Twisdale* for the Appellants.

Baboo *Ankhit Chunder Sen* for the Respondents.

[373] The Judgment of the Court (MORRIS and O'KINEALY, JJ.) was delivered by

Morris, J. This was a suit to set aside certain decrees on the ground of fraud. One Mahomed Wasil died in January 1878, leaving a widow, a daughter, and two married sisters. The two latter did not reside in the family-house, but the house with the other property of the deceased remained in the possession of his widow and daughter. Subsequently, and in the same year, three suits were brought by different plaintiffs against the widow and daughter to recover certain sums borrowed by the deceased, and in execution of the decrees obtained in them, the property left by the deceased was sold and purchased by the defendants Kamdar Ali and Asgar Ali. The sisters, the plaintiffs in the present case, were not parties to these suits, and the claim now put forward by them is—1st, that the decrees were fraudulent, and 2nd, that, even in the absence of fraud, their shares, amounting to six annas, could not pass to the purchaser. They ask for a declaration to this effect. The daughter also seeks to obtain a similar declaration on the ground that she was not properly represented in the creditor's suits.

The charge of fraud has not been established, and the argument put forward on behalf of the daughter is, in our opinion, untenable. The only point, therefore, now in issue is, whether the sisters are entitled to the declaration which they seek. This subject has been dealt with from different points of view in the decisions of our Courts. They all support the contention now raised on behalf of the respondents, that the sisters cannot obtain their shares of the property sold. The first is that of *Mussamut Nuzceerun v. Moulvie Ameerooddeen* (24 W. R., 3), according to which, following the analogy of the Hindu law in the case of a Hindu widow, the defendants in the former suit may be considered as having been sued in their representative character only and what passed at the sale in execution was the property of Mahomed Wasil. A second case—that of *Assamathemnessa Bibee v. Roy Lutcheemput Singh* (I. L. R., 4 Cal., 142)—ignores the extension of this principle of Hindu law to Mahomedans, and approves [374] of the procedure provided in the Hedaya for the guidance of Mahomedan law officers, and the judgments thereon are apparently to the effect that one of the heirs in possession may stand as litigant

on behalf of all the other heirs with respect to anything done to or by the deceased, whether it be debt or substance.

The third view is opposed to dealing with this question on either of these grounds, but recognizes all creditors' suits as in the nature of administration-suits. This principle was laid down, so far back as in 1799, by the *Sadr Dewany Adalat*, in the case of *Kishwar Khan v. Jevan Khan* (Sel. Rep., 25). A creditor's suit is there declared to be in the nature of an administration-suit, and, as such, an heir in possession is bound to account for any assets that may have come into his hands, and to that extent is liable to pay the creditors; the residue, if any, being divided among the heirs. This form of decree has been approved by their Lordships of the Privy Council in the case of *Khajah Hidayatullah v. Rai Jan Khanum* (3 Moore's I. A., 295); subsequently again by their Lordships, in the case of *Bazuyet Hossein v. Dooli Chund* (I. L. R., 4 Cal., 402). We think that this is the proper principle that must guide us in the decision of the present suit, because in the former suits by the creditors, the property of the deceased Mahomed Wasil was attached and sold in payment of his debts. We, therefore, affirm the judgment of the lower Appellate Court, and dismiss the appeal with costs.

Appeal dismissed.

NOTES.

MAHOMEDAN LAW—SUIT AGAINST SOME HEIRS ONLY--

Mr. F. B. Tyabji gives a lucid statement of the principles in his *Muhammadan Law* (1913) pp. 501 *et seq.* While the views of the High Courts of Calcutta and Bombay are as expressed in this case, (1894) 21 Cal. 311; (1887) 12 Bom. 101; (1895) 20 Bom. 338; the view of the Allahabad High Court is that the other heirs are not bound, (1901) 23 All. 263; also see (1885) 7 All. 716; 822; the Madras High Court is of the opinion that the other heirs are bound when the heirs sued are in possession of the *whole* property:—

(1902) 26 Mad. 734. See also (1901) P. L. R. 74].

[375] APPELLATE CIVIL.

The 13th February, 1882.

PRESENT:

MR. JUSTICE CUNNINGHAM AND MR. JUSTICE TOTTENHAM.

Thakur Doyal.....Defendant

versus

Ram Narain Singh.....Plaintiff.*

Onus probandi—*Evidence*—*Jagir tenure*—*Auldad Grant*—*Suit for possession*—*Landlord and tenant*.

By a sanad dated March 1854, the plaintiff's ancestor granted to B, the defendant's ancestor, a jagir of a certain mauza. B died in 1872, and plaintiff subsequently brought a suit to recover possession of the mauza, alleging that the grant to B was an ordinary service jagir. The plaintiff filed a kabuliat which had been executed by B, the terms of which supported the plaintiff's allegation as to the nature of the grant. The defendant alleged that the grant was *auldad*, but failed to produce the sanad or account for its non-production.

Held, that the plaintiff was entitled to a decree.

* Appeal from Appellate Decree, No. 1895 of 1880, against the decree of H. L. Oliphant, Esq., Judicial Commissioner, Chota Nagpore, dated the 21st June 1880, reversing the decree of Colonel H. M. Boddam, Deputy Commissioner of Hazaribagh, dated the 3rd June 1879.

Maharaja Juggernath Sahee v. Mussamut Ahlad Kowur (19 W. R., 140) distinguished.

THIS was a suit for possession of a mauza. The plaintiff, which was filed on the 20th of September 1878, stated that the mauza in question belonged to the plaintiff's ancestor, who, by a sanad, dated the 16th of March 1854, granted a jagir thereof to one Bhola Ram, partly in consideration of an annual rent of Rs. 18, and partly in payment of his services as *bhandari* of the *bhandars* of certain villages belonging to the grantor; that Bhola Ram died in October 1872, when the plaintiff was a minor under the jurisdiction of the Court of Wards; and that, since the death of Bhola Ram, the jagir (which then reverted to the plaintiff) was held by the defendant, who claimed to be entitled thereto as heir of Bhola Ram. The plaintiff filed a kabuliati signed by Bhola Ram, in which the latter undertook to observe the terms of the sanad of 1854. The defendant, who was the daughter's son of Bhola Ram, alleged that, according to the sanad, the jagir was given *auladad*, and that the kabuliati was a forgery. The Court of First Instance found that the plaintiff had failed to prove that the grant to Bhola Ram was for life, saying, that if it had been so, [376] "this would have been mentioned in the kabuliati produced by the plaintiff, and the jagir would not have been stated to have been given on condition of *khair khahi* only." The defendant did not produce the sanad, but having, in the opinion of the Court of First Instance, sufficiently accounted for its non-production, he was allowed to give oral evidence that the jagir was granted *auladad*. The suit was dismissed with costs.

On appeal, the Judicial Commissioner, having stated the facts set out in the pleadings, continued:— "I have now to consider the question of onus; and having regard to the relative position of the two parties, and the nature of the tenure which is set up by the defendant, it appears to me that the Deputy Commissioner has thrown the onus of proof on the wrong party, and this view would appear to be supported by the Privy Council decision in the case of *Rajah Prahlad Sen v. Rajendra Kiskore Singh* (2 B. L. R. (P. C.), 111; S.C., 12 Moore's I. A., 292), wherein it is set forth: 'The appellant is the zamindar; as such he has a *prima facie* title to the gross collection from all the mauzas within his zamindari. It lay upon the respondents to defeat that right by proving the grant of an intermediate tenure.' In the present case the plaintiff is admittedly the zamindar, and it is for the defendant therefore to prove the grant set up by him. He relies on a sanad, which is said to have contained the expression '*auladad*,' and which is alleged to have been given by the former proprietor of the estate to Bhola Ram, and this sanad he was bound to produce or else to account satisfactorily for its non-production. It has not been produced, nor has any evidence been offered to account for its non-production; and in these circumstances, and seeing that it was admittedly in the power and under the control of the defendant, secondary evidence in regard to its contents cannot be received. The defendant clearly has no right to retain possession of the village, unless he, as heir of Bhola Ram, can prove the grant made to him '*auladad*'; and as he has entirely failed to prove this, the plaintiff is entitled to a decree." The question as to the genuineness of the kabuliati was not touched upon. The decree of the Court of [377] First Instance having been reversed, the defendant appealed to the High Court.

Baboo Hem Chunder Banerjee and Baboo Jogesh Chunder Dey for the Appellant.

Mr. Mendies for the Respondent.

The **Judgment** of the Court (CUNNINGHAM and TOTTENHAM, JJ.) was delivered by

Cunningham, J.—In this case the plaintiff who is the zamindar of an estate, claims on the ground that, on the 16th March 1854, a service jagir was granted to one Bhola Bhandari; and that the grantee subsequently executed an ikramnama setting out that the grant was an ordinary service jagir. The plaintiff further states that the grantee has since died, and accordingly claims to resume.

The defendant, who is admittedly the lineal descendant of Bhola Bhandari, set up the case that he holds under his sanad, which, he contends, departed from the ordinary terms of a service jagir, inasmuch as it contained the word *auladad*,— i.e., descendible to heirs generally, both male and female.

This sanad has not been produced, and the Court below has found that no satisfactory evidence has been given to account for its non-production. This being the case, the Judge has held that the onus lay upon the defendant to show the special terms of the sanad which he sets up, and in the absence of the sanad or of satisfactory proof to account for its non-production, that this onus has not been discharged. We think that, in so doing, the lower Court has acted rightly.

Reference has been made in the course of the argument to the case of *Juggernath Sahoe v. Mussamut Ahlad Kowar* (19 W.R., 140) but in that case there was a material difference from the present, as the defendant there set up a perfectly different grant from that alleged by the plaintiff: and therefore, in default of the plaintiff proving his grant, their Lordships observe that no basis for the action had been laid. In the present instance the grant has been admitted; its terms are proved by the statement of the plaintiff corroborated by the ikramnama: and the defendant [378] has failed to give either proper evidence of the special terms of the sanad which he sets up, or any legal explanation for its non-production.

We think the lower Court was right, under the circumstances, in deciding against the defendant, and this appeal will, therefore, be dismissed with costs.

Appeal dismissed.

The 20th February, 1882.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE PONTIFEX.

Cally Nath Naugh Chowdhry.....Plaintiff

versus

Chunder Nath Naugh Chowdhry and others.....Defendants.

Hindu Law—Will— Gift to grandsons after death of annuitants—Vesting not postponed—Inconsistent declarations rejected.

A testator, after charging certain annuities and other payments on his estate, gave the whole of his property to his grandsons in these words. —“ I give the whole of my property to my grandsons ; but until those portions of the said property and the monthly stipends which I have given to some to enjoy for the natural term of their lives shall revert to the estate after their deaths, my estate shall not be divided amongst any of my grandsons or my great grandsons. After all the pensioners have died, and after the enjoyment of the said pensions and property shall have ceased, the executor's powers shall be annulled, and then my grandsons and my grandsons' heirs,—that is to say, my great grandsons,—shall be able to divide the whole of the property and take their father's shares.”

He further directed that, for five years after his death, his family should remain joint, and allowed to his executors Rs. 100 for family expenses.

Held, that the will contained sufficiently direct words of present gift to the grandsons, and that the clause in which it was attempted to postpone the enjoyment in possession, and other clauses which directed accumulation, must be rejected or disregarded as inconsistent or repugnant.

Held also, that the fact that the estate was subject to partial trusts or charges did not postpone the vesting in possession ; nor would it, even according to English law, let in grandsons of the testator born after his death during the continuance of the trusts.

Alangamanjori Dabee v. Sonamoni Dabee (*ante*, p. 157 ; S.C., 9 C. L. R., 121) discussed by PONTIFEX, J.

APPEAL from the decision of WILSON, J.

This was a suit brought for the construction of the will of one Rajmohun Naugh Chowdhry.

[379] Rajmohun died on the 5th July 1880, leaving him surviving a widow and two sons, Chunder Nath and Cally Nath. Previously to the testator's death the family of Chunder Nath consisted of six sons, all born in the testator's lifetime ; and that of Cally Nath, of one daughter. Cally Nath separated from the family in October 1880.

By his will, dated the 4th July 1880, the testator appointed Chunder Nath executor, and gave, amongst other gifts, certain pensions to be paid to certain persons named, and a sum of Rs. 75 for five years to Cally Nath should he choose to separate himself from the family ; and after the expiration of the five years he gave certain landed properties to him for life, and other landed properties jointly to Cally Nath and Chunder Nath for life.

The more important directions in the will were those contained in paras. 1, 3, 14, 17, and 19, which were as follows :—

In *para. 1* the testator enumerated his family in these words : “ I have two sons and grandsons surviving, Sreeman Chunder Nath Naugh Chowdhry, Sreeman Cally Nath Naugh Chowdhry, and my grandsons Sreeman Wopendro Nath Naugh Chowdhry and Sreeman Soorendro Nath Naugh, and others whose names will be mentioned hereafter. ”

Para. 3—“ For the first five years after my death, my son, grandsons and all the other members of my family shall live in commensality in one house. They shall not be able to separate, and in order to meet the household expenses, I allot Rs. 400 to my son . . . and no one else shall receive a separate allowance for expenses. ”

Para. 14—“ I give the whole of my property to my grandsons ; but until those portions of the said property and the monthly stipends which I have above given to some to enjoy for the natural term of their lives shall revert to the estate after their deaths, my estate shall not be divided amongst any of my grandsons or my great grandsons. After all the pensioners have died, and after the enjoyment of the said pensions and property shall have ceased, the executor's powers shall be annulled, and then my grandsons and my grandsons' heirs,—that is to say, my great grandsons,—shall be able to divide the whole of the property and take their father's shares. ”

[380] *Para. 17*—“ My daughter or daughter's sons, or my grandsons' daughters or their daughters' sons shall never be able to inherit my estate. My family shall inherit my estate in the male line only. ”

Para. 19 “ The executor shall, with the money of the estate, preserve in proper repair the family dwelling-house in Kristo Singh's lane and at Arbaliah, and the sons and sons' wives who have possession of certain rooms in the Arbaliah family dwelling-house shall continue to hold possession of them ; no other partition of the same shall be made. ”

Chunder Nath took out probate on the 1st October 1880. On the 17th July 1881, Cally Nath brought this suit against Chunder Nath and the six infant sons of Chunder Nath, making sundry charges of misconduct in carrying out the objects of the will against Chunder Nath, and asking that the will might be construed and an account taken of the estate of the testator, and for partition of the estate so far as it had not been validly disposed of, and for a receiver.

Mr. Jackson and Mr. Stokoe for the Plaintiff.

Mr. Bonnerjee and Mr. Trevelyan for the Defendant, Chunder Nath Naugh Chowdhry.

Mr. Palit and Mr. Mookerjee for the other Defendants.

Wilson, J.—I think this is a very clear case. This is a suit for the construction of the will of Rajmohun Naugh Chowdhry, and is brought by the plaintiff as one of the two sons who survived the testator. He asks to have the will construed, for an account, for partition, and for other relief not now insisted on. He is entitled to have the will construed and the rights declared so far as they concern him, and to such relief as follows. The whole real controversy turns upon *para. 14* [reads *para. 14*].

If that clause is effectual as giving an absolute estate to the grandsons, subject to life-interests and annuities and other charges created by the will,

the plaintiff is entitled to nothing but what the will gives him. If the clause is void as doing something which the law does not allow, the plaintiff is entitled to a half of the estate as heir, and to a partition.

[381] The clause "I give the whole of my property to my grandsons, &c.," is said to be void as a gift to a class, some members of which may not come into existence till after the death of the testator. I do not think that this is so.

Before applying the rule which it is sought to apply, a Court must be satisfied, on the construction of the gift, that the gift is clearly to such a class as falls within the rule. In the present case the matter is plain beyond any reasonable doubt. In the first clause we have a guide to the meaning of the testator when he speaks of grandsons: in it he purports to enumerate his family, he says, "I have two sons and grandsons surviving,—the middle, that is to say, the second son, Sreeman Chunder Nath Naugh Chowdhry, and the third son, Sreeman Cally Nath Naugh Chowdhry, and my grandsons, Wopendra Nath Naugh Chowdhry and Sreeman Soorendro Nath Naugh and others whose names will be mentioned hereafter." As a matter of fact he does not name the others afterwards. Those words clearly show what he has in mind when he speaks of grandsons,—namely, living grandsons, two named and two others whose names would be mentioned afterwards. Then he says in the 14th clause,— "I give the whole of my property, &c." If that was alone, it would be clear, and give his living grandsons the whole, but the clause goes on with a provision, "that after all the pensioners have died, and after the enjoyment of the pensions and property shall have ceased," the grandsons and the grandsons' heirs are to divide the property.

Those words, I think, only express over again, what was sufficiently clear without them, that the grandsons take, subject to the provisions, particular estates, and that when those estates are exhausted, they, to whom he makes an absolute present gift, or their heirs, may divide the property.

It was contended, however, that clause 17 makes a difference, "my daughter or daughter's sons, or my grandsons' daughters or their daughters' sons shall never be able to inherit my estate. My family shall inherit my estate in the male line only."

I think that does not control the gift to the grandsons for two reasons. In the first place, I think it may be well read as, speaking of the estate, of matters at the time of the testator's [382] death and as expressing an intention (such as in the *Tayore case* (9 B. L. R., 477) was held to fail) to disinherit particular heirs at the time of his death. If not, then I think the principles laid down in the *Tayore case* (9 B. L. R., 477) must be applied, if there be an attempt to control the line of inheritance which the law contemplates.

If the gift to the grandsons in para. 14 is an absolute gift, and if para. 19 attempts to say that the property shall only descend in a particular line, the restriction is void, and the gift in para. 14 prevails. The plaintiff, therefore, is only entitled to what is given him in the will. Paragraph 3 gives him 75 rupees a month for five years. Paragraph 6 gives him a right after five years to enjoy for life certain property mentioned in the schedule to the will, and during that enjoyment to have the Government revenue paid. Paragraph 13 gives him the right to enjoy for life two gardens, one exclusively and the other jointly with his brother, and he is entitled to those and to no other rights. As he has substantially failed, he must pay the costs.

From this decision the plaintiff appealed.

Mr. Pugh (with him Mr. Stokoe and Mr. M. M. Ghose) for the Appellant.—The main question is as to whether, as regards the bulk of the estate, there is not an intestacy. No one is to come into enjoyment of the estate till all the annuities are satisfied. My objections to the will are—(i) that the estate is not given to any one till after the pensioners should die; (ii) that the gift to grandsons in the 14th para. of the will is bad, as being a gift to a class some of the members of which might be born after the death of the testator; (iii) that there is in it an invalid attempt to create a novel form of inheritance. [PONTIFEX, J.—In *Saunders v. Vautier* (1 Cr. and Ph., 240) there was a gift to sons, postponing enjoyment till they reached 25; there the gift was good, but the provision postponing the enjoyment was rejected. GARTH, C.J.—Do you contend that there is no gift to the grandsons at all? Yes; and I also say that there is no indication in the will that the testator intended that there should be any owner of the estate until the period of distribution arrived. The word ‘grandsons’ means the same throughout the will; great grandsons [383] take by purchase. The rules for ascertaining the objects of gifts to children as a class, so far as relates to the period of their coming into existence, are set out in Hayes and Jarman’s Concise Forms of Wills, p. 210: 1st—If no period of distribution is named, the class is ascertained at the death of the testator; 2nd—When a period of distribution is named, that is the time for ascertaining the class; 3rd—A gift to the children, the distribution of whose shares is postponed till majority or some other age (which none of the class at the testator’s decease has attained) embraces the children living at the testator’s decease, and also those who come *in esse* before the eldest attain the prescribed age, when the distribution *pro tanto* takes place, and after born children are excluded; 4th—A gift to children preceded by a life-interest includes the children living at the death of the testator, and those who come *in esse* in the lifetime of the prior devisee or legatee, whose death is made the period of distribution. [PONTIFEX, J.—The question is, whether there is any period of distribution at all: see *Singleton v. Gilbert* (1 Ch. Cox., 68). The proper question which arises is, whether the gift is to the grandsons subject to the life-estates, or to the annuitants, and the remainder to the grandsons.] The estate is subjected to trusts for partial purposes, such as the raising of Rs. 100 for maintenance and charges for marriage expenses, &c. These trusts postpone the vesting in possession, and let in grandsons of the testator who may be born after his death during the continuance of the trusts. The case of *Gardner v. James* (6 Beav., 170) shows that a gift of residue in trust, after payment of annuity to A for life, to apply residue in payment of maintenance of children of B till 21, and after death of A, and at the age of 21, to pay the whole residue to the children of B, was held not to be confined to children living at the death of the testatrix. The learned counsel further cited the case of *In re Edmondson’s Estate* (L. R., 5 Eq., 389) as showing the meaning of the word ‘vesting;’ and *Barnaby v. Tassell* (L. R., 11 Eq., 363) and *Devisme v. Mello* (1 Bro. Ch. Cas., 537) as to the gift to the grandson not being one to the grandsons in *presenti*. The canon of English law, therefore, [384] shows that such a gift as the present to the testator’s grandsons is not confined to grandsons who are in existence at the death of the testator; but such a gift is bad in Hindu law, as being a gift to a class, some of the members of which might be born after the death of the testator. The testator has endeavoured to postpone the enjoyment of the gift to the grandsons by saying they shall not partition the estate till the annuitants are dead. Such a restriction is void as being repugnant to the gift to the grandsons: see *Mokoondo Lall Shaw v. Gonesh Chunder Shaw* (I. L. R., 1 Cal. 104). The

property is given to no one for five years, and trusts for accumulations are void under Hindu law—*Kumara Asima Krishna Deb v. Kumara Kumara Krishna Deb* (2 B. L. R., O. C., 11). See, as to accumulations, Mayne's Hindu Law, para. 356.

Mr. *Evans* (with him Mr. *Bonnerjee*) for the Respondents.—The question is as to whether the grandsons are not intended to be the beneficiaries, and whether the clause postponing enjoyment must not be rejected. It is enunciated in *Tagore v. Tagore* (9 B. L. R., 377, at p. 395) that if an estate were given to a man without express words of inheritance, it would carry an estate of inheritance; if there were, however, superadded words restricting the power of transfer, the restriction would be rejected. Now here there is a complete gift with a provision against partition. The English canons of construction should be sparingly applied to Hindu wills. The provision in clause 14 does not refer to the period of distribution, but refers to the usual method of partition belonging to Hindu estates. *Ashutosh Dutt v. Doorga Churn Chatterjee* (L. R., 6 I. A., 182) is a case where directions given in a will were inconsistent with the interest given, and such directions were rejected. I am treating the will as an ordinary will apart from the Hindu Wills Act. I say that the testator has attempted to postpone the enjoyment; the fetters on the condition must drop off; and a vested interest is given to the grandsons when this is done, by the first part. As to vesting, see *Rewan Persad v. Radha Beeby* (4 Moore's I. A. 137); and *S. M. Krishnaramani Das v. Ananda Krishna Bose* (4 B. L. R., O. C., 231, at p. 295), as showing that where a will is [385] bad in some respects, the property, if vested in trustees, should be left in their hands in order that they may carry out such of the provisions of the will as are valid. See also the Chief Justice's judgment in the latter case 'as to trusts.' As to the power of an executor, see *Brajanath Dey Sirkar v. S. M. Annandamayee Das* (8 B. L. R., 208). My second point is, that this being a will under the Hindu Wills Act, the estate is vested in the executor; see s. 179 Hindu Wills Act. Before the Hindu Wills Act, the words of the will would show in whom the estate vested. Section 293 lays down that the assent of an executor is sufficient to pass a legacy. The Hindu Wills Act was passed before the *Tagore case* (9 B. L. R., 377) was decided by the Privy Council. The present gift is one to the grandsons, and the bequest is (under s. 98 of the Succession Act, which is made applicable to Hindus by the Hindu Wills Act) confined to such as were alive at the testator's death. I rely upon the construction of the Hindu Wills Act as given in *Alangananjori Dabee v. Sonamoni Dabee* (*ante*, p. 157; s.c., 9 C. L. R., 121) in aid of my contention that the present gift was a valid one to the grandsons. I ask the Court to construe the word 'grandsons' as grandsons alive at the death of the testator; but if it is held that the word 'grandsons' is to include unborn grandsons, then I ask that the Court should not hold that the class is vitiated.

Mr. *Bonnerjee* on the same side.—In the 3rd para. of the will the testator uses the words "his sons and all the other members of his family"; for the meaning of the word 'family,' see the case of *Khetter Mohun Mullick v. Gangamoni Mullick* (unreported) decided by WHITE, J., in which it was held, that the word signified "members existing at the time of the death of the testator"; but on appeal the word was said to comprise the relations of the testator, whether by marriage or blood, who formed members of his household at the time of his death. No words of inheritance are necessary to give the property to the grandsons; there is nothing in the will to cut down the gift [386] by saying that grandsons who are to come into existence at a future

time is meant. Section 98 of the Succession Act does not contravene the Hindu law as laid down in the *Tagore case* (9 B. L. R., 377), and we fall under s. 98 as possession is not deferred.

Mr. Pugh in reply. —With regard to the Hindu Wills Act there is nothing to show that there is any difference between the 3rd and other sections, as decided by Mr. Justice WILSON, in *Alungamanjori Dabee v. Sonamoni Dabee* (*ante*, p. 157 ; s.c., 9 C. L. R., 121). Section 154 of the Probate Act amends ss. 2 and 3 of the Hindu Wills Act. [PONTIFEX, J. —The way I look at the Hindu Wills Act is, that, at the beginning or end of each section introduced from the Succession Act, you must add the proviso or qualification contained in s. 3 of the Hindu Wills Act.] So far as there is any difference between the saving-clause in the Probate Act and the saving-clauses of the Hindu Wills Act, it ought to be that the two clauses have the same effect, and not, as Mr. Justice WILSON has held, that they have not. Where there are different Statutes in *pari materia*, though made at different times, or even expired, and not referring to each other, they should be taken and construed together as one system, and as explanatory of each other—*Rer v. Lordale* (1 Burrows Rep., 445, at p. 448). As regards what ought to be looked at in construing Statutes, see *Holme v. Guy* (L. R., 5 Ch. Div., 901, at p. 905) ; see also *The King v. Inhabitants of Taunton* (9 B. and C., 831). The Hindu Wills Act should not be made to extend to something that it has not been intended to extend to. As regards construing the words of an older Statute in reference to words in a later Statute in *pari materia*, see *Rolle v. Whyte* (L. R., 3 Q. B., 286). [PONTIFEX, J.—With regard to the construction of Statutes, see *Donegall v. Layard* (8 H. L. C. 460). As to the provision as to the estate vesting in the executor, there is nothing in the Hindu law to prevent a person vesting his estate in his executor. On the question of remoteness, see *Soudaminy Dossee v. Jogesh Chunder Dutt* (I. L. R., 2 Cal., 262). [PONTIFEX, J.—If you can show that [387] there was a distinct period of distribution, then the arguments in the case you have just cited may come in. But I look upon the gift of the estate as already vested, and the enjoyment alone postponed.] In s. 329 of Mayne, it is laid down, that it is essential to the validity of a gift that possession should be given to the donee. If you cannot postpone the enjoyment of a gift *inter vivos*, you cannot do so by will. Possession must follow the gift. [PONTIFEX, J.—I do not see that the case of *Soudaminy Dossee v. Jogesh Chunder Dutt* (I. L. R., 2 Cal., 262) is to the contrary.] You cannot include after-born grandchildren and postpone the vesting, and the Court will not choose between these inconsistent objects so as to give effect to the one and disappoint the other—*Leake v. Robinson* (2 Mer., 363, at p. 389). [GARTH, C.J.—There is no question as to the rule of Hindu law ; the only question is whether we should read this will so as to apply the rule.] I say there is nothing in the will to show that the testator intended to disinherit his sons ; he did not intend to substitute any one else in their place. [PONTIFEX, J.—It seems that it was his intention to cut out his sons altogether and to benefit his grandsons after accumulation.] As to how far a Court may go in construing a will of a testator in a different way to what he intended, that is laid down in *Tagore v. Tagore* (4 B. L. R., 103 ; s.c. on ap., 9 B. L. R., 377).

The Judgments of the Court (GARTH, C.J., and PONTIFEX, J.) were as follows :—

Pontifex, J.—We are of opinion that the decision of the Court below is a correct decision, and that the testator's will contains a sufficiently clear gift to his grandsons living at his own decease.

It is true that the testator endeavours to postpone the possessory enjoyment of his grandsons to a period of at least five years from his death; and that he directs an accumulation of the profits of his estate for a very much longer period. But his will containing, as in our opinion it does, sufficiently direct words of present gift, the clauses in it which attempt to postpone the enjoyment in possession, and to direct accumulation, must be rejected or disregarded as inconsistent or repugnant.

[388] The fact that the estate is subjected to trusts or charges for *partial* purposes, such as the raising and payment of Rs. 400 per mensem for the maintenance of certain members of the testator's family; the substitution at the end of five years of a life-interest in a certain portion of the estate for the claim of one of the testator's sons to maintenance out of Rs. 400 per mensem, and the charges for marriage expenses of other members of the family;—this fact does not, in our opinion, postpone the vesting in possession, nor would it, even under English law, let in grandsons of the testator born after his death and during the continuance of those trusts or charges—*Singleton v. Gilbert* (1 Cox., Ch., 68) and *Hill v. Chapman* (3 Bro. Ch. Cas., 390). And reasonable as it no doubt was for English Courts to relax the general rule, which requires that a class of legatees must be in existence at the death of the testator, by putting such a construction on bequests to a class of kindred, as would admit or let in all born before the period of distribution, it would certainly not be reasonable in the construction of Hindu wills to make such a departure from the general rule, if, as I understand the law, it is not even now possible for a Hindu to make a gift by will to a person unborn at his death, because the result would be that the gift would be invalid *ab initio* from the possibility of its including persons unborn at the testator's decease—*Sowdaminey Dossee v. Jogesh Chander Dutt* (I.L.R., 2 Cal., 262).

And this leads me to offer some observations on the Hindu Wills Act, and the case of *Alangamanyori Dabee v. Sonamoni Dabee* (Iute, p. 157; s. C., 9 C. L. R., 121) decided therein.

On the argument of the present appeal before us, that case, and the construction which it put upon the Hindu Wills Act, were relied upon by counsel for the grandsons in aid of their contention that there was a valid gift to the grandsons.

In our opinion, as I have already said, the grandsons are entitled irrespective of the Hindu Wills Act and the construction so put upon it. For the decision of the present case therefore it is not necessary for us to express our opinion on the authority of the case cited. But as Counsel addressed a considerable part of their argument to that case, and as I may not again have an opportunity of expressing my individual opinion upon it, I do not like leaving it without remark, though of course any remarks I make must be treated as extra-judicial, and as only the personal opinion of myself.

In the first place I agree with the learned Judge that, in construing the Hindu Wills Act, we are not at liberty to go behind it and enquire what were the motives for its introduction; and after the ruling of the learned Judge to that effect, it would perhaps have been better if the extract from the *Calcutta Gazette* had not been stated in the Report (p. 127 of 9 C. L. R.). But it does not appear whether s. 3 of the Hindu Wills Act was inserted before or after the report of the Select Committee, and it seems to me impossible for us to dive into the mind of each member of the majority who passed the Act; and it may well be that a silent member, differing from the motives expressed by the

member who introduced the Act, might have considered, as I myself consider, that s. 3 sufficiently neutralized the view to which he himself might be opposed.

I also of course agree with the learned Judge that it is a "settled canon of construction that a Statute ought to be so construed that if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." But can the Hindu Wills Act standing alone be called a Statute within the meaning of that canon? It is not even a skeleton of a Statute, but a mere heap of inarticulate dry bones, which require to be set up and clothed with the flesh of the Succession Act, before the Act itself can give forth any sound. Its preamble gives no intimation that it was expedient to give enlarged powers over their estates to Hindu testators. On the contrary, it was a restricting rather than an enabling Act. It does not apply to Hindus in the Madras and Bombay Presidencies outside the Presidency-towns, or to the inhabitants of the North-Western Provinces or the Punjab. It is scarcely likely therefore that the Legislature could have intended to make any radical alteration in Hindu law. It is not even called "an Act to amend and define the law of Hindu Testamentary Succession," but simply "an Act to regulate the Wills of Hindus."

[390] It seems to me, therefore, that, in setting up and clothing each dry bone of the inarticulate bundle contained in s. 2 of the Hindu Wills Act, we must add, either at the beginning or end of each section introduced from the Succession Act, the proviso or qualification contained in s. 3 of the Hindu Wills Act.

If placed at the end of the exceptions to ss. 98 and 99, or to the end of ss. 100 and 101, it would certainly, according to the Privy Council decision in the *Tagore case* (9 B. L. R., 377), make them imperative so far as Hindus are concerned. But at the time the Act was passed the Legislature was not instructed as to this, for the legal powers of devise among Hindus were still in doubt, not having been defined by the final Court of appeal.

From the state of doubt in which the uninstructed Legislature acted, it seems to me that it would be more reasonable to read the qualification contained in s. 3 at the beginning of each of the exceptions to ss. 98 and 99, and at the beginning of ss. 100 and 101: which would then run thus: "Subject to the qualification that no Hindu is hereby authorised to create in property any interest which he could not have created before the 1st of September 1870, if property is bequeathed to a class of persons, &c." (exception to s. 98); or in other words (taking s. 100): "If a Hindu can make a bequest to a person not in existence, then where a bequest is so made, &c." And for all I know this might still leave the sections operative so far as Sikhs or Bhuddists are concerned. And for all the Legislature knew at the time, it might have left the sections operative even with respect to Hindus.

Besides, if the intention of the Legislature is to be considered—and in this respect I think it may be considered—regard must be had to the fact that the Legislature has always been careful not to make any alteration in the substantive law of property of Hindus.

Moreover, these sections of the Succession Act, taken together, have in that Act, or were at all events intended to have, a seriously restrictive effect, making the law in India with respect to Europeans far more stringent than theretofore. It would certainly be a most singular result of legislation if that which [391] was originally intended to operate as a restriction should, under the very unsatisfactory method of legislation employed in the Hindu Wills Act, not

only operate to create a power new and therefore unknown, but also to subvert what is recognized by their Lordships of the Privy Council as a fundamental principle of Hindu law. It surely could never have been the intention of the Legislature to make such a radical change in the law.

The difficulty really arises from what I may perhaps call the spasmodic method of legislation. If the Succession Act had, from its commencement, applied to all the inhabitants of British India, but had concluded with s. 3 of the Hindu Wills Act, could it then have been contended that ss. 98 to 101 were applicable to Hindus. These sections would have been operative with respect to Europeans, and there would have been no absurdity in excepting Hindus from their operation. No word in them would then have been superfluous, void or insignificant.

And is not this the way in which we ought to regard the legislation under the two Acts? By s. 331 of the Succession Act Hindus were excluded from its operation. The Hindu Wills Act is, so far as our present purpose is concerned, merely a repeal of that section with the super-addition of s. 3 of the Hindu Wills Act. If the Succession Act had not contained s. 331, and had contained s. 3 of the Hindu Wills Act, it would have been necessary to seek for a refined or non-natural interpretation of the words "create in property any interest" contained in s. 3.

I repeat that it is in my opinion only the method of legislation which creates the difficulty. It seems to me that the two Acts should be read together as one Act, applicable to all classes—Europeans, Hindus, Sikhs, Buddhists, &c. And then s. 3 of the Hindu Wills Act would receive a natural interpretation corresponding to that which would be placed on s. 149 of Act V of 1881, which last section shews the intention of the Legislature in an Act of similar character.

Indeed the very language of the last clause of s. 3 of the Hindu Wills Act betrays an alarmed consciousness in the Legislature, that through oversight or ignorance some provision which they had attempted to enact might be repugnant to Hindu law; and if we are to search for the particular provisions to which [392] such fear may relate, I should, as at present advised, find them in ss. 98 to 101; for, after an examination of all the sections imported into the Hindu Wills Act from the Succession Act, I confess I am unable to find any which purport to create an estate of a character unknown to Hindu law, and to which the remarks under the second head mentioned at p. 132-3 of 9 Calcutta Law Reports, might relate; and therefore I am unable to agree that the words "create any interest" in s. 3 can be "read in the narrower sense" as referring only to the estate or interest which can be given, without reference to the further question to whom it can be given. For, if so read with respect to this particular Hindu Wills Act, it appears to me that they would have no operation whatever, but would be mere surplusage, and would thus offend against the very canon of construction already referred to.

But apart from these remarks upon the Hindu Wills Act and the case cited, which I wish it to be known are remarks of myself alone, we affirm the decree of the lower Court, holding that the grandsons living at the testator's death are entitled, subject only to such interests and charges created by the will as are legal and capable of taking effect.

But we think, in a case of this kind, depending as it does on the construction of an obscurely worded will, the costs both in the Court below and in this Court should be borne by the estate.

With this modification we dismiss the appeal, and direct that the costs of all parties in both Courts shall be paid out of the estate.

Garth, C. J.—I agree that the appeal must be dismissed, apart from any question arising under the Hindu Wills Act. With respect to the case of *Alangamanjori Dabee v. Sonamani Dabee*, (*Ante*, p. 157 ; s. c., 9 C. L. R., 121), I at present express no opinion, as very possibly that case may come up on appeal to this Court.

Appeal dismissed.

Attorneys for the Appellant : Messrs. *Swinhoe & Co.*

Attorneys for the Respondents : Messrs. *Beeby and Rutter.*

NOTES.

[I. HINDU WILLS - GIFTS TO A CLASS—

In this case it was held that the gift to grandsons was to such as were in existence at the testator's death. Even if grandsons to be born were intended to be included, those who were in existence then would alone take under the devise, and the gift would not fail :— 38 Cal., 168 P. C. which held that the rule in *Leake v. Robinson* did not apply to Hindus ; see also 12 Cal., 663 ; 21 Cal. 616.

As regards accumulations, see 24 Cal., 589.

As regards the condition of remaining *joint*, which was in this case discarded as repugnant to the estate given, see the Notes to 6 Cal. 106.

The case of *Alangamanjori v. Sonamani*, 8 Cal., 157 discussed by Pontifex, J. in this case, was reversed on appeal in (1882) 8 Cal., 637.]

[10 C.L.R. 239]

[393] APPELLATE CRIMINAL.

The 28th February, 1882.

PRESENT:

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

In the matter of the Petition of Teacotta Shekdar and others.

Teacotta Shekdar and others

versus

Amcer Maje, Hafiz Paikar, and others.*

Transfer of class of cases from Subordinate Magistrates—Criminal Procedure Code (Act X of 1872), s. 48—Notice to the parties before the transfer is made.

Before a Magistrate of a district can transfer a case from a Court subordinate to him to any other subordinate Court, notice of such intended transfer should be served upon the parties, so as to enable any or either of the parties to come forward and show cause why such transfer should not be made.

A CRIMINAL case pending in the Court of a Deputy Magistrate was transferred to the Sub-divisional Officer by an order of the Officiating Magistrate of the District under s. 48 of the Criminal Procedure Code. The complainants in the case applied to the High Court to have the order of transfer set aside, on the grounds (i) that the order could not be made under s. 48 ; (ii) that it

* Criminal Motion, No. 38 of 1882, against the order of H. Mosley, Esq., Officiating Magistrate of Murshedabad, dated the 31st December 1881.

should not have been passed without notice of the intended transfer first having been given to them ; (iii) that the Court to which the transfer had been made was a long distance from their homes.

Mr. *Mendies* for the Petitioners.

The **Judgment** of the Court (MITTER and MACLEAN, JJ.) was delivered by

Mitter, J.—The petitioners state that a criminal case, in which the petitioners were complainants, and Ameer Majee and others were defendants, was pending in the Deputy Magistrate's Court of Jungipore. This case was transferred to the Sub-divisional Officer of Lallbagh by an order of the Officiating [394] Magistrate of the District, purporting to have been passed under s. 48 of the Criminal Procedure Code. The petitioners have applied to this Court to set aside the order of transfer, on the grounds (i) that it is not warranted by s. 48 ; (ii) that it should not have been passed without any notice to them, they being entitled to be heard in the matter ; and (iii) that it would be extremely inconvenient to them to attend the Court at Lallbagh, which is at some distance from their homes.

By the order of the Officiating Magistrate referred to above he directed that "all criminal cases occurring in Chuckla Ranchundrapur, and all cases if there be any, or any shall arise occurring near there and connected with the disputes there going on" be withdrawn from the jurisdiction of the Sub-divisional Officer of Jungipore, and be tried by the Sub-divisional Officer of Lallbagh.

It is doubtful whether the Officiating Magistrate's order is warranted by s. 48 ; but even supposing that he had the power of transferring the case at the stage in which it was under this section, he is clearly in error in exercising this power without giving the plaintiffs any notice or giving them any opportunity to be heard in the matter ; see the case of *In the matter of Jaffer Ali* (Criminal Motion, No. 302 of 1877, dated the 26th February 1877), also *Umrao Singh v. Fakir Chand* (I. L. R., 3 All., 749). The order of the Officiating Magistrate transferring this case is, therefore, quashed, and the Sub-divisional Officer of Jungipore will now proceed to dispose of it in accordance with the law.

NOTES.

[TRANSFER—NOTICE—

On general principles, notice should be issued.—(1902) 7 C.W.N. 114 ; (1902) P.R., 28 – 1903 P.L.R. 10 ; even if the District Magistrate's reasons be perfectly sound.—(1901) 14 C.P.L.R. 90. An order without such notice was held to be illegal : (1896) 22 Bom. 549 but see (1904) U.B.R. 1st Quarter, Cr. P.C., 15 (16).]

[=10 C.L.R. 435]

[395] APPELLATE CIVIL.

The 1st March, 1882.

PRESENT:

MR. JUSTICE PRINSEP AND MR. JUSTICE BOSE.

Raj Chunder Chatterjee.....Plaintiff

versus

Modhoosoodun Mookerjee and others.....Defendants.*

Limitation Act (XV of 1877), s. 2, sched. i, art. 11—Claim to mortgaged property—Execution of decree.

In execution of a decree upon a mortgage, a claim to the mortgaged property was put in under s. 246 of Act VIII of 1859 by certain persons, on the ground that they had purchased the right, title, and interest of the judgment-debtor in execution of a previous decree. The claim was allowed on the 26th July 1877. On the 29th March 1879, the mortgagee instituted a suit to establish his right to the property. The period of limitation for such a suit under Act XV of 1877 is one year from the date of the order; but under Act IX of 1871, a longer period was prescribed. Act XV of 1877 did not come into force until the 1st of October 1877.

Held, that the provisions of the last paragraph of s. 2 of Act XV of 1877 applied, and that the suit was not barred.

IN this case it appeared that the plaintiff had obtained a decree on a registered mortgage-bond against the principal defendant, and had attached the mortgaged land. The remaining defendants intervened under s. 246 of Act VIII of 1859 as claimants, on the ground that, in execution of another decree, they purchased the right, title, and interest of the judgment-debtor. The Court, on the 26th of July 1877, allowed the claim and released the property from attachment. The present suit was brought on the 29th of March 1879 for a declaration that the title set up by the intervening defendants could not affect the plaintiff, inasmuch as those defendants purchased the land in execution of a decree in which the original bond upon which the decree was founded was not registered, and that the plaintiff's bond having been registered, he was entitled [396] to preference. Both the lower Courts considered that the plaintiff's suit was barred by limitation under art. 11 †, sched. ii of Act XV of 1877. The plaintiff appealed to the High Court.

Bahoo Troilakhyanath Mitter for the Appellant.

Baboo Sreesh Chunder Chowdhry for the Respondents.

The **Judgment** of the Court (PRINSEP and BOSE, JJ.) was delivered by

* Appeal from Appellate Decree, No. 1949 of 1880, against the decree of Baboo Bhooputty Roy, Subordinate Judge of Burdwan, dated the 1st July 1880, affirming the decree of Baboo Dinesh Chunder Roy, Officiating Munsif of Bood-bood, dated the 7th August 1879.

† [Art. 11:—

Description of Suit.	Period of Limitation.	Time from which period begins to run.
By a person against whom an order is passed under section 280, 281, 282 or 335 of the Code of Civil Procedure, to establish his right to, or to the present possession of, the property comprised in the order.	One year.	The date of the order.]

Prinsep, J.—The plaintiff obtained a decree against the defendant No. 1 personally, with a declaration of a lien to the amount of the debt on the mortgaged property. In executing that decree he was opposed by the defendants, Nos. 2 and 3, who had purchased, before the institution of this suit, in execution of another mortgage-decree obtained on an unregistered bond, under which this very property was mortgaged. Their objection was allowed, and the plaintiff has, accordingly, brought the present suit to establish his right as against the defendants Nos. 2 and 3. The date of the adverse order under s. 246 of Act VIII of 1859 is 26th July 1877, and the present suit has been brought on the 29th March 1879. The lower Courts have held, that the plaintiff's claim is barred by limitation under art. 11, sched. ii of the Limitation Act, XV of 1877.

It is contended in appeal that, inasmuch as, under the decisions of this Court in *Matonginy Dossee v. Chowdhry Jummunjoy Mullick* (25 W. R., 513), and *Koylash Chunder Paul Chowdhry v. Preonath Roy Chowdhry* (I. L. R., 4 Cal., 610), it was held that, under the Limitation Act, IX of 1871, which was in force when the order of July 1877 was passed, the limitation was not that which is now enacted in art. 11 of Act XV of 1877, but a longer period, the lower Appellate Court should have applied the last paragraph of s. 2 of the Limitation Act of 1877, under which the suit would not have been barred until two years from October 1877, on which date that Act came into force. So far as I am aware, the rule laid down in the two judgments that I have already quoted has [397] always been followed, at least on the Benches in which I have been one of the Judges; and therefore, if the Limitation Act had remained unaltered, the present suit would not have been barred. The terms of art. 11 of the present Limitation Act are clear on this point, and would prevent a suit like the present from being brought after one year from the order in the execution proceedings; but, as I have before observed, that provision would not come into force until the 1st October 1879.

In this view, we are of opinion that the order of the lower Appellate Court is wrong, and that the case must, therefore, be remanded in order that it may be tried on the merits.

The costs will abide the result.

Case remanded.

NOTES.

[RETROSPECTIVITY—LIMITATION OF SUITS AND ACTIONS—

The decision in this case, it is submitted, does not appear to be sound. Limitation, being a matter of procedure has generally a retrospective operation. A certain period of limitation different from that in the previous enactment was provided in the Code of 1877; and the new enactment was declared to come into force (on 1st October 1877) *some time after its being enacted*. In such circumstances it has been held, as a maxim of interpretation, that the new Act operates retrospectively, on its coming into force [see *Towler v. Chatterton* (1829) 6 Bing., 251; *Craies on Statute Law* (1907) 1V Edn. pp. 327—331].

Secondly the new time limit would work no hardship, in that the New Code came into force on the 1st October 1877 and the one year given by it would expire only on the 26th July 1878, and thus there was time for instituting the suit.

The case of *R v. Chandra Dharna* (1905) 2 K. B. 335 was one in which the time *enlarged* by the new statute was held applicable; the same reasoning would apply equally to the case where the time is *curtailed* by the new Statute, and there was time for instituting the suit.

Thirdly, the matter does not fall within the scope of sec. 2, as the proceeding etc., had not commenced when the new Code came into force; and a new suit cannot be regarded in the same light as an appeal, which has been regarded as a continuation of the original proceedings, 3 Cal., 662.]

[8 Cal. 397: 10 C. L. R. 419]

APPELLATE CIVIL.

The 1st March, 1882.

PRESENT:

MR. JUSTICE PRINSEP AND MR. JUSTICE BOSE.

Sham Chunder Adhicary.....Plaintiff

versus

Sobin Bhoopal Sing and another.....Defendants

Chota Nagpore Tenures Act (Beng. Act II of 1869)—Powers of Special Commissioner.

The scope and object of Beng. Act II of 1869 is to determine the quantity of lands of certain specified descriptions within villages to which the Special Commissioner, named under the Act, may have been appointed. Nothing in the Act empowers an officer so appointed to determine a question of disputed boundary between two villages, and to oust the Civil Courts of their ordinary jurisdiction in determining the rights of parties under conflicting titles as proprietors of such villages.

A SPECIAL Commissioner, appointed under the Chota Nagpore Tenures Act (Beng. Act II of 1869) decided that certain lands were within the boundaries of the defendants' village. The plaintiff then instituted a suit to recover possession of these lands, relying on a safinama settling the boundaries of his [398] and the defendants' village, executed by himself and the defendants. The defendants contended that the question had already been decided by the Special Commissioner, and that no suit would lie to reverse his decision. Both the lower Courts took this view of the case and dismissed the suit. The plaintiff appealed to the High Court.

Bahoo Jogesh Chunder Dey for the Appellant.

Bahoo Mohendronath Banerjee for the Respondents.

The **Judgment** of the Court (PRINSEP and BOSE, JJ.) was delivered by

Prinsep, J.—The plaintiff, as jagirdar of Mouza Tangarjoria, sues the jagirdar of the adjoining mouza of Chintamunkura to obtain possession of certain specific land. The District Judge has dismissed the suit as not maintainable, inasmuch as in his opinion the matter in dispute has been decided by the Special Commissioner appointed under what is known as the Bhuinhari Act (Beng. Act II of 1869), and the orders of such special tribunal are, under the provisions of s. 20 of that Act, final. It seems that, both before the Special Commissioner as also in the present suit, the dispute was simply a dispute regarding the boundary between two villages. So far as we understand the scope and object of Act II of 1869, it is to determine the quantity of lands of certain specified descriptions within villages to which the Special Commissioner may have been appointed. There is nothing in the Act that would empower an officer so appointed to determine a question of disputed boundary between two villages, and to oust the Civil Courts of their ordinary jurisdiction in determining the rights of parties under conflicting titles as proprietors of such villages. If, therefore, the Special Commissioner's order

* Appeal from Appellate Decree, No. 991 of 1880, against the decree of H. L. Oliphant, Esq., Judicial Commissioner of Chota Nagpore, dated the 3rd March 1880, affirming the decree of Moulvi Guzuffer Ali, Munsif of Lohardugga, dated the 18th June 1879.

had the effect of disturbing existing village boundaries and the titles acquired by such defined boundaries, it appears to us that he acted beyond the jurisdiction vested in him by that Act.

The case must, therefore, be returned to the lower Appellate Court in order that it may determine whether the lands in dispute belong to Mouza Tangarjoria or to Mouza Chinta-[399] munkura. If the plaintiff should establish to the satisfaction of the Court that it belongs to the former mouza, then, clearly, the defendants can have no title to the lands as Bhuinhari belonging to Mouza Chintamunkura.

The costs will abide the result.

Case remanded.

[8 Cal. 399—6 Ind. Jur. 530.]

APPELLATE CIVIL.

The 2nd March, 1882.

PRESENT :

SIR RICHARD GARTH, Kt., CHIEF JUSTICE, AND MR. JUSTICE PONTIFEX.

Akbar Ali.....Plaintiff

versus

Jezuddin and others.....Defendants.*

Jurisdiction—Small Cause Court—Suit to determine co-parcener's rights in moveable property.

A Small Cause Court has no power to entertain a suit for a declaratory decree.

There is nothing to prevent a Small Cause Court from determining whether a person, who has been made a co-plaintiff and claims as a coparcener of the original plaintiff, has any right to the property sued for.

The decree in such a case, if given in favour of the plaintiffs, must order that the parties do recover possession of the property sued for in such shares as the Judge may consider them to be entitled. A declaratory decree of the relative rights of the parties cannot be made.

THIS was a suit brought to obtain a declaration of the plaintiff's right to a cow and a calf, and also for the recovery of the cow and calf, together with the sum of Rs. 28, the value of milk given by the cow during a month and-a-half. The plaintiff, it was admitted, had given the cow to the defendants on the following conditions : that the defendants should have the first calf and retain the milk ; and that, on birth of a second calf, the cow and second calf should be returned to the plaintiff. The defendants retained the cow and the second calf, and appropriated the milk after the birth of the second calf.

* Reference under s. 317, Civil Procedure Code, No. 18 of 1881, from the order made by Baboo Boroda Prosono Shome, First Munsif of Jehanabad, vested with the powers of a Judge of a Court of Small Causes, dated the 17th November 1881.

The plaintiff brought this suit in the Small Cause Court for the purposes abovementioned.

The defendants admitted the conditions and their liability to return the cow and the second calf, but claimed to be paid [400] the expenses incurred in their keep; and further objected to the jurisdiction of the Small Cause Court.

At the hearing, one Luteefunnessa, the widow of a deceased brother of the plaintiff, applied to be added as a co-plaintiff, and claimed a one-anna and a half share in the cow and calf. The plaintiff objected, stating that he was the sole owner; the Court, however, allowed the widow to be added as a plaintiff.

The Munsif held, that the suit would lie, but referred to the High Court the question whether the Small Cause Court was competent to adjudicate upon and declare co-parcenary rights in respect of moveable property.

No one appeared for the Parties.

The **Opinion** of the Court (GARTH, C.J. and PONTIFEX, J.) was as follows :—

Garth, C.J.—If this were really a suit for a declaratory decree only, I should hold that the Small Cause Court had no jurisdiction to entertain it.

The case of *Ram Dhan Biswas v. Kefal Biswas* (10 W. R., 141; s. c., 1 B. L. R., S. N., 10), decided by Sir BARNES PEACOCK and Mr. Justice MITTER, is perfectly good law at the present time. It has never, so far as I am aware, been seriously questioned; and the case of *Nathu Ganesh v. Kalidas Umed* (I. L. R., 2 Bom., 365) is plainly distinguishable from it. Indeed, Sir Michael Westropp, in page 367, very carefully recognizes the distinction. A man whose goods have been taken and sold in execution has a right to bring a suit in the Small Cause Court for the recovery of those goods against any one into whose hands they have come. But a judgment-creditor cannot sue in the Small Cause Court to have it declared that goods are the property of the judgment-debtor. In the first case, the plaintiff sues to recover his own property; in the other, he asks for a declaration, that the property belongs to a third person.

Sections 280 and 281 of the Civil Procedure Code relate only to execution-proceedings, and have no application to a substantive suit, which is brought to establish a mere right.

But in this case, although the plaintiff asks in form for a [401] declaration of his right, he is really suing, not for a declaratory decree, but to recover possession of his cow and calf, and Rs. 28-10 in money as the value of the milk; and I think that the Small Cause Court should deal with the case upon that footing.

This disposes of the first question which is raised in the reference.

As regards the second question, it is unfortunate that a very simple matter should have been complicated by allowing Musst. Luteefunnessa to intervene as a claimant. We think that the Court would have acted more wisely if, in the exercise of its discretion, it had left Luteefunnessa to bring a separate suit against the plaintiff to establish her title to the property; but as she has been allowed to come in, there is nothing to prevent the Small Cause Court from determining whether she has any right to the property or any other questions of title which may arise in such a suit.

Any decision which the Court may arrive at with regard to the respective rights of the plaintiff and the intervenor to the property in question, would not operate as a *res judicata* or otherwise affect the rights of the parties with respect to any immoveable property, which may depend upon the same title.

If the Court decides in favour of Luteefunnessa, as well as of the original plaintiff, the decree will be, that those two parties do recover possession of the

cow and calf in whatever shares the Judge considers them entitled, and any decree with regard to the money will be decided upon the same principle; but in no case will it be either necessary or proper for the Judge to make a declaratory decree (properly so called) as to the relative rights of the parties.

NOTES.

[See also 7 Cal., 608; 7 All., 152; 5 All., 462; 8 Bom., 259; 4 Bom., 503; 9 Mad., 206; 11 Mad., 264.]

[6 Ind. Jur. 473]

[402] ORIGINAL CIVIL.

The 19th August, 1881 and 7th March, 1882.

PRESENT:

SIR RICHARD GARTH, Kt., CHIEF JUSTICE, AND MR. JUSTICE PONTIFEX.

Kristo Mohinee Dossee and others.....Plaintiffs

versus

Kaliprosono Ghose and others.....Defendants.

Execution—Suit to stay execution against certain property, until judgment-creditor had proceeded against other property—Cause of action—Civil Procedure Code (Act X of 1877), s. 244, cl. (c)—Part satisfaction.

One Khelut Chunder was entitled to a share in Pargana Alumpore; before he obtained possession, Government revenue on the whole estate fell due. Khelut failed to pay his share, and his co-sharer, Kaminee, to save the estate, paid the whole sum due, and subsequently sued Khelut for the amount, eventually obtaining a decree. Subsequently this decree became vested in one Rutnessur, and the Pargana Alumpore came into the possession of one Kaliprosono Ghose. Rutnessur obtained an order for execution against the property of Khelut, and having transferred his decree to the High Court, proceeded to enforce the decree against Kristo Mohinee, the widow of Khelut, and her son, by attaching the family dwelling-house in Calcutta. The widow and son then brought this suit against Kaliprosono to have the share of Khelut in Alumpore ascertained, and praying for a decree calling upon Kaliprosono to pay the amount of the value of the share of Alumpore in satisfaction of Rutnessur's decree.

Held, that the suit could not be maintained so far as it attempted to make the decree a charge against Alumpore.

Questions as to part satisfaction of a decree cannot, according to cl. (c) s. 244 of Act X of 1877, be raised in a separate suit. That section alludes to parties to the decree or their representatives; but it is not on that account open to a plaintiff to evade the section by adding an unnecessary party to the suit.

Held on appeal, that the suit was rightly dismissed; that, as far as Rutnessur was concerned, it had already been decided that Rutnessur was entitled, if he so chose, to execute his decree against the Calcutta property; and that, therefore, that question was *res judicata*; and that, as regards the plaintiff's claim that the patni given by Kaliprosono to Hury Churn should be treated as part-payment to Rutnessur, such a question could only be decided, in execution-proceedings.

That the mere existence of the agreement between Kaliprosono, Rutnessur, and Hurry Churn did not entitle the plaintiff to join them as co-defendants in the suit.

[403] That, as far as Kaliprosono was concerned, the suit brought against him could only be treated as a suit to establish a charge or lien on land out of Calcutta, and therefore the Court had no jurisdiction to try it.

THIS was a suit brought, on the 15th September 1880, by one Kristo Mohinee Dossee, the widow of one Khelut Chunder Ghose, for herself and as next friend of Romanath Ghose, her adopted son, seeking to have the exact value of the share of Khelut Chunder Ghose, as it originally existed in the zamindari Alumpore, ascertained, and to obtain a decree against the defendant Kaliprosono Ghose, calling upon him to pay the amount of such value in satisfaction or part-satisfaction of the amount of a decree obtained on the 18th January 1876 by one Kaminee Soondery Dossee against Khelut Chunder Ghose, and of which decree the defendant Rutnessur Biswas alleged himself to be the assignee, or, in the alternative, for an order for the sale of such share, and for the application of the net proceeds in satisfaction or in part-satisfaction of the said decree; and pending the decree for an injunction restraining further execution under the said decree.

The application for the injunction came on on December 7th 1880, and the case is reported in I. L. R., 6 Cal., 485. The hearing of this suit came on on August 17th 1881. The plaintiff Kristo Mohinee Dossee for herself and as next friend of Romanath Ghose, the adopted son of Khelut Chunder Ghose, her husband, who died in 1878, stated, that, in execution of a judgment on a bond executed in 1862 by Kessub Chunder Paul Chowdhry, Joydeb Dey Chowdhry, and Sarasoondery Dossee, in favour of Khelut Chunder Ghose, the interest of Kessub Chunder Paul Chowdhry in a certain zamindari called Alumpore was attached and sold at public auction on the 2nd September 1870, and was purchased by Khelut Chunder Ghose and one Prosono Chunder Chatterjee in equal shares; that one Kaminee Soondery Dossee, the widow of one Ram Chunder Chowdhry, and Sarasoondery Dossee, the widow of Sham Chunder Paul, were also proprietors in the same zamindari; and that, in the year 1865, part of the share of Sarasoondery was sold at public auction to one Gunganarain Sannel, [404] and that, at two later sales in 1866 and 1867, the remaining portions of her share were purchased at public auction by Kessub Chunder Paul Chowdhry and one Bhuggobutty Churn Mukerjee; that Khelut Chunder, after the sale of the 2nd September 1870, obtained a certificate from the Court declaring him to be the purchaser of Kessub Chunder Paul Chowdhry's share in Alumpore, but his possession was obstructed, and it was not till January 1874 that, by an amicable arrangement come to between Khelut, Kessub, and Bhuggobutty Churn Mukerjee, and Prosona Chunder Chatterjee, Khelut Chunder obtained possession of the share he had purchased.

Thus the greater portion of the zamindari belonged to Kaminee Soondery Dossee and Khelut Chunder Ghose.

In the years 1871 and 1872, Government revenue for the estate so held by Kaminee Soondery Dossee and Khelut Chunder Ghose fell into arrears; and Kaminee, in order to save the estate, borrowed, on the 26th March 1872, a large sum of money on mortgage of her share in the zamindari from one Hurrichurn Bose in the name of one Grees Chunder Bonnerjee; and she, again, on the 9th May 1872, borrowed in the same manner on a further mortgage of her share, a further sum, and with these two sums so borrowed she paid off the Government revenue. Kaminee then brought a suit against Khelut Chunder for contribution of his share of the revenue so paid by her, and pending such suit the revenue due on the joint estate again fell into arrears, and as Kaminee was

unable to raise a sufficient sum to save the estate, it was sold by public auction in 1874 and was purchased by one Kaliprosoṇo Ghose, subject to the incumbrances thereon (and with notice, as the present plaintiff alleged, of the suit for contribution). Kaliprosoṇo, on the 9th April 1874, took an assignment from Hurri-churn Bose of the two mortgages, dated the 26th March 1872 and the 9th May 1872, in the name of his servant Bhuggoban Chunder Mitter, as trustee for himself, and for the purpose of preventing the merger of the interests of the mortgagor and the mortgagee in the said properties.

Kaliprosoṇo, in his own name and in that of Bhuggoban Chunder Mitter, then instituted two suits against Kaminee,—one [406] for the purpose of obtaining possession of the properties mortgaged on the 26th March 1872 (which had already been foreclosed), and for a declaration that he was entitled by virtue of his purchase and of the foreclosure proceedings to a proprietary interest in the zamindari Alumpore, and the other suit to recover principal and interest due under the mortgage of the 9th May 1872. These suits were heard together; and on the 20th July 1878 he was declared entitled to the right of Kaminee and Bhuggoban Chunder in the zamindari of Alumpore; Kaminee being placed under certain conditions, one of which was, that the debt secured by her mortgage of the 9th May 1872 should be borne by Kaliprosoṇo and Kaminee in certain proportions. (Such an apportionment was ascertained subsequently on the 10th March 1879). On the 18th January 1876, the suit brought by Kaminee against Khelut Chunder was, on appeal, decreed in favour of Kaminee; but the plaintiffs in this present suit alleged that Khelut Chunder was not aware of the arrangement come to between Kaliprosoṇo and Hurri-churn Bose with respect to the two mortgages of the 25th March and 9th May 1872, and that such arrangement was kept concealed from the Court in Kaminee's suit against Khelut when Kaminee obtained her decree.

Kaminee, on the 16th January 1877, assigned her rights under the decree of the 18th January 1876 to one Rutnessur Biswas, who obtained leave to place his name on the record in the stead of Kaminee; and he, after several attempts to execute his decree, obtained an order to execute it in September 1878 against Romanath Ghose; but this order was subsequently reversed, on appeal, on 1st April 1879, and an order passed, stating that Rutnessur might execute his decree against the estate of Khelut and not against the estate upon which a lien was declared by the decree. On the 26th May 1880, Rutnessur transferred his decree to the High Court, and in execution attached the plaintiffs' family dwelling-house.

The plaintiffs further alleged, that, since the commencement of the execution-proceedings, they discovered that, in the month of July 1877, a secret arrangement had been entered into between Kaliprosoṇo, Rutnessur, and Hurri-churn Bose, whereby [406] it was agreed that Rutnessur should not, in execution of the decree of the 18th January 1876, proceed to realize the charge against Alumpore, and that Hurri-churn Bose and Rutnessur should release Kaliprosoṇo and the share charged with payment of the decree from all liability, and that they would not take any proceedings in any Court against Kaliprosoṇo and the share charged; that the whole conduct of the execution-proceedings should be entrusted to Kaliprosoṇo, and that, in consideration of these matters, Kaliprosoṇo should, without any bonus, grant a perpetual lease of five mouzas in Alumpore to Hurri-churn Bose and Rutnessur Biswas at a small annual rental. They then alleged that, in accordance with such agreement on the 4th August 1877, Hurri-churn Bose and Rutnessur had executed a release in favour of Kaliprosoṇo, and the latter, on the same day, had executed the patni lease in favour of Hurri-churn Bose, and they submitted that the amount

of the decree was payable out of Alumpore notwithstanding the arrangement last mentioned which sought to save Alumpore and to make Khelut Chunder Ghose's estate liable for the decree. They therefore brought this suit for the purposes abovementioned.

The defendants Rutnessur and Kaliprosono put in written statements, in which they stated that the High Court had no jurisdiction to hear the suit, as the suit was one for land situate in Nuldea; they denied that Khelut Chunder was unaware of the arrangement come to between Kaliprosono and Hurry Churn with respect to the mortgages; and Kaliprosono stated that, with regard to the patni lease granted, the rent of such patni was only less by Rs. 100 per annum than the rents payable by the tenants. They also stated that no secret arrangement had been entered into between themselves and Hurri Churn Bose, but that the release of the 4th August 1877, after setting out the terms of the release to Kaliprosono, contained a proviso to the following effect: "That should the Court, in which the decree should be executed, of its own accord or upon petition of Khelut Chunder, or his legal representatives, and notwithstanding objection on the part of Rutnessur and Hurry Churn Bose, make any order directing the decree to be executed in the first instance against [407] the estate formerly belonging to Khelut and Kaminee, then Rutnessur and Hurry Churn Bose should not be bound by the covenant for release, nor be bound to indemnify Kaliprosono as therein agreed, but that in such case it should be open to Kaliprosono to cancel the agreement."

The plaintiffs subsequently to the filing of the written statements of the defendants, obtained leave to put in a written statement, stating that Rutnessur had no beneficial interest in the decree of the 18th January 1876 and was not entitled to execute the decree; that the 'secret arrangement' operated as a satisfaction of the decree, and that, as between the owner of Alumpore and themselves, the Alumpore zamindari was primarily liable for the amount of the decree, the 'secret arrangement' having operated as a release of that zamindari, it was not in accordance with equity to permit the defendant Rutnessur to execute the decree against themselves.

At the hearing the following issues were fixed—

- (1) Has this Court jurisdiction to entertain the suit?
- (2) Are the plaintiffs barred by ss. 239¹ and 244 of Act X of 1877 from maintaining this suit?
- (3) Does the plaintiff disclose any cause of action as against any or which of the defendants?
- (4) As between Khelut Chunder Ghose and the owner of Alumpore, are the plaintiffs entitled to insist that the amount of the decree of the 18th January 1876, or any and what part thereof, should be paid out of Alumpore?

*[Sec 239 :—The Court to which a decree has been sent for execution under this Chapter, shall upon sufficient cause being shown, stay the execution of such decree for a reasonable time, to enable the judgment-debtor to apply to the Court by which the decree was made, or to any Court having appellate jurisdiction in respect of the

decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by such Court of First Instance or Appellate Court if execution had been issued thereby, or if application for execution had been made thereto; and in case the property or person of the judgment-debtor has been seized under an execution, the Court which issued the execution may order the restitution or discharge of such property or person pending the result of the application for such order.]

(5) What is the effect of the agreement of the 4th August 1877, and the patni lease executed in pursuance of it ? and have either of these transactions satisfied the decree of the 18th January 1876 ?

(6) Are the plaintiffs to stand in the position of the decree-holder as regards the decree when they shall have paid off the amount of the decree ?

(7) Is the defendant Hurry Churn Bose entitled to any interest, and if any, what interest, under the decree ?

Mr. *Bonnerjee* (with him Mr. *Trevelyan* and Mr. *Henderson*) for the Plaintiffs.—With regard to the first issue, this cannot be [408] said to be a suit for land, in the sense in which the words 'a suit for land' are used in the Charter; part of the cause of action arose in Calcutta, and we having obtained leave to sue, this Court can entertain the suit. As to the third issue, the plaint discloses two causes of action against all the defendants ; the first is between the owner of Alumpore and Kaliprosono (Ghose as to whether Alumpore is liable to pay the amount of the decree. The second cause of action is, that Rutnessur having obtained a benefit (*viz.*, the patni lease on Alumpore) should be bound to account for this. The payment of the Government revenue by Kaminee created of itself a charge on the property for the amount of the sum she had paid, and the purchasers of Alumpore are bound to discharge this debt. The Government revenue is not a personal liability attached to the owner of a zamindari, but is a liability attaching to the estate. Therefore a third person paying revenue on account of an owner has only a charge against the property itself, but no remedy against the defaulting proprietor. It was only lately that by Statute a right has been given against the defaulter, but for that Kaminee would have had no right of suit. *Khelut Chunder's* position was that of a surety. The charge existed on the zamindari before the decree ; it existed directly the money was paid. The Court which gave the decree of the 18th January 1876 proceeded on the case of *Syed Enayet Hossein v. Muddun Moonee Shahoon* (14 B. L. R., 155; s.c., 22 W. R., 411). See also *Nugender Chunder Ghose v. Sreenuttj Kaminee Dossee* (11 Moore's L. A., 241), *Waring v. Ward* (7 Ves. 332), and *Fetherstone v. Mitchell* (11 Ir. Rq., 35), in which the same principle is laid down. [WILSON, J.—Can you find any case that shows that a defaulter can relieve himself from liability by shifting the liability from himself on to his property which he has since disposed of ?] None except *Averall v. Wade* (Lloyd and Gould, 252). [WILSON, J.—It will be more convenient to hear the other side as to whether there is a cause of action or not.]

Mr. *Branson* for the defendant Kaliprosono. —The plaintiffs [409] say that a certain amount of satisfaction seems to have been obtained by Rutnessur, and that ought to go in part satisfaction of the decree ; but I contend that such a question cannot be raised in this suit ; it ought to have been raised in the execution-proceedings, s. 244 of the Civil Procedure Code. As to whether a lien was acquired against the estate, see s. 9 of Act XI of 1859 and the notes thereon in Forsyth's Revenue Sale Law of Bengal. The section creates no charge on the land, but gives only a personal remedy. As to the case of *Enayet Hossein v. Muldun Moonee Shahoon* (14 B. L. R., 155 ; s.c., 22 W. R., 411), it has been considered in *Hurri Mohun Bagchi v. Gresh Chunder Bundopadhyaya* (1 C. L. R., 152). Further, how have the plaintiffs any right of action against my client, or how can they join him as defendant in a suit against Rutnessur to restrain Rutnessur from executing his decree ?

Mr. *Jackson* (with him Mr. *Stokoe*) for the defendant Hurry Churn Bose.

Mr. *Mitra* for the defendant Rutnessur.—Section 69 of the Contract Act says, that a person who is compelled to make a payment is entitled to be

reimbursed by the one for whom payment has been made ; so the suit against Khelut was rightly brought. As to the second cause of action put forward by the plaintiffs, if the effect of the arrangement was that the decree was satisfied, why have either Hurry Churn or Rutnessur been made parties.

Mr. *Trevelyan* in reply contended that Rutnessur and Hurrichurn had been rightly made parties for the sake of discovery.

WILSON, J. —This case has at first glance an appearance of complexity but after discussion the points necessary to be decided are exceedingly simple. It appears from the plaint (and for the purpose of dealing with the case as I propose, I assume the truth of all the allegations in the plaint) that the late Baboo Khelut Chunder Ghose was entitled to a share of Pargana Alumpore. Before he obtained possession some Government revenue became payable. One Kaminee Soondery [410] Dossee, another sharer, paid the revenue chargeable on Kholut Chunder Ghose's share to save the property, and sued Khelut Chunder for the amount. Her suit was dismissed, but she obtained on appeal a decree of the High Court on its Appellate Side, set out in the plaint, that Kholut Chunder should pay, &c.

It appears further that that decree has since become vested in the defendant Rutnessur Biswas ; that Pargana Alumpore has become vested in Kaliprosono Ghose ; and that Hurry Churn Bose is interested in the decree. Rutnessur Biswas has proceeded to enforce the decree against the plaintiffs by attaching a house in Calcutta, the property of Khelut Chunder Ghose.

The question is, whether the plaint shows any cause of action.

It was contended it did in two ways, —1st, that the plaintiffs, as the heirs of Khelut Chunder Ghose, were entitled to have the decree satisfied out of his (Khelut Chunder's) share in Alumpore before they could be made liable in respect of other property. According to this contention a person who has made default, and had a decree passed against him as a defaulter, is entitled to have the decree satisfied out of the property in the hands of others and not by himself. To my mind that is a very startling proposition ; and no authority has been cited in support of it. It appears to me that this suit cannot be maintained so far as it seeks to make the decree a charge against Alumpore. It was said, however, that the suit would lie on other grounds, *i.e.*, that by reason of certain transactions set out in the 18th and 19th paras. of the plaint, the decree has been in fact satisfied, and Rutnessur Biswas is not entitled to enforce the decree. Whether the suit can be maintained on this ground depends on s. 244 of the Civil Procedure Code, which says :—

“ The following questions shall be determined by order of the Court executing a decree and not by separate suit, namely,—

(a) questions regarding the amount of any mesne profits as to which the decree has directed enquiry ;

(b) questions regarding the amount of any mesne profits or interest which the decree has made payable in respect of the subject-matter of a suit, between the date of its institution and the execution of the decree, or the expiration of three years from the date of the decree ;

[411] (c) any other questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree.

“ Nothing in this section shall be deemed to bar a separate suit for mesne profits accruing between the institution of the first suit and execution of the decree therein, where such profits are not dealt with by such decree.”

The point raised seems to be plainly one as to the execution, discharge, or satisfaction of the decree within the meaning of the section. That section speaks of parties to the decree or their representatives. The plaintiffs are the representatives of Khelut Chunder Ghose, and Rutnessur is the representative of Kaminee. It is said the section is not applicable, because Hurrichurn Bose has been added as a party. But it is obvious that the plaintiffs cannot evade the section by adding unnecessary parties. The question is one simply between the judgment-debtor and the decree-holder, and Rutnessur is the only proper party. Kaliprosono Ghose and Hurrichurn Bose ought not to be joined. Without, therefore, expressing any opinion on any of the other matters which have been argued, it appears to me that this suit must be dismissed.

From this decision the plaintiffs appealed.

Mr. Pugh (with him Mr. Evans) for the Appellants. --As regards the secret agreement, equity will not allow a person to buy a property subject to a mortgage and say to the mortgagee, 'I will make it worth your while to proceed against other property belonging to the mortgagor' --*Mirza Fuleh Ali v. Gregory* (6 W. R., Misc., 13). [GARTH, C.J. That case is founded on s. 271 * of Act VIII of 1859.] Yes, and see also *Fukeer Bux v. Chutturdharee Chowdhury* (14 W. R., 209). As showing that there are equities analogous to the present equity we set up, see *Kaliprosono Ghose v. Kamini Soondery Chowdhraim* (3 C. L. R., 184). As to the effect of property being sold in England subject to a covenant or incumbrance, see *Burnett v. Lynch* (5 B. & C., 589) and *Moule v. Garrett* (L. R., 7 Exch., 101). As to the decree [412] being a charge on Alumpore: Is the payer of revenue able to get both a personal decree and also one against the property? A person who pays revenue for another is entitled to a charge on the estate for which he has paid revenue. [*The Advocate-General*.--The whole case depends on contribution; I bought subject to incumbrances at the time of the decree, at an auction-sale, before this suit was brought, and I arranged with Hurry Churn as to this incumbrance.] Then I say that you were bound, as this suit was pending, and I do not require to show notice, as you bought *pendente lite*. I say that *lis pendens* is as much an incumbrance as a mortgage. A purchaser *pendente lite* is not even a necessary party to a suit --*Unumoyi Burmonce v. Tarini Prasad Ghose* (7 W. R., 225). With reference to *lis pendens*, see *Lala Kali Pershad v. Buli Singh* (3 C. L. R., 396), *Rajkishen Mookerjee v. Radha Madhub Halder* (21 W. R., 349). [PONTIFEX, J. The reason does not apply when the property is sold by a power paramount.] As regards the last quoted case, it shows that nothing more would be taken than the right which the judgment-debtor himself could have passed, and the section confers no further right on the purchaser than he would take under the Sheriff's sale. But apart from *lis pendens*, no particular form of words is necessary to make a charge. As to whether there is a charge or not, I say, 1st, that there is a charge independent of the Act; 2nd, if not, by the Court in which they got notice of the debt. [PONTIFEX, J., referred to the case of *Aldridge v. Westbrook* (5 Beav., 188).]

* [Sec. 271. --If, after the claim of the person on whose application the property was attached has been satisfied in full from the proceeds of the sale, any surplus remain, such surplus shall be distributed rateably amongst any other persons, who, prior to the order for such distribution, may have taken out execution of decrees against the same defendant and not obtained satisfaction thereof: Provided that, when any property is sold subject to a mortgage, the mortgagee shall not be entitled to share in any surplus arising from such sale.]

Surplus to be rateably distributed among decree-holders who have taken out execution prior to the order for distribution.

Proviso where property is sold subject to a mortgage.

Payment of revenue gives me a charge : see *Syed Enayet Hossein v. Muddun Moonee Shahoon* (14 B. L. R., 155; s.c., 22 W. R., 411). The cases of *Gopee Churn Bural v. Mussamat Lukhee Ishwaree Debia* (3 Sel. Rep., 93), and *Hamilton v. Denny* (1 Ball and Beattie, 199) are in my favour. [PONTIFEX, J.—In the latter case the sale was on account of a fine for renewal of a lease.] As to whether payment of rent creates a lien, see *Fetherstone v. Mitchell* (11 Ir. Eq., 35), *Kehoe v. Hales* (5 Ir. Eq., 597), and *Locke v. Evans* (11 Ir. Eq., 52).

[413] The Advocate-General (Mr. Paul, with him Mr. Phillips) for Kaliponso.—The word 'incumbrances,' in s. 54 of Act XI of 1859, means that the purchaser takes subject to all incumbrances. As regards s. 9, which deals with deposits made by persons not proprietors, see the definition of the word 'proprietor' as given in s. 1 of Beng. Act VII of 1868. Kaminee was not the recorded proprietor, but, under the section, she would have to pay the money. No authority has been shown that a payment of a sum for which a person was jointly liable, gives a right to the payer to follow the estate. [GARTH, C.J.—I question whether there is any privity between co-sharers of a revenue-paying estate, so as to cause any equity to arise.] I say that no equity governs the present case, and it cannot be distinguished from *Syed Enayet Hossein v. Muddun Moonee Shahoon* (14 B. L. R., 155; s.c., 22 W. R., 411). Payments of revenue by persons interested to save an estate have been held to be personal claims against the person for whom the payment was made, and not liens on the estate—*Manikmulla Chowdhraun v. Parbuttee Chowdhraun* (15 S. D. A. of 1859, p. 515). *Fagan v. Sreemotee Dassee* (Marsh, Rep., 226) holds that a deposit of revenue obtains no lien. The Privy Council case of *Nugender Chunder Ghose v. Sreemutty Kaminee Dossee* (11 Moore's I. A., 241) lays down that s. 9 of Act I of 1845, which is nearly the same as s. 9 of Act XI of 1859, authorizes a personal action, but gives no remedy against the land, which it leaves to the then existing law; and *Hurri Mohun Bagchi v. Grish Chunder Bundopadhyia* (1 C. L. R., 152) is to the same effect. [GARTH, C.J.—Unless we can distinguish this case from *Syed Enayet Hossein v. Muddun Moonee Shahoon* (14 B. L. R., 155; s.c., 22 W. R., 411), we ought to refer the question to a Full Bench.] Even if your Lordships think that that case is not distinguishable, yet the Privy Council case is conflicting, and the Privy Council case should be followed. The doctrine of *lis pendens* does not apply to a purchaser at a sale in execution—*Nuffur Merdha v. Ram Lall Adhicarry* (15 W. R., 308) and *Sreemutty Gourmoney Dabee v. Reed* (2 Taylor and Bell, 83). [414] [GARTH, C.J.—The question is whether there is any charge at all, even between the parties, unless it is declared by the Court.] There are two ways in which a lien may arise: 1st, where a lien can be affected by a suit; 2nd, where there is a lien in the suit itself. [PONTIFEX, J.—I think the case of *Wilcocks v. Wilcocks* (2 Vernon, 2nd pt., 558), will show where a lien arises, and it will aid your case.] If a person buys land from the heirs of a Hindu, knowing that there are women to be maintained, is there a charge on the property for maintenance? I say there is no charge till it is declared by the Court—s. 386, Mayne's Hindu Law. As to *lis pendens*, the plaintiffs must be defeated on the pleadings, irrespective of the fact that *lis pendens* does not apply to a case of this sort. In their plaint they do not say that they want to make the payment a charge, but they simply bring this suit. I am only bound by what appears on the pleadings. With regard to the doctrine of *lis pendens*, see *Kailas Chandra Ghose v. Fulchund Jahari* (8 B. L. R., 474, at p. 489). There was here no voluntary alienation by the parties to defeat the plaintiffs, and therefore the doctrine does not apply. Execution would in no way detract from the rule, for the purchaser stands in

the judgment-creditor's shoes, and that is all. The decree must be read as giving a personal decree against Khelut, and the decree giving a charge must be struck out; and in that case where does equity come in? Assuming even that there was a charge created in 1876, what equity have they to compel us to pay the debt referred to in the 12th paragraph of their plaint? They say that Rutnessur held benami for Hurry Churn; so far at least the equity must fail, as it was decided in the execution-proceedings that Rutnessur did not hold benami. *Waring v. Ward* (7 Ves., 332) rests on the same principle as this decree rests, viz., that when a person borrows and gives land as a further security, it is intended that his personal estate shall be first liable.

Mr. Phillips on the same side.—As regards the equity which has been assumed, take the case of a private vendor who has [415] mortgaged his property. He is personally liable and his property is liable also; he sells to a third person: in such a case he would have to recite in the deed that the property was charged with the debt. Would a mortgagee have a right to come in and ask for relief without a covenant of indemnity? Where there is nothing to show any contract for the equity of redemption, except a supposed difference between the price paid and the value of the estate, this is not enough to raise an equity. They allege we bought with notice, but they must rely on some principle of law for the notice, as there is no statement that we were aware of the debt to Kaminee. Is this an incumbrance? The sale was by a paramount authority, and we don't derive our title from the previous holder although we take his title—*Moonshee Buzlool Rahman v. Pran Dhun Dutt* (8 W. R., 222). Was the liability of Khelut an incumbrance? In order to show that the debt was charged on the land, the plaintiffs ought to show that there was an agreement, inferrible from the price given or the conduct of the parties, that the property was to be the primary source: they must make out this before they can succeed in the suit. The equity to make us repay is, that the whole or part of the charge is to be realized out of the land. As regards the case of *Syed Enayet Hossein v. Muddun Moonee Shahoon* (11 B. L. R., 155; s. c., 22 W. R. 411), decided by MARKBY and MITTER, JJ., I say it is opposed to the Privy Council decision. [PONTIFEX, J.—Does not the second part of s. 9 of Act XI of 1859 show that there is no charge? If it was a charge, the parties would not be put into possession.] As to the case of *Fetherstone v. Mitchell* (11 Ir. Eq. 35), the circumstance of the defendant having consented that the plaintiff should redeem the land, might very well give the plaintiff an equity. Supposing there not to be a charge originally either under the Act or otherwise, does the doctrine of *lis pendens* apply? No party can withdraw from litigation so as to affect a suit. It must be *bona fide* litigation, carried out in a *bona fide* manner, before a decree obtained by admission, as this decree was, would bind outsiders; it cannot be called *lis pendens*. We also object to the jurisdiction of this Court.

[416] Mr. Branson for Rutnessur.—The plaintiff seeks no relief against me; the only question that is raised is whether my decree had been in part satisfied; and Mr. Justice WHITE, in his decision on the application for an injunction, put me on terms. I, however, contend that the question as to whether my decree had been in part satisfied, was a question to be raised in the execution-proceedings and not in the suit. I say so far as they may have any supposed claim for relief as against me, such question would be *res judicata*; and so far as they claim relief against the others, the Court has no jurisdiction to hear the suit.

Mr. Stokoe and Mr. Hyde for Hurry Churn Bose.

Mr. Pugh in reply.

The **Judgment** of the Court (GARTH, C.J., and PONTIFEX, J.) was delivered by

Pontifex, J.—The circumstances of this case may be concisely stated as follows :—

A and *B* were co-sharers in a share of an estate, with respect to which share the Collector had ordered a separate account to be kept. *B* failing to provide his quota of the revenue, *A* raised money on a mortgage to *C* of his own interest, and paid the revenue on the share and so saved the share belonging to *A* and *B* from sale under s. 13^{*} of Act XI of 1859. Subsequently, both *A* and *B* failed to pay the revenue due on the share, and the share was sold under s. 13 to defendant Kaliprosono Ghose, who under s. 54,[†] took subject to all incumbrances by *A* and *B*. Then Kaliprosono bought up *C*'s mortgage. But before the sale to Kaliprosono, *A* had sued *B* for the amount, which *A* had on the first occasion paid as *B*'s quota of revenue to save the share from sale; and in that suit *A* claimed to have a lien on *B*'s interest in the share.

At the time of Kaliprosono's purchase, *A* had obtained a decree in that suit which made *B* personally liable. But the Court which made the decree refused to declare any lien. Against that decree *A* appealed to this Court after Kaliprosono's purchase. Kaliprosono was not made a respondent [417] to that appeal, though of course *A* knew of his having purchased the share. About two years after Kaliprosono's purchase, this Court, apparently with the consent of *B* (whose interest to dispute the matter had of course ceased, or rather whose interest it then was to concede the question), declared a lien in favour of *A* on *B*'s former interest. *A* assigned this decree to the defendant Rutnessur. *B* died leaving the plaintiff his representative. Rutnessur proceeded to execute his decree against other property of *B* in the mofussil in the possession of the plaintiff. The plaintiff in those execution-proceedings insisted that Rutnessur was bound to proceed first against the original interest of *B* in the share originally held by *A* and *B* and which had been purchased by Kaliprosono as before mentioned. This question was decided against the plaintiff, and is therefore *res judicata* between the plaintiff and Rutnessur. Afterwards Rutnessur's execution-proceedings in the mofussil dropped. Kaliprosono and Rutnessur subsequently entered into an agreement, by which Rutnessur agreed, if possible, to execute his decree against property of *B* in the possession of his representatives, and (if it could be avoided) not as against the original interest of *B* in the share originally held by *A* and *B* and then in Kaliprosono's possession. As an inducement or consideration for this agreement, Kaliprosono gave the defendant Hurry Churn Bose, as the nominee of Rutnessur, a patni in the share originally held by *A* and *B*.

*[Sec. 13 :—Whenever the Collector shall have ordered a separate account or accounts to be kept for one or more shares, if the estate shall become liable

Sale of separate shares. to sale for arrears of revenue, the Collector or other Officer as aforesaid, in the first place shall put up to sale only that share

or those shares of the estate from which, according to the separate accounts, an arrear of revenue may be due. In all such cases notice of the intention of excluding the share or shares from which no arrear is due, shall be given in the advertisement of sale proscribed in section 6 of this Act. The share or shares excluded from the sale, shall continue to constitute one integral estate, the share or shares sold being charged with the separate portion or the aggregate of the several separate portions of jumma assigned thereto.]

†[Sec. 51 :—When a share or shares of an estate may be sold, under the provisions of section 13, or section 14, the purchaser shall acquire the

Rights of purchasers of share or shares subject to all encumbrances, and shall not acquire any rights which were not possessed by the previous owner or owners.] shares of estate.

Rutnessur then sought to execute his decree against property of *B* in Calcutta in the plaintiff's possession as *B*'s representative.

Thereupon the plaintiff institutes this suit against Kaliprosono, Hurry Churn, and Rutnessur, whereby she asks for a declaration, if Rutnessur executes his decree against the Calcutta properties, that the plaintiff is then entitled to stand in the shoes of Rutnessur, and to be recouped both by Kaliprosono personally and also out of the original instalment of *B* in the share originally held by *A* and *B*; and the plaintiff asked in the meantime for an injunction to restrain Rutnessur's execution against the Calcutta property.

Now, so far as Rutnessur is concerned, it is already *res judicata*, that Rutnessur is entitled, if he so chooses, to execute [418] against the Calcutta property; and if plaintiff claims, that the patti given by Kaliprosono to Hurry Churn should be treated as part-payment to Rutnessur, such question ought to be decided on the execution-proceedings, as directed by s. 244 of the Procedure Code. The mere existence of the agreement between Kaliprosono, Rutnessur and Hurry Churn does not entitle the plaintiff to join them as co-defendants in this suit, or give this Court jurisdiction to try the case. Kaliprosono and Rutnessur were quite entitled as between themselves to come to the arrangement. That arrangement can neither bind nor prejudice the plaintiff. Therefore, Rutnessur and Hurry Churn were not necessary parties to the plaintiff's suit against Kaliprosono.

But, so far as Kaliprosono is concerned, we think this suit can only be treated as a suit to establish a charge or lien in land out of Calcutta; and therefore this Court had no jurisdiction to try it.

It is true that Mr. *Pugh*, on the assumption that *A*'s payment on *B*'s account gave *A* a lien on *B*'s interest, tried to put his case as high as this:—That person claiming under *B*, but subject to incumbrances, would be *personally* liable to pay this debt; and if so, the plaintiff would be entitled to sue Kaliprosono in this Court, he being a resident of Calcutta.

Mr. *Pugh* attempted to put his case on the footing of a purchase of an equity of redemption, and the contract between the mortgagor and the purchaser stating the amount of the money due on the mortgage subject to which the sale was made, and the purchase-money being estimated on that footing. Even if in such a case equity would fasten on the conscience of the purchaser so as to make him personally liable to indemnify his vendor, the mortgagor, it is sufficient to say the present is an entirely different case.

Under s. 54, Kaliprosono undoubtedly took subject to incumbrances; but he purchased not from the mortgagor, but from the Government, the paramount vendor. There was nothing to show him that anything was due from *B* to *A*, and no notice of this alleged lien was given. Under these circumstances, we think even if a lien existed, it would be preposterous to make Kaliprosono personally answerable.

[419] We are, therefore, of opinion that the plaintiff's suit was rightly dismissed.

It is thus unnecessary for us to deal with the question whether the payment by *A* on behalf of *B* gave *A* a lien on *B*'s interest on the share originally held by *A* and *B*, which would bind *B*'s interest in the hands of a purchaser under ss. 13 and 54 of Act XI of 1859. This question was determined affirmatively, as already mentioned, by a Division Bench of this Court in the suit between *A* and *B*; that decision having, as I have before said, been virtually made by consent. That decision, whether by consent or otherwise, was founded on the decision of another Bench of this Court—the case of *Seyd Enayet Hossein v. Muddun Moonee Shahoon* (14 B. L. R., 155; s.c., 22

W.R., 411), which has also been followed and extended by a still later case, *Ram Dutt Singh v. Horakh Narain Singh* (I. L. R., 6 Cal., 549). Had it been necessary to deal with this question, we should certainly have referred it to a Full Bench; for we are not, as at present advised, at all satisfied as to the correctness of those decisions. They, no doubt, enunciate what at the first blush seems to be an attractive and catching equity; but it is difficult to see on what foundation such an equity could rest. Mr. *Pugh* has attempted to support the cases referred to, on the authority of certain Irish cases, which are treated as insurance cases. It is sufficient with respect to those cases to say, that there is a substantial difference between them and the present case. In all of those cases the person who claimed the lien was previously interested in the estate which his payment went to save. But, in the present case, *A* had no interest in *B*'s share of the share originally held by *A* and *B*; and it may be remarked that none of the Irish cases go the length of establishing a personal liability.

The Irish cases, in fact, only decide exactly what the last paragraph of s. 9 of Act XI of 1859 provides.

If *A* had been entitled to a previous lien on *B*'s interest, then he could have tacked the amount paid by him to save the interest from sale. If he had no such previous lien, then, as at [420] present advised, we think his rights would be those provided for by the preceding portion of s. 9,—that is, he may recover from the defaulting proprietors personally.

It appears to us, that whenever it may be necessary to settle this question, it ought to be referred to a Full Bench. In the present case it is unnecessary, and we dismiss the plaintiff's appeal with costs on scale 2.

Appeal dismissed.

Attorneys for the Appellant: Messrs. *Remfry and Remfry*.

Attorneys for the Respondent: Messrs. *Roberts, Morgan & Co.*

Baboo Promothounath Bose, and Baboo Troyluc Konath Roy.

NOTES.

I. EXECUTION PROCEEDINGS OR SUIT—

The presence of an unnecessary party does not make C.P.C. 1908 sec. 47 any the less applicable:—(1902) 5 Bom. I R. 1036.

II. LIENS IN FAVOUR OF ONE CO-SHARER PAYING THE REVENUE ON SHARE OTHER THAN HIS OWN—

The personal remedy is declared in the several statutes; and see generally ss. 69, 70 of the Indian Contract Act 1872.

As regards the lien, however, the opinion of the **CALCUTTA** High Court is against it, (1887) 14 Cal. 809; see also 15 Cal. 542; 22 Cal. 800; 25 Cal. 565. The **ALLAHABAD** and the **BOMBAY** High Courts have held similarly:—14 All 299; 18 All. 471; 26 Bom. 437. 4 Bom. L. R. 90; but see 11 Bom 318. The **MADRAS** High Court held otherwise in 26 Mad. 686.

See on this subject the criticism of Dr. Rash Behari Ghosh in his *Mortgages* (1911) Vol. I pp. 112—127; Fisher on mortgages (1910) 6th Edn. pp. 278—284.

13 All. 195; 10 A.W.N. 228 relates to the case of mortgagee.]

[8 Cal. 420]

ORIGINAL CIVIL.

The 9th March, 1882.

PRESENT :

MR. JUSTICE WILSON.

Kedarnath Dutt

versus

Harra Chand Dutt.

*Limitation Act (XV of 1877), sched. ii, cls. 171, 171 a, and 178—
Application to revive suit—Right to apply—Pending suit.*

The right to apply in a pending suit,—i.e., a suit in which no final order has been made,—is a right which accrues from day to day, and therefore the periods of limitation provided in cls. 171, 171a, and 178 do not apply in an application to revive such a suit.

IN this suit, which was one for partition, a decree for partition had been made on the 2nd February 1870, and the usual commission for partition was directed and issued. The commissioners filed their return to the commission on 7th December 1871, but they differed in opinion on the subject of the partition, and by an order of Court of 14th March 1872, the commission of partition and the return were quashed and directed to be taken off the file; and it was further ordered that a fresh commission of partition should issue under the decree. No steps, however, were taken to obtain the issue of such fresh commission. On the 8th December 1880, the defendant died intestate, leaving five sons his heirs and representatives. The present application was made on behalf of the plaintiff on [421] notice to the sons of Harra Chand, for an order to revive the suit, to enter their names as the heirs and representatives of the defendant in the register of the suit in the place of that of the defendant, and to allow the suit to be thereupon proceeded with. The plaintiff, in his affidavit in support of the application, stated, that the delay in proceeding with the suit had arisen from his being desirous of effecting an amicable partition, which he had used his best endeavours to do, but without success.

Mr. Bonnerjee for the plaintiff referred to the case of *Gocool Chunder Gossamee v. The Administrator-General of Bengal* (I. L. R. 5 Cal., 726).

Mr. Hill appeared to oppose the application, and contended that it was barred by lapse of time. The period of limitation for applications under chap. xxi of the Civil Procedure Code was sixty days under cls. 171,* 171a, and 171b, of sched. ii of the Limitation Act, XV of 1877. If that period of limitation was not applicable, the application was barred by cl. 178 of sched. ii of that Act, it being "an application for which no period of limitation was provided, elsewhere in that schedule or by s. 230 of the Civil Procedure Code," and the right to apply having accrued more than three years previously to the application.

* Cl. 171 :—

Description of suit.	Period of limitation.	Time when period begins to run.
Under section 363 or 365 of the Code of Civil Procedure by a person claiming to be the legal representative of a deceased plaintiff.	Sixty days ...	The date of the plaintiff's death.

Wilson, J. (without calling on Mr. *Bonnerjee* to reply), held, that the application being one in a pending suit, the right to apply was a right which accrued from day to day, and therefore it was not barred by lapse of time.

Application granted.

Attorney for the Plaintiff: Baboo *Norendro Nauth Sen*.

Attorney for the Representatives of the deceased defendant: Baboo *Upendrolall Bose*.

NOTES.

[LIMITATION—PENDING PROCEEDINGS—

For similar rulings, see 31 Mad. 71 18 M.L.J. 46 3 M.L.J. 329. A suit was held pending when directions were given to take an account.—(1903) 30 Cal. 609-7 C.W.N. 517. See also (1899) 3 C.W.N. 756.]

[9 I. A. 8: 4 Sar. P. C. J. 310: 6 Ind. Jur. 201.]

[422] PRIVY COUNCIL.

The 18th, 19th, and 22nd November, 1881.

PRESENT:

SIR B. PEACOCK, SIR M. E. SMITH, SIR R. COUCH, AND SIR
A. HORHOUSE.

Mahammad Azmat Ali Khan.....Defendant

versus

Lalli Begum and othersPlaintiffs.

[On Appeal from the Chief Court of the Punjab.]

*Mahomedan Law—Acknowledgment of children as sons—Pensions Act
XXIII of 1871, ss. 4 and 6—Jurisdiction of Civil Court—Omission
to obtain previously to suit certificate enabling Court to entertain
suit—Effect of certificate granted after the hearing.*

The acknowledgment and recognition of children by a Mahomedan as his sons, giving them the status of sons capable of inheriting as being of legitimate birth, may, without proof of his express acknowledgment of them, be inferred from his treatment of such children, provided that certain conditions negativing this relationship are absent.

The question whether such acknowledgment should be presumed or not, depends on the circumstances of each particular case. *Ashrafud Dowlah Ahmed Hossein Khan v. Hyder Hossein Khan* (11 Moore's L. A. 94) referred to and followed.

Part of the property in suit consisted of land, which was assumed in the Courts below to be held on terms bringing it within the Pensions Act, 1871. After the judgment, which disposed of the principal questions in the case, had been given, final judgment was suspended upon an objection that no certificate had been obtained under that Act. The certificate having been then obtained and delivered to the Court,—*held*, that the original defect did not prevent the suit proceeding.

APPEAL from a decree of the Chief Court of the Punjab (5th December 1876), in part reversing, and in part affirming, a decree of the Commissioner of Lahore (19th January 1874).

The principal questions which arose on this appeal were as to the effect, according to Mahomedan law, of an alleged acknowledgment of the two minor plaintiffs as his sons by the late Ahmed Ali Khan, Nawab of Kurnal, and as to the existence of an alleged custom of the family in exclusion of that law.

The first plaintiff in the suit was Mussamut Lalli Begum, suing on her own behalf as widow of the late Nawab, who died [423] on the 14th November 1867, and also suing as mother and guardian of his two minor sons, aged respectively seven and eleven years. The defendant was Nawab Mahammad Azmat Ali Khan, eldest son and successor of the late Nawab.

The suit was commenced in 1871, and was heard by the Commissioner of Lahore, who found that neither Lalli Begum, nor her sons, were entitled to inherit. He was of opinion that she was never married to the Nawab, and that her sons were neither originally legitimate, nor rendered so by subsequent recognition.

The Chief Court on appeal remanded the suit to the Commissioner, with reference to certain alleged customs of the family, which, if proved, would preclude the operation of the Mahomedan law in respect of sons acknowledged, though born out of wedlock, and in respect to the succession of widows. On this remand the Commissioner found that, by the custom of this family, even a lawfully married widow could not inherit as a sharer: and this finding having been accepted by the Chief Court, Lalli Begum's claim was dismissed—a result against which she made no further appeal.

The Commissioner also found that the Mahomedan law of inheritance did not regulate this family, but that a custom, inconsistent with the law, excluded from inheritance illegitimate sons, even if acknowledged, allowing them only a certain proportion for maintenance.

This latter finding the Chief Court reversed. As regards the sons, the Chief Court was of opinion that the alleged custom had not been proved, and that the Mahomedan law prevailed. The Court held, that the minor plaintiffs were entitled to inherit, being either originally legitimate, or legitimated by subsequent acknowledgment by the late Nawab, their father.

Part of the property claimed consisted of six villages in the district of Muzaffernagar, conferred on the family by 'altanga' grant from the Delhi Emperor: also of villages granted by the British Government in 'istemrari,' through Lord Lake, in 1806; also of a jaghir granted by Lord Canning in 1858. As to the above, the Court held, that they were unable to give a decree; because no certificate under the Pensions Act, 1871, enabling the Court to take cognizance in the matter had been [424] obtained. Before final decree, a certificate was obtained from the Government under the above Act. Thereupon, the Court, considering that the defect of jurisdiction was removed, decreed in favour of the minors for their share.

From this decision the defendant appealed.

Mr. T. H. Cowie, Q.C., Mr. R. V. Doyne, and Mr. J. T. Woodroffe for the Appellant.

Mr. J. F. Leith, Q.C., and Mr. J. D. Mayne for the Respondents.

For the appellant it was contended, that the alleged custom had been proved; and further that, even if proof of it had failed, the late Nawab had been shown to believe that by it 'illegitimate sons' (excluded from inheriting as sharers) were provided with maintenance suitable to their position. Accordingly, in treating the minor plaintiffs as he had treated them, he intended no other consequences than would follow from their being his sons, with reference to the provisions made for them by the custom of the family. From his recognition of a son, therefore, only the above consequences would arise, and not the right to rank as a sharer under the Mahomedan law. It was also contended, that even if the latter law were applied to the case, the effect of an acknowledgment of parentage being merely to raise a presumption of an antecedent marriage, such a presumption had in this case been excluded by the facts in evidence, which tended to show, and had shown, that there was no marriage.

The Courts had not been able to find that the marriage as a fact took place. Again, independently of the right effect not having been attributed to the acknowledgment, the latter had not extended to the younger boy, Umar Daraz Ali, who was four years younger than his elder brother Rustam Ali; and who had not shared the treatment, from which acknowledgment on the part of the late Nawab of his being the father, had been inferred.

Counsel for the respondents were not called upon.

Their Lordships' **Judgment** was delivered by

Sir M. E. Smith.—This appeal arises in an action brought by Mussamut Lalli Begum, claiming in her own right, as [425] widow of the late Nawab of Kurnal, Ahmed Ali Khan, and as guardian on behalf of her minor sons, Rustam Ali Khan and Umar Daraz Ali Khan, to recover her own share as widow, and the shares of her minor sons, who are alleged to be sons of the late Nawab, in large landed estate and other property left by him. The defendant in the action is Nawab Azmat Ali Khan, who is the undoubted son of the late Nawab and much older than the two minor plaintiffs.

The late Nawab had four wives. A son, Rahmat Ali Khan, died in his lifetime. He left, surviving him, Azmat Ali Khan, the defendant, the Mussamut Lalli, who asserts that she was his wife and is now his widow, and the two minor plaintiffs.

In the Courts below several judgments, original and on remand, have been given, and the result of the litigation appears to be as follows :—The Commissioner of Lahore found that neither Mussamut Lalli, nor her sons, were entitled to inherit, being of opinion that she was never married to the Nawab; that her sons were not originally legitimate; and further, that the status of sons had not been conferred upon them by the late Nawab by any recognition of them as his sons. On remand the Commissioner found that, by family custom, widows did not inherit. The Chief Court of the Punjab agreed with the finding of the Commissioner as to this custom, and dismissed the Mussamut's appeal on the ground that she was disentitled by the custom. The Commissioner also, as already observed, dismissed the suit of the sons. The Chief Court of the Punjab reversed his decree so far as it dismissed the suit of the sons, and decreed in their favour, being of opinion that the minor plaintiffs were entitled to inherit. No question now arises as to the widow, both Courts having found that she is excluded by the custom of the family; and she does not appeal from those decisions.

The issues raised as to the right of the minor plaintiffs to inherit originally involved the following questions :—*First*, the alleged marriage of their mother, Mussamut Lalli, with the late Nawab; *secondly*, the alleged acknowledgment and recognition of them by the late Nawab as his sons, and the legal consequence of such recognition, if made; and *thirdly*, the existence of certain family custom.

[426] It will be convenient, in the first place, to refer to the issues as to the customs of the Mandals, to which this family belonged, to see if any custom has been established varying the general rule of the Mahomedan law relating to inheritance, or the effect of the acknowledgment of a son. An attempt was made to show that, by the customs of the Mandals, the sons of ignoble wives did not inherit. It appears that, in 1849, an inquiry was instituted by the Government respecting the customs of the Mandals, and various *dustur-ul-amals* were drawn up by members of Mandal families respecting them. But, on consideration of these documents, it appears first, that they do not agree on important points; and, further, they do not profess to record existing customs, except possibly with regard to the exclusion of women from inheritance, but contain endeavours to come to an agreement with respect to the rules which should bind the family in the future. This was the view taken by the

Government at the time, and also by both the Courts in India in this suit, of these documents, so far as they related to the inheritance of sons. On a remand by the Chief Court oral evidence of the custom was taken by the Commissioner. The evidence satisfied the Commissioner, and the Chief Court agreed with him, that the custom to exclude widows from a share of the inheritance was proved. The claim of the widow was therefore rejected. With respect to the sons the Commissioner's judgment is to this effect: he finds distinctly, upon the question which was referred to him by the judgment remanding the case, that legitimate ignoble sons would take a share with noble sons; that there is no distinction as to the right to inherit between the sons of noble and ignoble wives. But in the course of his judgment he finds an issue to be proved, which does not appear to have been referred to him. He says this: "They agree"—that is, the *dustur-ul-amals* and the oral evidence agree—"that illegitimate sons of ignoble mothers, though recognized as sons, got no share." Their Lordships have been referred to the evidence on which this last finding rests; but the learned counsel for the appellant did not prosecute the consideration of it after a few witnesses had been referred to, because it soon appeared that the evidence afforded no foundation [427] upon which the learned Commissioner could properly base his finding, and the Judges of the Chief Court have distinctly come to a different conclusion upon it. His finding that legitimate ignoble sons get a share with noble sons was, however, affirmed by the two Judges of the Chief Court, who both came, after a very careful review of the evidence, to the conclusion that no custom prevails in this family which varies the ordinary rules of the Mahomedan law with regard to the rights of sons to inherit.

An attempt has been made to show that the family were originally Hindus and converts to the Mahomedan faith, and upon this foundation a suggestion has been raised that Hindu customs were preserved in the family; but the foundation for this suggestion entirely fails. Not only was the fact of the family having been at one time Hindus not proved, but it was negatived by some of the witnesses. Even if the fact had been proved, it would only have lent probability to the suggestion that some Hindu laws had been preserved in the family as custom. It must still have been proved that they were in fact so preserved and acted upon; and, as already stated, the proof of the existence of any custom, so far as the present suit is concerned, entirely failed, except as to the widow's right to share. It is to be observed also, that there is evidence that the late Nawab was himself a strict Mahomedan. The rights of the minor plaintiffs have therefore to be determined by the rules of Mahomedan law as applicable to the facts of the case.

The undisputed facts of the case are, that Mussanut Lalli was originally a slave girl in the late Nawab's house, and at one time acted as a servant in it. She lived in the house up to the time of the Nawab's death, and beyond question the Nawab cohabited with her, and the two minor plaintiffs were born in his house, and remained in it up to the time of his death. Those facts are undisputed.

The questions which arise are,—first, whether there was a marriage between the late Nawab and Mussanut Lalli before the births of the plaintiffs, in which case, of course, both would be his legitimate sons; and, secondly, whether, if that be not established, there is proof of an acknowledgment and recognition [428] by the Nawab of the two plaintiffs as his sons, which would give them the status of sons and a title to inherit.

The direct evidence of the marriage is not very satisfactory, and is in some respects contradictory. Still there is positive evidence that a ceremony of marriage did take place before the births of the children. That direct evidence

is met by the negative evidence of witnesses, who say that if such a ceremony had taken place they must have known of it. From this state of the evidence, if it stood alone, it would be difficult to affirm that a marriage had been established; but the evidence exists, and a question certainly arises, whether the treatment of the minor plaintiffs by the Nawab as his sons, to be hereafter adverted to, and the acknowledgments he made respecting them, do not afford such a strong presumption of marriage as to entitle the testimony of the witnesses who speak to the marriage to credit which otherwise it would not have possessed. Their Lordships, however, do not think it necessary to decide the case upon the ground that an actual marriage is proved. The Commissioner of Lahore has found against the marriage. The two Judges of the High Court certainly do not find against it. The inclination of Mr. Justice BOULNOIS's opinion was that it was not proved, whilst the inclination of Mr. Justice LINDSAY's opinion was the other way; they therefore did not find against the marriage, though they have not affirmed it. Their Lordships also do not find it necessary to pronounce a distinct opinion upon the question whether the marriage, in fact, took place, as they think the plaintiffs are entitled to succeed upon the ground that acknowledgments of them as his sons by the Nawab have been proved.

The evidence of the acknowledgment of the elder son, Rustam, is extremely strong. It rests not only on oral testimony, but on documents, one of which is almost conclusive of the question. It seems that Rustam was born six or seven years before his father's death. His brother Umar was born shortly before his death,—the precise time is not ascertained,—probably about a year, or a little more: but it is not possible to arrive at the time with any exactness.

With regard to Rustam, it is shown that he was treated by [429] the Nawab as a legitimate son would be. He was often taken by his father on visits to the houses of Mr. Warburton, a native of India, but educated by an Englishman and a Government official, and of Major Parsons, another British officer, both living in the neighbourhood. The Nawab appears to have introduced Rustam as his son, and the evidence is that he treated him with greater affection than his eldest son Azmat. Not only in the Nawab's house was Rustam put forward as his son, but he was taken on the above-mentioned and other visits as if he were a legitimate son. He was always dressed as a legitimate son would be. Mr. Warburton proved that he "used frequently to see Rustam going about well dressed, mounted on an elephant, and attended by servants." He also says he was extremely like the Nawab. A great deal of other evidence was given to this effect. Besides evidence of this kind, when Rustam's education was about to be commenced, the Bismillah ceremony was performed. There is distinct evidence of the performance of that ceremony, not only by the native gentlemen who attended, but by Mr. Warburton and Major Parsons, who were also invited and attended. Mr. Warburton appears to have been an intimate friend of the late Nawab; he is a witness whose credit is entirely unshaken, and appears to be in every respect an unimpeachable witness. At this Bismillah ceremony Rustam was introduced and treated as the son of the Nawab. It is scarcely conceivable this ceremony would have been performed if he had been an illegitimate son. With regard to the evidence of the defendant's witnesses as to the manner in which these children were treated, their Lordships think that it is entirely unworthy of credit. In opposition to the strong and credible evidence given by the witnesses for the plaintiffs, it is attempted to be shown that these children were, in fact, the children of a slave girl allowed to have promiscuous intercourse with men outside the Nawab's house, and whose fathers, some of the witnesses say, it was impossible to know. This evidence, and that which

seeks to prove that the boys were treated as such children would probably be treated, seems utterly unworthy of credit.

In addition to the oral evidence which has been mentioned, a declaration, important in itself, and as affording confirmation of [430] the oral testimony of the plaintiffs, is found in the report which the Nawab made to the Government respecting the arms belonging to his family. In a letter to the Deputy Commissioner of Kurnal, dated the 7th March 1866, the year before he died, is a schedule in which the arms held by himself and the members of his family are described. The letter is:—"After expressing a desire for an interview which has abundant advantages, and is the best of the objects, be it known to your splend and kind mind, on the arrival of your kind note a list of my personal arms is annexed to this friendly letter, as required in Commissioner's circular dated 8th January 1866." In that list there are columns with the names of the possessors and the descriptions of the arms. First there is 'Personal,' that is himself; and he returns 11 native swords, 1 shield, muskets, pistols, and other arms. Then follows:—"The Nawab's son Azinat Ali Khan" (the appellant), 4 native swords, 1 shield, 2 double muskets and so on. Then follows:—"The Nawab's son, Rustam Ali Khan" (the respondent), 4 native swords, 1 shield, 2 double muskets, and so on. In this document the Nawab describes Rustam as "the Nawab's son, Rustam All Khan," and returns exactly the same number of arms as belonging to him as belonged to his eldest son. He therefore not only calls him his son, but treats him as he treated Azmat, his undoubted legitimate son. Their Lordships think that this acknowledgment in a formal report to the Government is almost conclusive as regards Rustam.

Undoubtedly the evidence of acknowledgment and recognition of Umar, the youngest son, is, as may naturally be expected, much less than that in the case of the elder brother. Considering the short period that elapsed between his birth and the death of the Nawab, it is not surprising that a paucity of evidence appears; but their Lordships think that enough is shown in the case of Umar also to satisfy them, as it satisfied the Judges of the Chief Court of the Punjab, that he was acknowledged and treated as a son.

(His Lordship then went through the direct evidence on this point, continuing thus):—

It is also important to observe that Umar received the titular [431] name of Khan, as his brother Rustam had, a name which it is not likely the father would have bestowed upon any but his acknowledged and legitimate sons. Those who advised the appellant were apparently aware of the importance attached to this name, for they endeavoured to show that it had not been given to the boys until after the death of the Nawab; that is distinctly disproved by the evidence in the case, and it appears that they always bore that name.

The evidence of Major Parsons is not so distinct as that of Mr. Warburton. He says, to the best of his recollection, the Nawab spoke himself to him about the second boy. Besides this testimony, there is general evidence that both boys were treated by the Nawab as his sons.

Undoubtedly an acknowledgment of each son must be proved. In the actual circumstances of this case, it is highly probable that when the Nawab had recognized the elder son of Mussanul Lalli, he would also acknowledge the younger, and this probability gives support to the evidence in the case of the latter. There seems to be no reason for his making a distinction between them.

Their Lordships have already adverted to the unsatisfactory character of the evidence given on the part of the defendant. The only piece of evidence entitled to weight is the genealogical tree which has been produced by him.

That tree professes to be a pedigree of the Nawab's family, which was returned to the Government. The genealogy begins, at no distant period, with the father and uncles of the late Nawab. He was asked for a genealogy of his family. Undoubtedly, in the paper which has been produced, there is, under his own name, an entry of two sons only, Rahmat Ali Khan, 'deceased,' and Azmat Ali Khan; there is no mention of Rustam, though Rustam must have been born at the time that this pedigree was drawn up. It is, however, to be observed that the document produced is a copy only, and that the original has not been produced or satisfactorily accounted for. There may be considerable question whether the copy was admissible in evidence; but whether admissible or not, it is a copy only, and there is an entry after the name of Rahmat Ali of his death—Rahmat Ali Khan, [432] 'deceased.' Now at the time that this pedigree was prepared Rahmat Ali Khan was not dead; and therefore the document must have been altered, at least to that extent after it had been originally prepared. It is possible that when the Nawab was called upon for his genealogy he might have thought it sufficient to give the genealogy only down to himself. But the document itself, the original not being produced, containing an entry which could not have been in a genuine original, cannot be safely relied upon. Even if an original pedigree had been produced without the name of Rustam, though it would no doubt be a piece of evidence favourable to the view of the appellant, and perhaps strongly favourable to that view, it would not be sufficient to outweigh the positive evidence of the acknowledgment of Rustam by the Nawab.

Their Lordships, therefore, have come to the conclusion that an acknowledgment by the Nawab of both the minor plaintiffs as his sons has been proved.

The only question which remains on this part of the case is as to the effect of these acknowledgments. Both the Judges of the Chief Court, who have given learned and careful judgments, have gone very fully into the authorities upon this question. Their Lordships, however, are relieved from a discussion of those authorities, inasmuch as the rule of Mahomedan law has not been disputed at the bar, viz., that the acknowledgment and recognition of children by a Mahomedan as his sons gives them the status of sons, capable of inheriting as legitimate sons, unless certain conditions exist, which do not occur in this case. That rule of the Mahomedan law has not been questioned at the bar. In this case we have not only the treatment of the plaintiffs by the Nawab as his sons, from which, under certain circumstances, an acknowledgment may be presumed, but we have actual acknowledgments of them. It has been decided in several cases that there need not be proof of an express acknowledgment, but that an acknowledgment of children by a Mahomedan as his sons may be inferred from his having openly treated them as such. The question whether the acknowledgment should be presumed or not must of course depend on the circumstances of each particular case in which [433] it arises. The only authority, after the course which the argument has taken, to which their Lordships think it necessary to refer, is the case of *Ashrafud Dowlati Ahmed Hossein Khan v. Hyder Hossein Khan* (11 Moore's I. A., 94, see p. 113). In that case their Lordships say:—"The presumption of legitimacy from marriage follows the bed, and whilst the marriage lasts the child of the woman is taken to be the husband's child: but this presumption follows the bed, and is not antedated by relation. An antenuptial child is illegitimate. A child born out of wedlock is illegitimate; if acknowledged he acquires the status of legitimacy." The rule of the Mahomedan law as to acknowledgment is so affirmed in this judgment. "When, therefore, a child really illegitimate by birth becomes legitimated, it is, by force of an acknowledgment, express or

implied, directly proved or presumed. These presumptions are inferences of fact." This last passage appears to refer to cases where an express acknowledgment is not proved, and has to be presumed from other facts. "They are built on the foundations of the law, and do not widen the grounds of legitimacy by confounding concubinage and marriage." Those observations must be taken with reference to the facts of that case; and in that case it appeared that there was a 'mootta' marriage after the birth of the child. There was no acknowledgment, and the treatment of the child was equivocal. Sometimes he was treated as a son and at others not; and indeed, by a deed executed by the father for that purpose, he was distinctly repudiated by him as his son. In that case it was decided that, in the absence of express acknowledgment, the evidence was insufficient either to raise the presumption of a marriage which in point of time would cover the birth of the child, or of an acknowledgment. The facts and questions in that case were very complicated, and some of the passages in the judgment referred to by the Judges below can only be understood by referring to the questions to which they were addressed. However, there really is no dispute about the law; and their Lordships in this case have not to lay down any new principles of law, but only to apply a well-established principle to the facts.

[434] The remaining point relates to a part of the property which is sought to be recovered. It appears that some part of the property in suit consisted of land which was assumed in the Courts below to be held under a grant from the Crown on terms which brought it within the Pensions Act (XXIII of 1871). Their Lordships have not been referred very specially to the facts, nor was that necessary in the view taken by them of the construction of this Act; they are therefore not to be understood to affirm the assumption upon which the Courts below acted, that the grant in question is a grant within the Pensions Act. They give no opinion upon that point; but, assuming that the Court was right in considering the grant as one within the Pensions Act, their Lordships think it came to a correct decision in holding that, when the certificate mentioned in the Act was obtained, the suit might proceed. It seems that, after the judgment which disposed of the principal questions in the case had been delivered, final judgment was suspended upon an objection that no certificate had been obtained. Before the case was finally disposed of and the final decree passed, the certificate was obtained and delivered to the Court. The Pensions Act, by s. 4, provides that: "Except as hereinafter provided, no Civil Court shall entertain any suit relating to any pension or grant of money or land-revenue conferred or made by the British or any former Government." Then the sixth section is, "A Civil Court, otherwise competent to try the same, shall take cognizance of any such claim upon receiving a certificate from such Collector." It is contended that the suit ought to have been dismissed altogether as regards the property held under the grant, because no certificate was obtained before the commencement of the suit; but their Lordships think that the Court, although up to a certain time they had proceeded, apparently without objection, with the suit without a certificate, was justified in going on with the suit when it was received. The Statute says that: "A Civil Court otherwise competent to try it"—this Court was competent to try it—"shall take cognizance of any such claim upon receiving a certificate from such Collector." When the Court received the certificate it was bound to take cognizance of the [435] claim; and it seems to their Lordships that, finding an existing suit when it received the certificate, it might take cognizance of the claim in that suit. The decision on that point, therefore, seems to their Lordships to be correct.

The result is, that the decree of the Chief Court of the Punjab should be affirmed; and their Lordships will humbly advise Her Majesty to that effect. The appellants will pay the costs of the appeal.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *Watkins and Latty*.

Solicitor for the Respondents: Mr. *T. L. Wilson*.

NOTES.

[I. MAHOMEDAN LAW ACKNOWLEDGMENT—

The offspring of adulterous intercourse or by a Hindu prostitute cannot be acknowledged :—(1900) 27 Cal. 801 ; (1910) 32 All. 345 ; (1883) 10 All. 289 on appeal from 8 All. 234 ; 10 Cal. 663 (668) ; the question should be determined with reference to Mahomedan Law:—(1904) 9 C.W.N. 352. See the Notes to 11 M.L.A. 94 in the INDIAN REPORTS REPRINTS (1909) Vol. II.

II. VALIDITY OF CUSTOM LAYING DOWN COURSE OF SUCCESSION DIFFERENT FROM THAT PRESCRIBED BY MAHOMEDAN LAW—

See (1910) 8 I.C. 897 . 4 S.L.R. 88 where the cases are collected.

III. RIGHT OF SUIT OR TO DECREE DEPENDENT ON CONDITIONS—THEIR FULFILMENT AFTER INSTITUTION (OR DECREE)—

The irregularity was held curable in cases under Pensions Act :—8 Cal. 422 ; 17 Bom. 169.

As regards succession certificates, see 18 Mad. 466 ; 20 Bom. 76 ; suits under C.P.C. (1882) s. 539, see 10 Mad. 185 (186) , see generally 5 C.L.J. 270 ; 34 Cal. 305. In these cases, the irregularity was held incurable :—21 Bom. 351 (suit against Ruling Chief) ; 16 Cal. 89 (suit by manager under Court of Wards) ; 13 Bom. 656 (659) (suit by next friend of an unadjudged lunatic)—*N.B.*—The law on this point has been changed in the C.P.C. of 1908.]

[8 Cal. 435 : 10 C.L.R. 46]

APPELLATE CRIMINAL.

The 7th December, 1881.

PRESENT :

MR. JUSTICE PONTIFEX AND MR. JUSTICE FIELD.

In the matter of the Petition of Giridhari Mondul and another.

Giridhari Mondul

versus

Uchit Jha.*

Prosecution for false charge—Penal Code (Act XLV of 1860), s. 211—

"Sanction to prosecute"—Criminal Procedure Code (Act X of 1872), s. 468.

A Magistrate should not direct a prosecutor to be put upon his trial under s. 211† of the Penal Code without first giving him an opportunity of obtaining a judicial enquiry into the charge originally preferred by him.

The sanction to prosecute, contemplated in s. 468 of the Criminal Procedure Code, is not a direction to prosecute, but is a permission granted to a private person to exercise his own unfettered discretion as to whether he will take proceedings or not.

* Criminal Motion, No. 28 of 1881, against the order of A. Weekes, Esq., Magistrate of Puneah, dated the 13th July 1881.

†[Sec. 211 :—Whoever, with intent to cause injury to any person, institutes or causes to be instituted any criminal proceeding against that person, or

False charge of offence falsely charges any person with having committed an offence, knowing that there is no just or lawful ground for such proceeding or charge against that person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both ; and if such criminal proceeding be instituted on a false charge of an offence punishable with death, transportation for life, or imprisonment for seven years or upwards, shall be punishable with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.]

ON the 25th May 1881, a complaint was made by one Chumroo Mondul, to a Joint Magistrate, whilst on tour, that a dacoity had taken place in the house of his brother, Giridhari. The Joint Magistrate proceeded to the spot and held a preli-[436]minary enquiry in his executive capacity under s. 115 of the Code of Criminal Procedure, at which Chumroo stated that he recognized one Uchit Jha and others amongst the dacoits. On the 28th May, the Joint Magistrate forwarded, for information, to the District Magistrate and Superintendent of Police, a memorandum of his proceedings. On the same day, the District Magistrate recorded his concurrence in the proceedings of the Joint Magistrate; but no final orders were passed on the case. Subsequently, one Badhri Dosadh was suspected of being implicated in the dacoity, and Giridhari Mondul was sent for to identify certain property found with Badhri Dosadh. He, however, failed to identify the property, and Badhri was discharged. On the 13th July, the District Magistrate, without examining either the complainant or his witnesses, and without entering into any judicial enquiry into the charge of dacoity against Uchit Jha, passed the following order:—"Uchit Jha to bring a case under s. 211 of the Penal Code." And on the 30th August 1881, the Magistrate directed the District Superintendent of Police to conduct the prosecution. The Monduls applied to the High Court under s. 297 of the Criminal Procedure Code, to have the order of the 13th July set aside, and asked for an order that the dacoity-case should be proceeded with, and that the case under s. 211 against them might be postponed till the dacoity-case had been disposed of.

Mr. Wood and Baboo Anund Gopal Palit, for the Petitioners, contended, that the Court had no right to pass the order without first proceeding with the charge against Uchit Jha; that Giridhari Mondul had not mentioned that he recognized Uchit Jha at the dacoity; and that Uchit Jha had never been put upon his trial or even summoned to appear in Court.

Mr. Kilby for the Crown.

The **Judgment** of the Court (PONTIFEX and FIELD, JJ.) was delivered by

Field, J.—The facts of this case are as follows: On the morning of the 25th May last, Mr. Pratt, the Joint Magistrate of Purneah, was riding along in a portion of the district, [437] when one Chumroo Mondul came to him, and complained that a dacoity had been committed on the previous night in the house of his brother, Giridhari Mondul. Mr. Pratt immediately proceeded to the spot, and made, what we must assume to be, a preliminary enquiry under the provisions of s. 115 of the Code of Criminal Procedure, or what is commonly called a local investigation, conducted, not in his judicial capacity as Joint Magistrate, but in his administrative or executive capacity as a Police-officer. To this conclusion we are led by several facts. In the first place, there is no record of the examination of witnesses taken down in the manner directed by the Code of Criminal Procedure for proceedings of a judicial nature. In the second place, Mr. Pratt did not proceed to dispose definitively of the case of dacoity; and this he would probably have done if he had been acting as a judicial officer. In the third place, he forwarded, by a memorandum of the 28th May, his proceedings to the Magistrate and the District Superintendent of Police for information; and this is only consistent with the supposition that Mr. Pratt conceived himself to be acting in his administrative or executive capacity, and as a Police-officer. It appears that the local enquiry made by the Joint Magistrate extended over the days intervening between and including the 25th and 28th May. On the 28th May, Mr. Pratt recorded, with some care, the investigation which he had made, and the conclusion to which he was led; and, as has been already

observed, this record was forwarded to the Magistrate of the district. Upon the same day, Mr. Weekes, the Magistrate, recorded certain observations, expressing his concurrence generally with the conclusion at which the Joint Magistrate had arrived, but no final orders were passed upon the case. It would then appear that, in the course of some other proceedings held before the Police or before some of the magisterial authorities, one Badhri Dosadh made certain statements as to having taken part in certain dacoities, and having received, and being in possession of, certain property taken in those dacoities. Giridhari Mondul, in whose house the dacoity of the 25th May is said to have taken place, was upon this sent for, together with certain members of his family, and they were examined by the [438] Joint Magistrate on the 13th June. These witnesses did not, however, identify any of the property produced by Badhri Dosadh as property taken on the night of the 25th May. The Joint Magistrate, after examining Giridhari Mondul and the members of his family, released Badhri Dosadh on fifty rupees bail; and by an order, dated the 28th June, he transferred the case of Badhri Dosadh to the District Magistrate for orders. On the 6th July, the District Magistrate, Mr. Weekes, took up the case, and made the order that Badhri Dosadh be released from bail. Meanwhile it would seem that no judicial proceedings were being taken upon the original charge of dacoity made by Chumroo Mondul to the Joint Magistrate on the morning of the 25th May, and no final orders had been passed upon the report of the preliminary enquiry submitted by the Joint Magistrate, Mr. Pratt. We then find that, on the 13th July, the District Magistrate took up this case and made the following order:—"Nunhoo directed to bring a case under s. 211 of the Penal Code." Nunhoo is an *alias* for one Uchit Jha, whose name had been given by Chumroo Mondul and Giridhari Mondul as that of a person recognized by his voice or otherwise at the time of the dacoity. There is nothing on the papers before us to show that Uchit Jha was arrested, or that any enquiry of a judicial nature, conducted with judicial formalities, was ever made into the charge of dacoity made against this Uchit Jha and certain other persons who had been mentioned by Chumroo Mondul and his brother Giridhari Mondul as persons present at the time of the dacoity. It has been repeatedly pointed out by this Court that it is not a fair course towards a prosecutor to direct him to be placed upon his trial under s. 211 of the Penal Code without having first given him an opportunity of having a judicial enquiry into the charge originally preferred by him. In the present case, it is clear that Chumroo Mondul and his brother Giridhari had no opportunity of producing witnesses and establishing before an officer acting in a magisterial capacity the charge of dacoity which had originally been made on the morning of the 25th May. We think that, under these circumstances, if the order of the 13th July, which [439] has been already quoted, was intended as a sanction under s. 468 * of the Code of Criminal Procedure, it was made without proper discretion, and in opposition to what has been repeatedly laid down by this Court as the proper course to be pursued in these matters. But, upon a full consideration of the case, it appears to us that this order cannot properly be considered as a sanction within the meaning of s. 468. There had been no judicial proceeding, and

[Sec. 468: A complaint of an offence against public justice, described in section one

Prosecution for certain offences against public justice.

hundred and ninety-three, one hundred and ninety-four, one hundred and ninety-five, one hundred and ninety-six, one hundred and ninety-nine, two hundred, two hundred and five, two hundred and six, two hundred and seven, two hundred and eight, two hundred and nine, two hundred and ten, two hundred

and eleven, or two hundred and twenty-eight of the Indian Penal Code, when such offence is committed before or against a Civil or Criminal Court, shall not be entertained in the Criminal Courts, except with the sanction of the Court before or against which the offence was committed, or of some other Court to which such Court is subordinate.]

the offence, if any, committed under s. 211 was not committed before or against a Court. It has been decided that, in the case of a complaint made to the Police, the sanction required by s. 468 is not necessary. It is further to be observed that, if this order of the 13th July was intended as a sanction under s. 468, it is expressed in an improper manner: "Nunhoo directed to bring a case under s. 211." In the mofussil the effect of such a direction upon a person in complainant's position of life would be that he would feel himself constrained to carry out the direction so conveyed to him by the Chief Magistrate of the District. The sanction contemplated by s. 468 is something very different from this, inasmuch as it leaves a private prosecutor free to exercise his own unfettered discretion as to whether he will proceed or not. We find a further order, dated the 30th August, in which the Magistrate instructs the District Superintendent of Police to direct the prosecution. We cannot suppose that the District Magistrate intended to assume in this case the functions of a public prosecutor, or that the prosecution under s. 211 was intended to be inaugurated and conducted as a prosecution on behalf of Government. This being so, we are of opinion that this further order that the District Superintendent should direct the prosecution was calculated to prejudice still further the accused persons against whom Nunhoo was directed to bring a charge under s. 211. The proceedings in the dacoity-case not being proceedings before a Court, no sanction under s. 468 was requisite; and regarding these proceedings as proceedings merely before a Police-officer, we think that the order of the Magistrate directing Nunhoo to institute a case under s. 211, and the further order directing the District Superintendent of Police to take charge of that prosecution, were made without jurisdiction, and must be [440] set aside. We have been asked further to direct that the private prosecution instituted by Uchit Jha should determine, or, at least, that the proceedings taken upon that prosecution should be stayed until there has been a judicial enquiry into the charge of dacoity. We think that we have not jurisdiction to make an order to this effect; and that if Uchit Jha is disposed, at his own instance, to proceed with the charge under s. 211 of the Penal Code, we cannot interfere to prevent him. At the same time, we think it proper to observe, that if Chumroo Mondul and Girdhari Mondul desire that the original charge of dacoity should be judicially enquired into, it is not competent to the District Magistrate to refuse a judicial enquiry into that charge as originally made on the morning of the 25th May.

Order set aside.

NOTES.

[I. SANCTION TO PROSECUTE

It was held no bar to institution of proceedings otherwise than under the sanction :-- (1899) 13 Bom. 600; (1902) P.R. 27; (1903) P.L.R. 5; (1888) 13 Bom. 384; Rat. 381; (1905) 32 Cal. 351; 9 C.W.N. 277. The person to whom sanction is given may institute proceedings by another :--(1904) 32 Cal. 169; 8 C.W.N. 883.

II. NOTICE IN CASES UNDER S. 211.

See also (1887) 11 Cal. 707; (1886) 10 Mad. 232; 2 Weir 183 F.B; (1881) 7 Mad. 292; 1 Weir 292.]

The 21st December, 1881.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE MITTER.

Rajmonoe Dabee.....Defendant

versus

Chunder Kant Sandel.....Plaintiff.*

*Appeal, Abatement of—Death of appellant—No application for substitution—
Application by respondent for costs—Civil Procedure Code
(Act X of 1877), ss. 582, 368, 365, and 366.*

Per MITTER, J. (GARTH, C. J., dubitante)—Notwithstanding that s. 582 of the Code of Civil Procedure does not expressly direct that the word 'plaintiff' occurring in s. 366 shall be held to include an 'appellant,' yet the power conferred by s. 366 on the Court of original jurisdiction to award costs against the estate of a deceased plaintiff, may, by analogy, be taken to be conferred on the Appellate Court.

Lakshmbai v. Balkrishna (I. L. R., 4 Bom., 654) followed.

THIS was a suit for possession of certain lands, which was dismissed by the Court of First Instance, but determined in [441] favour of the plaintiff in the lower Appellate Court. The defendant appealed to the High Court, and, pending the hearing of the appeal, died; but no application having been made by her legal representative to be substituted in her place, the appeal abated.

Baboo Bungshedhur Sen for the Respondent applied for costs.

Baboo Pran Nath Pandit, who had been the deceased defendant's pleader, contended that the Court had no power to award any costs to the respondent as against the representative of the deceased Appellant.

The following **Judgments** were delivered :—

Mitter, J.—In this appeal the appellant having died, and no application having been made by her legal representative to be substituted in her place, the appeal will abate.

A question has been raised as to the power of this Court to award any costs to the respondent, who, there cannot be any doubt, is justly entitled to them. I am of opinion that we have the power to award to the respondent the costs of this appeal, to be recovered from the estate of the deceased appellant.

Section 582 of the Code of Civil Procedure is to the following effect :—The Appellate Court shall have, in appeals under this chapter, the same powers, and shall perform, as nearly as may be, the same duties, as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted under Chap. V; and in ss. 363 and 365, the word 'plaintiff' shall be held to include an 'appellant.'

* Appeal from Appellate Decree, No. 809 of 1880, against the decree of J. G. G. Campbell, Esq., Acting Judge of Moorshedabad, dated the 16th January 1880, reversing the decree of Baboo Rahi Chundra Gangooly, Munsif of Azimgunge, dated the 7th March 1879.

Although s. 366 is not expressly mentioned here, the power conferred by it on the Court of original jurisdiction to award costs against the estate of the deceased plaintiff is, in my opinion, also conferred on the Appellate Court by the last part of the section cited above. This view is in accordance with a decision of the Bombay High Court in the case of *Lakshuibai v. Balkrishna* (I. L. R., 4 Bom., 654).

I would, therefore, award to the respondent the costs of this appeal, to be recovered from the estate of the deceased appellant.

[442] Garth, C.J.—I have some doubt whether, in the absence of express legislative authority, we have any right to make an order for costs as against the representatives of the appellant, who are no parties to the record.

Section 582 of the Code has provided, that, in ss. 363 and 365* the word 'plaintiff' shall be held to include 'an appellant.' If the same provision had been made with regard to s. 366†, all difficulty in this case would have been removed; but the express mention of ss. 363 and 365, and the omission of s. 366, would rather lead to the supposition that the Legislature did not intend a respondent to have his costs under such circumstances. As my learned brother, however, is disposed to put a more liberal interpretation upon s. 582, and as the view which he takes appears to be supported by the Bombay High Court in the case to which he has referred, I shall not differ from him on this occasion, more especially as, in my opinion, the justice of the case is entirely in accordance with that view.

We trust that the omission, if it is one, may be supplied in the Bill to amend the Civil Procedure Code, which is now before the Legislative Council.

The appeal will, therefore, abate, and the respondent will have his costs in this Court.

NOTES.

[APPELLATE COURT'S POWERS—

'Defendant' was held to include respondent whether defendant or plaintiff in the original suit:—(1885) 7 All., 693 (701); (1885) 11 Cal., 694. As regards the Appellate Court's powers, see also (1888) 10 All. 223 F. B.; (1911) 22 M. L. J. 225; (1911) 15 C. L. J. 258.]

* [Sec. 365:—In case of the death of a sole plaintiff or sole surviving plaintiff, the Court may, where the cause of action survives, on the application of the legal representative of the deceased, enter his name in the place of such plaintiff on the record, and the suit shall thereupon proceed.]

† [Sec. 366:—If no such application be made to the Court by any person claiming to be the legal representative of the deceased plaintiff, the Court may pass an order that the suit shall abate, and award to the defendant the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff; or the Court may, if it think proper, on the application of the defendant, and upon such terms as to costs or otherwise as it thinks fit, pass such other order as it thinks fit for bringing in the legal representative of the deceased plaintiff, or for proceeding with the suit in order to a final determination of the matter in dispute, or for both those purposes.]

Explanation:—A certificate of heirship, or a certificate to collect debts, does not of itself constitute the person holding it the legal representative of the deceased. But when the person holding any such certificate obtains thereby property belonging to the deceased, he may be treated as a legal representative liable in respect of such property.]

The 22nd December, 1881.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Pursut Koer and another.....Plaintiffs

versus

Palut Roy and others.....Defendants.*

Limitation Act (XV of 1877), sch. II, art. 141—Suit by reversioners after death of Hindu widow.

In 1846, a widow, under an ikramnama, made over to her brother-in-law certain properties formerly belonging to the estate of one Luchmi Narain, her late husband. The widow died in 1878. In March 1879, a suit was [443] brought by the daughters of Luchmi Narain to recover the properties formerly belonging to their father, from the hands of certain vendees.

Held, that the suit by the reversioners was not barred under art. 141 of Act XV of 1877, there having been no possession adverse to the widow, by dispossession for more than twelve years, the widow's cause of action having ceased when she entered into the ikramnama in 1846, and gave up her right to the property; nor, under sched. II of Act XV of 1877, could the right of the plaintiffs be said to be barred by any Act repealed thereby, inasmuch as art. 142 of Act IX of 1871 prescribes the same period of limitation as is prescribed in art. 141 of Act XV of 1877; and that although, under Act XIV of 1859, repealed by Act IX of 1871, it was decided in *Nobin Chunder Chuckerbutty v. Guru Persad Dass* (B. L. R., Sup. Vol., 1008; S. C., 9 W. R., 505), that adverse possession which bars a widow also bars the reversionary heirs, yet the exception laid down in that case would be applicable, and would save limitation.

THE plaintiffs, the daughters of one Luchmi Narain, stated that their father and Ramjoy Narain were brothers belonging to a Mitakshara family,

* Appeal from Original Decree, No. 57 of 1880, against the decree of Baboo Koylas Chunder Mookerjee, Officiating Second Subordinate Judge of Mozufferpore, dated the 7th February 1880.

[Art. 141:—

Description of suit.	Period of limitation.	Time from which period begins to run.
Like suit by a Hindu or Muhammadan entitled to the possession of immoveable property on the death of a Hindu or Muhammadan female.	Twelve years.	When the female dies.]

; [Art. 142:—

Description of suit.	Period of Limitation.	Time when period begins to run.
Like suit by a Hindu entitled to the possession of immoveable property on the death of a Hindu widow.	Twelve years.	When the widow dies.]

but that they were separate in food and estate. Luchmi Narain died in 1842, leaving a widow, Golab Koer, and two daughters; after the death of Luchmi Narain, Ramjoy, on the 25th January 1846, entered into an ikarnama with Golab Koer, by which the latter relinquished to Ramjoy the whole of the property left by her husband, retaining only a one-anna share in a certain mouza in lieu of maintenance. Ramjoy, in 1847 and 1848, sold the properties so made over to him to the defendants.

On the 9th April 1878, Golab Koer died, and the plaintiffs, on the 29th March 1879, brought this suit to recover from the defendants the properties which had belonged to their father, and asked that the ikarnama made by their mother, who had only a life-interest in the property, might be set aside.

The defendants contended, that the two brothers had never separated, and that Ramjoy, on the death of Luchmi Narain, succeeded by survivorship to his brother's property; and that the suit was barred by limitation, Ramjoy and his vendees having held adversely to Golab Koer.

The Subordinate Judge found that, on the death of Luchmi Narain, Ramjoy had taken possession of the properties to the exclusion of the widow, and that the brothers were members [444] of a joint Hindu family at the time of the death of Luchmi Narain; that there was no proof that Golab Koer was ever in possession of the property; and that the possession of Ramjoy and his vendees had been adverse; and he, therefore, dismissed the suit on the ground of limitation as well as on the merits.

The plaintiffs appealed to the High Court.

Mr. C. Gregory and Baboo Chunder Madhub Ghose for the Appellants.

Mr. Twidale and Baboo Amarendronath Chatterjee for the Respondents.

The **Judgment** of the Court (MITTER and MACLEAN, JJ.) was delivered by

Mitter, J.—The only question of fact that we have to decide in this appeal is, whether the two brothers, Luchmi Narain Singh and Ramjoy Narain Singh, at the time of the death of the former, which took place in the year 1842, were members of a joint Hindu family. (After stating the facts, and finding on the evidence that Luchmi Narain and Ramjoy Narain were not members of a joint Hindu family at the time of the death of Luchmi Narain, his Lordship continued):

This brings us to the question, whether, notwithstanding our finding that the brothers Luchmi Narain and Ramjoy Narain were separate, the plaintiffs' suit must fail on the ground of limitation. The finding of the lower Court upon this point is, that, on the death of Luchmi Narain, the whole of the family property came into the possession of Ramjoy Narain to the exclusion of the widow of the former, *viz.*, Golab Koer. We are not prepared upon the evidence to dissent from this finding, although it seems to us that the possession of Ramjoy as regards Luchmi Narain's share was far from undisputed.

In fact, in our opinion, the disturbed state of possession and the constant squabbles which must have ensued between the widow of Luchmi Narain and her brother-in-law, resulted in the ikarnama of the year 1846; but, in our opinion, this finding did not warrant the lower Court in holding that the plaintiffs' claim was barred by limitation. This suit was instituted [446] on the 29th March 1879; it is consequently governed by the now law of limitation, *viz.*, Act XV of 1877. Under art. 141 * of the 2nd schedule, a suit of this description would not be barred unless it was brought more than twelve years from the date of the death of the last female entitled to the

succession. In this case, according to our finding on the question of separation, Golab Koer was the legal heir of Luchmi Narain, and the plaintiffs in this case are entitled to the possession of the property left by Luchmi Narain on the death of the widow Golab Koer, and admittedly her death took place within twelve years from the date of suit. Therefore it is quite clear that, under art. 141 of the Limitation Act, the suit would not be barred unless under the second para. of s. 2 the right of the plaintiffs had been barred under Act IX of 1871, or any other Act repealed by the latter Act. Now, under Act IX of 1871, art. 142, 2nd schedule, the same period of limitation is provided as in the present Act.

Therefore this suit would not have been barred even if the Act of 1871 had been applicable. Therefore we have to consider next, whether the right of the plaintiffs had been barred by any Act repealed by the Limitation Act of 1871. Now the Act which was repealed by the Limitation Act of 1871 was Act XIV of 1859. In the Full Bench Decision in the case of *Nobin Chunder Chuckerbutty v. Gurn Persad Doss* (B. L. R., Sup. Vol., 1008; s. c., 9 W. R., 505), it was held, that, under Act XIV of 1859, adverse possession which barred the widow also barred the reversionary heir; but there was this exception laid down to the general proposition enunciated above, *viz.*, that the same rule of law would not apply to alienations made by a Hindu widow while in possession of the estate. In a case like the last mentioned, it was held, that the cause of action to recover possession of properties improperly alienated by Hindu widows would accrue on the death of the widow. Now, in this case, taking the finding of the lower Court that Golab Koer was dispossessed on the death of her husband,—that is, in the year 1842,—as correct, there was no adverse possession by the dispossessor for more than twelve years. The cause of action which [446] accrued to her ceased to exist when she compromised the dispute between herself and her brother-in-law Ramjoy by the *ikrarnama* of 1846. Consequently, the present case, even under Act XIV of 1859, would come within the exception to the rule laid down by the Full Bench in the case cited above. The plaintiffs' claim cannot, therefore, be considered to have been barred by the law of limitation.

Upon all these grounds, we are of opinion that the decree of the lower Court in this case is not correct. We accordingly set it aside, and decree the plaintiffs' suit with costs in both Courts. The claim regarding mesne profits, under the circumstances of the case, is disallowed.

Appeal allowed.

NOTES.

[HINDU REVERSIONER'S SUIT FOR POSSESSION · LIMITATION—

Art. 142 of the Limitation Act 1871; Arts. 141 of the Limitation Acts of 1877 and 1908 have been held (after some conflict of cases) to have effected a change in the law as laid down in that of 1859; and limitation runs against the reversioner from the death (natural or civil) of the Hindu female, whether possession was lost through adverse possession or by her alienation:—

Calcutta:—9 Cal. 934; 23 Cal. 460; 6 C. L. J. 490; 9 C. L. J. 236; **Madras:**—20 Mad. 49.; **Allahabad:**—14 All. 156; 23 All. 448; 25 All. 435; **Bombay:**—14 Bom. 482; 512; 23 Bom. 712 **P.C.**; **Punjab:**—(1898) P. R. 79; (1903) P. R. 41; **Central Provinces:**—(1900) 13 C. P. L. R. 81; (1906) 3 N. L. R. 35.

The same considerations apply to *reversioners entitled to life estates* as to those entitled to *absolute estates*:—22 Cal. 85 (89); 27 All. 494; to *reversioners coming after several life-estate holders* as to those coming after *one life-estate* only:—23 Cal. 460.]

[8 Cal. 446 : 10 C. L. R. 381]
APPELLATE CIVIL.*The 7th February, 1882.*

PRESENT :

MR. JUSTICE CUNNINGHAM AND MR. JUSTICE TOTTENHAM.

Holloway.....Defendant

versus

Muddon Mohun Lall.....Plaintiff.*

Co-sharers—Indigo cultivation—Lease by one co-sharer—Landlord and tenant—Joint property—Estoppel.

A and *B* were joint owners of a certain piece of land. In the year 1874, *A* leased his share to the defendant for a term ending in October 1880, for the purpose of growing indigo. At the same time *B* leased his share to the defendant for the same purpose for a term ending in October 1881. *A* and *B* sold their shares to the plaintiff in the year 1879. In January 1881 plaintiff sued to prevent the defendant from growing indigo on the land and for khas possession, on the ground that the lease of *A*'s share having expired, the defendant was not entitled to retain the land for the purpose of growing indigo under the lease given by *B*.

Held, that the plaintiff having by his own act become the owner of both shares, he could not as owner of one share exercise a right which he was precluded from exercising as owner of the other share; and that the suit should have been dismissed.

THIS was a suit for khas possession. The land in dispute (about 650 bighas) had previously belonged to a joint family, [447] the members of which were Rughoobur Dyal Sahoo, Rughoonundun Lal Sahoo, and Lalji Sahoo, and had been held under them for the cultivation of indigo by the defendant from the year 1272 (1865-66). On the 4th of April 1874, Rughoobur Dyal gave a patta of his share, a five-annas share, to the defendant for a term ending the 15th of October 1880. At the same time the defendant received a patta from Rughoonundun Lal of his eight-annas share for a term ending the 15th of October 1880, or the 15th of October 1881, at the option of the lessee.

On the 3rd of September 1879, the shares of Rughoobur Dyal and Rughoonundun Lal were sold to the plaintiff, who, on the 30th September 1880, gave notice to the defendant to quit the land on the 15th of October 1880. On the 2nd of October 1880, Lalji Sahoo gave the defendant a lease of his share (a three-anna share), from the 14th of October 1880, for a term of seven years. The plaintiff brought the present suit on the 29th of January 1881.

It was contended in the Court of First Instance that, as the defendant was entitled to retain possession until the 15th of October 1881, under Rughoonundun Lal Sahoo's patta, the plaintiff could not claim khas possession of the land, though the term of Rughoobur Dyal's patta had expired. The same contention was raised with respect to Lalji Sahoo's patta. The Subordinate Judge said:—"Both these questions may be decided by the disposal of one of them, and it is this,—whether a shareholder of an ijnali mouza has or has not any power of retaining khas possession of land which is not his khas khamat, or which is not acquired by him as dur-jote from a tenant having a right of occupancy, without the consent of the other shareholders.' This question will be

* Appeal from Original Decree, No. 164 of 1881, against the decree of Moulvie Hafiz Abdool Kurrim, First Subordinate Judge of Bhagalpore, dated the 13th May 1881.

clear from a perusal of the following precedents:—*Stalkart v. Gopal Panday* (12 B. L. R., 197 ; s.c., 20 W. R., 168) and *Lloyd v. Mussamut Bibee Sogra* (25 W. R., 313). From a perusal of these two decisions, it appears that the shareholder or his ticcadar has not the power to which allusion has been made above. The pleas which have been or can be taken by the present defendant for retaining the khas possession have been decided in *Lloyd v. Mussamut Bibee Sogra* (25 W. R., 313). The decision in *Gobind Chunder [448] Ghose v. Ram Coomar Dey* (24 W. R., 393) has been quoted on behalf of the defendant ; but the spirit and real purport of that decision have been clearly explained in the decision in *Lloyd v. Mussamut Bibee Sogra* (25 W. R., 313), and that spirit and purport are not against the plaintiff's claim. Hence, it being disposed of that a shareholder or his ticcadar is not entitled to hold khas possession of any ijmal land in an ijmal mouza without the consent and permission of the other shareholders, both the arguments forwarded by the defendant's vakeel fall to the ground. Hence the defendant is not entitled to retain possession of the indigo field from the month of Kartick 1288 F. S., according to the conditions laid down in the ticca patta in respect of the five-annas share. It is clear that, had this share not been sold to the plaintiff, the maliks of the said share could institute a suit of this nature against the defendant, in which case this plea of the defendant could not be entertained, that, under the conditions of the pattas granted by other sharers, the defendant has a right to retain possession of the indigo field. It is also clear, that the plaintiff, by his purchase, has become the representative of those owners. Under such circumstances, if the plaintiff's suit, on the consideration of his being the representative of the maliks of the eight-annas share, is not tenable under the conditions of the patta in respect of the eight-annas share, there is no reason why it should not be maintained on the ground of the plaintiff being the representative of the maliks of the five-annas share. The plaintiff being the purchaser of the five-annas share, has acquired the right to ask the defendant to quit possession of the indigo cultivation from the 15th of October 1880. Hence, in the absence of the defendant's having any right of occupancy, the plaintiff is entitled to a decree for the ejection of the defendant from khas possession of the indigo cultivation, and to prevent him from sowing therein either indigo or any other kind of crops ; and that the said land should remain in a condition by which all the maliks and possessors of the mouza can be able to make a joint management and settlement of those lands." The learned Judge then gave the plaintiff a decree. The defendant appealed to the High Court.

[449] Mr. Branson and Mr. Sandel for the Appellant.

The Advocate-General (Mr. G. C. Paul and Mr. Twidale for the Respondent.

The **Judgment** of the Court (CUNNINGHAM and TOTTENHAM, JJ.) was delivered by

Cunningham, J. (who, having stated the facts above set out, continued) :—The position of things is therefore as follows :—

The plaintiff has, by purchase, become lessor, as to an eight-anna interest of a lease by which the lessees are entitled to grow indigo till October 1881, and the lessor is bound to assent to indigo being grown. As to a five-anna interest, the plaintiff has become lessor of a lease by which the lessee's right of growing indigo extends only to 1880.

It is admitted that indigo can be grown on land, which is the subject of co-ownership, only by the consent of all the co-owners.

It is urged in appeal that the plaintiff being bound as lessor of the eight-annas interest to assent to the cultivation of indigo and receiving consideration for that assent, cannot, in his capacity as lessor of the five-annas interest

refuse his assent, and invoke the aid of the Court to have the cultivation stopped, and this assent given in respect of the eight-annas interest rendered unavailing.

The *Advocate-General*, in support of the plaintiff's claim to exercise in one capacity a right which he has surrendered in another, has put a hypothetical case. Suppose, he says, that *A* and *B* are joint owners, and *X* gets a lease from *A* of his interest for Rs. 10,000. *X* then tries to get a lease from *B*, but fails, as *B* demands Rs. 15,000. *A* acquires *B*'s interest. Then if this vesting of the two interests in one person would disentitle *A*, as representing *B*'s interest, to object to cultivation, the result, he says, would be to confer on *X* for nothing the boon he was unable to procure from *B* except at a price of Rs. 15,000.

But it is argued, and we think with justice, with reference to this illustration, that though *X* is thus accidentally benefited by the union of *A* and *B*'s interest, it would be a still greater anomaly if *A*, having for consideration given his assent to *X*, could by purchasing *B*'s interest render that assent unavailing.

[450] The case of different and conflicting interest, the right to refuse and the obligation to assent being vested simultaneously in the same person, is not one which appears to have been dealt with in the recorded rulings of this Court, nor has any English authority, by the analogy of which our decision might proceed, been brought to our notice. We are obliged, therefore, to be guided by the general equities of the case: and it appears to us that the plaintiff, having by his own act become the owner of both leases, cannot equitably, under one of them, exercise a right which he is precluded from exercising under the other, and which would render the benefit conferred by the other unavailing.

We hold accordingly that the plaintiff cannot, as owner of the eight-annas interest, sue to stop the tenant's cultivation, because the lease has not expired, and that he cannot do so as owner of the five-annas, six gandas interest, because, though the lease has expired, and he would have, if this lease stood alone, a right to enforce its terms, it would be inequitable that he should in his capacity as owner of one interest in the estate do anything which would render his acts, as owner of another interest, abortive, and the advantages purchased by the tenant for valuable consideration practically valueless. We, therefore, allow the appeal, and dismiss the plaintiff's suit with costs throughout.

Appeal allowed.

[8 Cal. 480 : 10 C.L.R. 421 : 6 Ind. Jur. 531]

APPELLATE CRIMINAL.

The 7th February, 1882.

PRESENT :

MR. JUSTICE MORRIS AND MR. JUSTICE O'KINEALY.

In the matter of Sreenath Kur.

The Empress

versus

Sreenath Kur. “

Penal Code (Act XLV of 1860), ss. 167, 466, 471—Code of Criminal Procedure (Act X of 1872), ss. 445, 446, 453—Separate trials—Offences of the same kind—Amendment of charge.

The prisoner was committed for trial on fifty-five charges, including three charges under ss. 167, 466, and 471 of the Penal Code. At the trial before [481] the District Judge sitting with assessors, the Court informed the prisoner that the trial would be confined to the three charges last mentioned. The prisoner was convicted on these, but the Court allowed evidence to be adduced by the prosecution on all the remaining charges, and in respect of these the prisoner was acquitted. On appeal to the High Court,—

Held, that the District Judge should have exercised the powers conferred on him by ss. 145 and 146 of the Code of Criminal Procedure, and then have proceeded to hold separate trials; that he should not have tried together the charges under ss. 167 and 466 of the Penal Code, as the offences were not of the same kind within the meaning of s. 453† of the Code of Criminal Procedure; but the convictions on these charges were upheld, as it did not appear that the prisoner had been prejudiced by the mode of trial adopted.

IN this case the prisoner, who had been committed for trial on fifty-five charges, was convicted of two offences under s. 167 of the Penal Code, and also under ss. 466 and 471, which he is said to have committed while accountant of the Judge's Court of Mymensingh. The first conviction related to a cheque for Rs. 405-9-6 of money on deposit in Court, drawn in favour of one Kisto Kant Ghose, as agent for Deno Nath Roy. As accountant, the prisoner had charge of all the books and papers connected with his department. He was bound to see, among other things, that the deposit registers were properly kept up, and, as a fact, most of the entries in these registers were in his handwriting. In connection with repayments his duties were as follows:—On receipt of the local Court's application, usually made by rubokari, he verified the item by looking at his register and made out a letter to the Accountant-General, asking him to sanction the repayments. When this officer's sanction was accorded, the prisoner referred to the rubokari to find the name of the payee. He then filled up the cheque, entered the payee's

*Criminal Appeal, No. 695 of 1881, against the order of R. F. Rampini, Esq., Officiating Sessions Judge of Dacca and Joint Sessions Judge of Mymensingh, dated the 3rd October 1881.

More offences than one of same kind may be charged within a year of each other.

†[Sec. 153 :—When a person is accused of more offences than one of the same kind committed within one year of each other, he may be charged and tried at the same time for any number of them not exceeding three.

Explanation.—Offences are said to be of the same kind under this section if they fall within the provisions of section four hundred and fifty-five.]

name in it, and having obtained the Judge's signature, delivered the documents to the person entitled to receive payment. All matters connected with these repayments were under the immediate control of the prisoner, were disposed of by him alone, and no other officer of the Court ever filled up the cheques or presented them for signature to the Judge. The charge against the prisoner in connection with the cheque was, that, with intent to injure, he framed this cheque in a manner which he knew to be [452] incorrect. The real payee's name was Koonja Kishore Laha, nephew of Makadassy, and instead of his name, the name of Kisto Kant Ghose, on behalf of Deno Nath Roy, was entered in the cheque. Looking to the fact that the prisoner always, as part of his duty, filled up the cheques,—that the entry containing the wrong payee's name was proved to be in his handwriting,—that Kisto Kant Ghose was a poor man, a mukhtar's mohurir, related to the prisoner and living with him,—and that the proceeds of this cheque were traced to the joint possessions of the peon and the prisoner, the High Court thought that there could not be any possible doubt of the prisoner having committed the offence of which he had been found guilty by the Court of Sessions.

Intimately connected with this portion of the case were the charges laid against the prisoner in regard to a document which purported to be a certified copy of a rubokari, dated the 8th of March 1880, requesting the District Judge to obtain sanction for the payment of a lapsed deposit. That this rubokari had been tampered with, the original schedule erased, and a new schedule entered, was not seriously denied: indeed, the marks of the erasure were plainly visible. But it was urged before the High Court that there was not sufficient evidence to bring the act home to the accused. But the writing in the schedule was sworn to be similar to that of the prisoner, the document was received from him, and the false entry was made only for the purpose of supporting the scheme for obtaining the money drawn by the cheque. The High Court thought this evidence sufficient to convict the prisoner of having forged the document; but as there was nothing to show he ever used it, their Lordships considered that the conviction under s. 471 of the Penal Code should be set aside. The last charge was based on a second cheque. It was similar to that laid on the cheque previously mentioned. The documents were of the same kind, and the evidence in support of both charges was almost identical. The High Court was of opinion that the prisoner had been properly convicted on this charge also.

Mr. A. M. Bose (with him Baboo Kally Churn Banerjee), [453] who appeared for the prisoner, argued that the prisoner had been prejudiced by the mode of trial adopted in the Sessions Court; that he had been tried upon charges under ss. 167, 466, and 471 of the Penal Code, which were not in respect of offences of the same kind (s. 452, Code of Criminal Procedure, *Illus.*); and that the Judge should have ordered the Government Pleader to select any items he wished and amend his charge under ss. 445 and 446 of the Code of Criminal Procedure.

The Advocate-General (Mr. G. C. Paul), who appeared for the Crown, said,—there had not been any irregularity committed, as the charges were of

Separate charges for distinct offences.

*[Sec. 152:—There must be a separate charge for every distinct offence of which any person is accused, and every such charge must be tried separately, except in the cases hereinafter excepted.]

Illustration.—A is accused of a theft on one occasion, and of causing grievous hurt on another occasion. A must be separately charged and separately tried for the theft and the causing grievous hurt.]

the same kind; and that even if there had been, the prisoner had clearly not been prejudiced—s. 167* of the Evidence Act.

Cur. ad. vult.

The **Judgment** of the Court (MORRIS and O'KINEALY, JJ.) was delivered by

O'Kinealy, J. (who, having stated the facts of the case, the charges brought against the prisoner, and the decision of himself and MORRIS, J., on the merits, as above set out, continued):—We have had some trouble in dealing with this case, owing to the manner in which it has been tried by the lower Court. On the preliminary inquiry before the Deputy Magistrate, the proceedings were allowed to cover a very large number of transactions. The prisoner was committed for trial on fifty-five charges, and with other persons who were accused of having more or less assisted him in obtaining money from the Government treasury. Those irregularities were perceived by the Sessions Judge; but instead of exercising the powers conferred on him by ss. 445 and 446 of the Code of Criminal Procedure, and then proceeding to hold separate trials, he adopted the somewhat unusual course of informing the prisoner that he would acquit him of all the charges except those already mentioned, and that to those the trial would be confined. Having come to that determination, he failed, unfortunately, to act up to his own convictions; and, under the excuse of giving Government an opportunity of appealing, if necessary, against the [454] acquittals on the other charges, he allowed evidence in regard to them to be adduced by the prosecution. On the other hand, it must be admitted that the Judge recorded the evidence bearing on the selected charges in a compact and succinct form, and it was in respect of them, and of them only, that the prisoner was examined and called upon to give any explanation. The selection, too, of those particular charges seems to have been the best that could have been made in favour of the prisoner. Both the cheques referred to transactions of the same date; so that this circumstance greatly facilitated the defence of the prisoner, where so much—indeed, we may say, his innocence or guilt—turned upon the state of his accounts. Moreover, the charges were confined to acts arising out of two, and only two, transactions of a similar kind, in which the prisoner succeeded in dishonestly and fraudulently obtaining Government money by means of false documents, and had he been tried at one trial, as he should have been, for obtaining the money, then all the evidence in connection with the present charges would have been properly admitted against him.

In this Court it has been contended on behalf of the prisoner, that he should have been tried separately for offences under ss. 167 and 466 of the Penal Code, and that he was prejudiced by the irregular manner in which the trial was held in the lower Court. In reply, the Advocate-General asserted that the charges under ss. 167 and 466 were of the same kind, and even if this were not so, still the prisoner had not shown how, or in what manner, he had been prejudiced by the irregularities which had occurred at the trial.

We are of opinion that offences under ss. 167 and 466 are not of the same kind as defined in s. 453 of the Code of Criminal Procedure. There are several points in which they differ. They are not even in the same chapter

* [Sec. 167 :—The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court, before which such objection is raised, that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not

No new trial for rejection or improper reception of evidence.
to have varied the decision.]

of the Code. Section 167 requires that the accused should be a public servant, but not that he should be actuated by any dishonest or fraudulent intention ; while s. 466 requires the latter, but not the former. The offences seem to us, therefore, to be different, and not of the same kind, although the same individual may possibly commit both in the same transaction. But we are also of opinion that nothing has been brought to our notice which would [455] support the contention that the prisoner has been prejudiced in his defence by the proceedings in the lower Court. As we have already stated, the selection of the charges to be tried was made in the interest of the prisoner, and the transactions out of which they arose are of the same state and kind and only two in number. Moreover, no objection of this kind was pressed on the lower Court. We, therefore, confirm the convictions of the prisoner, except as to that for using a forged document, which we set aside. The sentences will stand, but instead of the third sentence being entered upon the two convictions,—viz., under ss. 466 and 471 of the Penal Code,—it will be entered upon s. 466 of the Penal Code only.

Convictions, except that under s. 471, upheld.

[8 Cal. 455 : 10 C. L. R. 443]

APPELLATE CIVIL.

The 15th February, 1882.

PRESENT :

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

Protab Chunder Dass.....Plaintiff

versus

Arathoon.....Defendant.*

Arathoon.....Defendant

versus

Protab Chunder Dass.....Plaintiff.†

Agreement not to appeal—Subsequent appeal—Estoppel.

After a plaintiff had obtained a decree, and under it, in execution, arrested his judgment-debtor, the latter filed a petition in Court agreeing not to prefer any appeal against the

* Appeal from Appellate Decree, No. 998 of 1880, against the decree of R. F. Rampini, Esq., Officiating Judge of Dacca, dated the 12th March 1880, modifying the decree of Baboo Gunga Churn Sircar, Subordinate Judge of that District, dated the 30th April 1879.

† Appeal from Appellate Order, No. 160 of 1880, against the orders of R. F. Rampini, Esq., Officiating Judge of Dacca, dated the 12th and 24th February 1880, rejecting the memo. of appeal against the order of Baboo Gunga Churn Sircar, Subordinate Judge of that District, dated the 30th December 1879.

judgment obtained by the plaintiff, and the judgment-creditor at the same time agreed to release the judgment-debtor from arrest, and to take payment of the sum decreed to him by instalments. An order was passed by the Court embodying this arrangement.

The judgment-debtor, in contravention of this arrangement, preferred an appeal,—*held*, that the judgment-debtor having induced the decree-holder to believe, and having expressly undertaken that he would not prefer an appeal, and having by the representation and undertaking procured his own release from arrest, was estopped from acting contrary to his deliberate representation and undertaking.

[456] Section 28 of the Contract Act has no application to such an undertaking. *Anant Dass v. Ashburner and Co.* (1. L. R. 1 All., 267) followed.

THIS was a suit on a contract to supply 4,000 maunds of kajla rice. The plaintiff supplied to the defendant in all, at different dates, 3,181, maunds but the defendant refused to accept the rice, on the ground that it was not kajla. The plaintiff thereupon sold the rice elsewhere at a loss of Rs. 1,882, and brought this suit against the defendant to recover that sum with commission and interest, amounting in all to Rs. 2,920. The defendant contended that the plaintiff was not entitled to any compensation, inasmuch as the rice was not of the same quality as was mentioned in the contract. The Subordinate Judge, on the 30th April 1879, gave the plaintiff a decree for Rs. 2,037. Execution of this decree was taken out, and the defendant was arrested. On the 21st May 1879, the defendant presented to the Court a petition under which he bound himself not to appeal against the judgment of the 30th April 1879, and the decree-holder at the same time agreed to release the defendant from arrest and to take payment of his decree by instalments; and further agreed that he himself would not appeal against the portion of the claim for which he had failed. On the 30th December 1879, the Subordinate Judge passed an order giving effect to the arrangement entered into between the parties. The defendant appealed against this order, but his appeal was dismissed.

The defendant appealed against the decree of the Subordinate Judge, dated the 30th April 1879. The District Judge found that the appellant was not prevented from appealing by the agreement entered into between the parties set out in the petition of the 21st May 1879, and on the merits reversed in part the decision of the Subordinate Judge, disallowing to the plaintiff a sum of Rs. 1,057 out of the sum of Rs. 2,037 decreed to him.

The plaintiff appealed to the High Court, and the defendant also appealed against the order of the District Judge, dismissing an appeal against the order of the 30th December 1879.

[457] Baboo Mohiney Mohun Roy and Baboo Busunt Coomar Bose, for the appellant, contended, that the Court was bound by the compromise made between the plaintiff and defendant mentioned in the petition of the 21st May, and ought not to have allowed the appeal to be preferred.

Baboo Chunder Madhub Ghose and Baboo Hari Mohun Chuckerbutty, for the respondent, contended, that s. 28 of the Contract Act made void all agreements entered into in restraint of legal proceedings, and that, therefore, the appeal preferred to the District Judge was in order.

The **Judgment** of the Court (McDONELL and FIELD, JJ.) was delivered by

Field, J.—In this case one Baboo Protap Chunder Dass, the plaintiff, entered into an arrangement with Mr. Arathoon, the defendant, under which

the former was to purchase rice on behalf of the latter, and was to receive one per cent. on all moneys actually advanced, and also a commission of one rupee eight annas of the transactions. After the execution of this agreement, rice was, on several occasions, purchased by the plaintiff and forwarded to the defendant. Disputes arose in consequence of its being alleged by the defendant that the rice so forwarded was not of a quality which had been contracted for. Other disputes, to which it is unnecessary to refer in detail, also arose in connection with consignments of rice and other matters concerned with the transactions had under the agreement; and the result was a suit by the plaintiff in which he claimed the sum of Rs. 2,920 odd. Upon the 30th of April 1879, he obtained, in the Court of the Subordinate Judge of Dacca, a decree for a portion of the amount so claimed,—viz., Rs. 2,037 odd. Execution was taken out upon this decree, and the defendant was arrested. Upon his arrest an arrangement was made between the judgment-debtor and the decree-holder, by which the decree-holder undertook to release the judgment-debtor from arrest without having him sent to jail, and to allow him time to pay the amount of the decree by instalments: and the judgment-debtor undertook not to appeal against the decree, while the decree-holder further undertook not to appeal in [468] respect of that portion of the claim for which he had failed. This agreement was at once acted upon by the decree-holder, who had the judgment-debtor released without being sent to jail. Subsequently, the judgment-debtor, in contravention of this agreement, appealed against the decree, and the first question, and indeed the only question, with which we have to deal upon this appeal is, whether, under the circumstances, the judgment-debtor could be allowed to carry on his appeal. The District Judge of Dacca decided that the agreement did not estop the judgment-debtor from appealing. In this view we are unable to concur. The case of *Anunt Dass v. Ashburner and Co.* (I. L. R., 1 All., 267) is very similar to the case now before us, and we concur in the view taken by the majority of the Judges in that case. We think that s. 28^c of the Indian Contract Act has no application. We think that the judgment-debtor, having induced the decree-holder to believe, and having expressly undertaken that he would not prefer an appeal, and having by this representation and undertaking procured his own release from arrest, was estopped from acting contrary to his deliberate representation and undertaking.

* [Sec. 28 :—Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.]

Exception 1. This section shall not render illegal a contract, by which two or more persons agree that any dispute, which may arise between them in respect of any subject or class of subjects, shall be referred to arbitration and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

When such contract has been made a suit may be brought for its specific performance; and if a suit, other than for such specific performance, or for the recovery of the amount so awarded, is brought by one party to such contract against any other such party, in respect of any subject which they have so agreed to refer, the existence of such contract shall be a bar to the suit.

*Exception 2 :—*Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.]

There are two other cases which, although not exactly in point to a certain extent, support the view which we take. The first is the case of *Moonshee Ameer Ali v. Moharani Indurjeet Singh*, (14 Moore's I. A., 203; s.c., 9 B.L.R., 460). In that case the appellant had undertaken not to appeal from the judgment of the High Court to Her Majesty in Council if the High Court would confine its judgment to a single point,—*viz.*, the validity of a certain *mokhtear-nama* relied upon in the case. The High Court did accordingly confine its decision to this one point. The appellant afterwards preferred an appeal to the Privy Council upon the whole case; and the High Court having certified the fact of the undertaking made by the appellant, the Lords of the Privy Council were of opinion that the appeal had been brought in violation of good faith, and therefore ought not to be entertained. The other case is that of *Raj Mohun Gossain v. Gour Mohun Gossain* (8 Moore's I. A., 91; s.c., 4 W. R., P. C., 47). In that case the Privy Council expressed [459] a strong opinion that a decree of an Appellate Court obtained after a compromise of the matters in dispute was an adjudication obtained not only with great impropriety, but, in effect, by fraud.

Having regard to these authorities, it appears to us that the defendant did, by his conduct and by his petition of the 21st May 1879, estop himself from afterwards preferring an appeal against the decree of the Subordinate Judge.

But it is said that the agreement by which the defendant undertook not to appeal was an agreement obtained by duress. We have heard the defendant's own account of the transaction as given in his deposition, and it appears to us impossible to say that this agreement was obtained by duress. We think that it was an agreement made of his own free will, and that it ought to be strictly enforced against him, seeing that he obtained the immediate benefit of it by being released from arrest. In connection with the present case there is an appeal, No. 160, which is an appeal from the order of the District Judge rejecting, on the ground that it was not properly stamped, an appeal from an order of the Subordinate Judge, dated 30th December 1879. By that order the Subordinate Judge rejected certain objections raised by Arathoon, the defendant—objections which in fact raised the same question with which we have just dealt,—*viz.*, the question of duress, and directed that the decree originally passed on the 30th April 1879 should be amended in accordance with the petition of the 21st May. We think it exceedingly doubtful whether any appeal would lie against the order of the Judge rejecting the petition of appeal, on the ground that it was not properly stamped; but the question is not really very material, because the substantial question raised upon this appeal to the Judge has been disposed of in dealing with the substantial appeal from the District Judge's decree. Appeal No. 998 of 1880 will, accordingly, be decreed with costs, and the Miscellaneous Appeal, No. 160 of 1880, will be dismissed without costs.

Appeal No. 998 allowed.

Appeal No. 160 dismissed.

NOTES.

[ESTOPPEL—AGREEMENT NOT TO APPEAL—

Similar rulings have been given :—(1901) 29 Cal. 306; 6 C.W.N. 121 (reference to Commissioner); 29 Cal. 577 (time given on condition of not impeaching validity of sale) 36 Cal. 422; 9 C.L.J. 251; 6 C.L.J. 176; 5 O. C. 49 (51); 217.]

[460] APPELLATE CIVIL.

[—10 C.L.R. 484 : 6 Ind. Jur. 527]

The 17th February, 1882.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE BOSE.

Pran Nath Surma Jowardar.....Plaintiff

versus

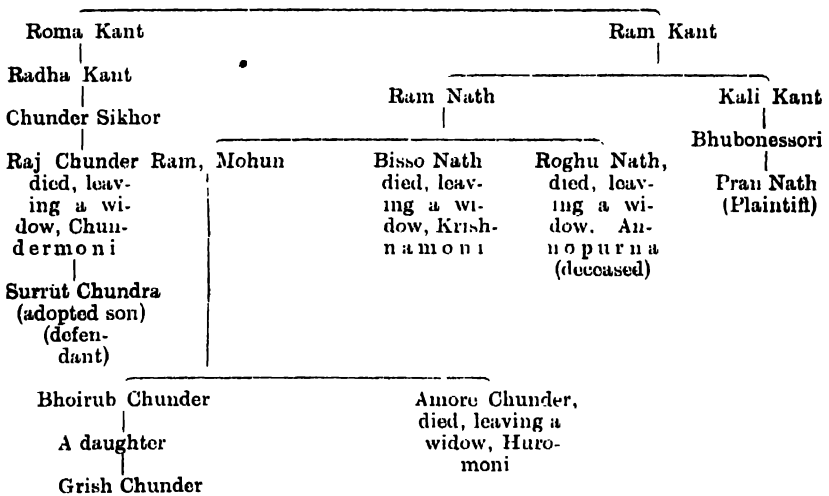
Surrut Chundra Bhuttacharjee.....Defendant.

Hindu Law—Inheritance—Bengal school.

According to the Bengal school of law, inheritance goes to him who offers oblations to the deceased, or to ancestors of the deceased, in which oblation the deceased would participate. Where more than one person offers such oblations, succession goes to him who offers oblations to the father of the deceased, and an heir who offers such an oblation, will be preferred to an heir who offers oblations to the grandfather and great grandfather of the deceased.

THIS was a suit to establish the plaintiff's right to inherit certain property, and for possession with mesne profits. The following genealogical table explains the position of the members of the family :—

RAMGOPAL



[461] The plaintiff stated, that Roghu Nath died possessed of the property in question, and that his widow, Annopurna Dabi, remained in possession thereof as a party having a life-interest therein and as one entitled to offer the pindas ; that Annopurna Dabi died in Chait 1274 (March 1868), leaving the plaintiff, her husband's uncle's daughter's son, as the preferential heir ; that, at the date of Annopurna's death, there was no one who was a nearer heir than the plaintiff ; and that the property had devolved upon him as the heir of Roghu Nath.

* Appeal from Appellate Decree, No. 2975 of 1879, against the decree of T. M. Kirkwood, Esq., Officiating Judge of Mymensingh, dated the 8th September 1879, reversing the decree of Baboo Kedar Nath Mozoomdar, Officiating Second Subordinate Judge of that District dated the 10th September 1878.

The defendant appeared by his guardian and adoptive mother Chundermoni, who, in her written statement, alleged, that the plaintiff, being an uncle's daughter's son, was not, according to the Dayabhaga, an heir; that her husband was the sapinda kinsman of Roghu Nath; and that she had, by her husband's permission, adopted Surrut Chundra. She further stated, that her husband, being Annopurna's reversionary heir, had, during her lifetime, entered on the property, Annopurna having sold the property to him in order to raise money to pay off debts contracted by Roghu Nath and to perform his shradh. On behalf of the defendant it was further alleged that Grish Chunder, the nephew's daughter's son of Roghu Nath, was entitled to succeed to the property in suit in preference to the plaintiff. The Subordinate Judge found the plaintiff was Roghu Nath's legal heir, and gave him a decree. The District Judge reversed this decision, holding that Grish Chunder was a sapinda as well as the plaintiff, and that both of them took before any sakulya; but that Grish Chunder took before the plaintiff, notwithstanding that the plaintiff offered two oblations and Grish Chunder one, because Grish Chunder's oblation went to the deceased owner's father, while the plaintiff's oblations went to the deceased owner's grandfather and great grandfather.

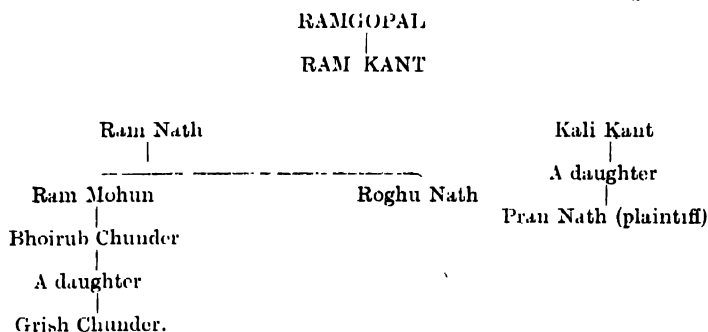
The plaintiff appealed to the High Court.

Baboo *Grish Chunder Chowdhry* for the Appellant.

Baboo *Gopal Lal Mitter* and Baboo *Behury Lal Mitter* for the Respondent.

The following **Judgments** were delivered by the Court (PRINSEP and BOSE, JJ.):—

Bose, J.—The following genealogical tree shows the relationship of the plaintiff and Grish Chunder as heirs to the deceased Roghu Nath:—



The defendant belongs to another branch of the family, but defends his possession of the land in suit against the claim of Pran Nath by asserting that Grish Chunder, and not Pran Nath, is the proper heir.

This case raises a question of Hindu law as current in the Bengal school. The question is—Who is the preferential heir to Roghu Nath, deceased proprietor—his uncle's daughter's son, namely, Pran Nath, or his brother's son's daughter's son, namely, Grish Chunder?

The District Judge of Mymensingh, in appeal from the judgment of the Subordinate Judge, has held, in an elaborate and well considered judgment, that Grish Chunder, offering oblations to the immediate ancestor, *viz.*, the father of the deceased proprietor, should be preferred to Pran Nath, who offers oblations to his grandfather and great grandfather.

In second appeal, it is contended on behalf of Pran Nath, that the District Judge's view of the law is not correct; that the Dayabhaga does

not mention the brother's son's daughter's son as an heir ; that the Dayakrama Sangraha expressly gives a position to the plaintiff, namely, to the uncle's daughter's son, as an heir, but does not give any to a brother's son's daughter's son ; that the dictum of Jagannath Tarkapanchanun, that the latter has a position in the line of heirs, because he offers oblations to the ancestor of the deceased proprietor, is no authority on the subject. Again it is contended, that, if instead of the daughter's son Grish Chunder had been the son's son of the brother's [463] son of the deceased, then he would not have been a sapinda, because he would occupy the position of a fifth in descent. Ultimately it is urged, that even if it be conceded that Grish Chunder is an heir, he, as offering oblations to one paternal ancestor of the deceased, cannot have preference over Pran Nath, who offers oblations to two such ancestors.

We are of opinion that the District Judge's view of the law is correct. Grish Chunder is undoubtedly an heir, when he offers one oblation to the father of the deceased in which the deceased participates. He satisfies the principle of the Bengal law, that inheritance goes to him who offers oblations to the deceased, or to an ancestor of the deceased, in which oblation deceased would participate. He may not be expressly mentioned as an heir either in the Dayabhaga or Dayakrama, but the list of heirs set forth in those treatises is not exhaustive, as has been held in *Guru Gobind Shaha Mandal v. Anand Lal Ghose* (5. B. L. R., 15). He clearly comes within the principle upon which that list has been prepared, and which must be applied to complete it. The Dayabhaga does not mention the brother's daughter's son as an heir, but, on the principle enunciated therein, the author of the Dayakrama has included him in the list of heirs. Again, the brother's son's daughter's son is not mentioned either in the Dayabhaga or Dayakrama, but he is noticed by Jagannath as an heir. He says : " It should be here remarked that the son of a son's and of a grandson's daughter, and the son of a brother's and of a nephew's daughter," and so forth, " claim succession in the order of proximity before the maternal grandfather ; for they also confer benefits by the oblation of funeral cakes " (3 Colebrooke's Digest, 530). It seems that both these commentators, in elaborating the line of succession, have proceeded on the text of the Dayabhaga, chap. xi, sec. 6, v. 20. That text is, " that the order of succession then must be understood in this manner : on failure of the father's daughter's son or other person who is a giver of three oblations (presented to the father, &c.), which the deceased shares, or which he was bound to offer the succession devolves in the next place on the maternal uncle and others namely, his son and grandson)." It is [464] upon this authority, as I take it, that the author of the Dayakrama Sangraha has given the brother's son's daughter's son a position in the line of succession. When Jagannath's opinion is supported by this text of the Dayabhaga, it is entitled to the highest respect. We, therefore, hold Grish Chunder to be an heir on the authority of the Dayabhaga as interpreted by Jagannath. The contention that if the line of descent had not been through a female (his mother), but had been in equal degrees through males,—that is to say, if instead of his mother as daughter of the brother's son the descent had been through a male, then, as being fifth in descent, he would have no place in the list of sapindas, has no force in our estimation, because the daughter's son presents the oblation which his mother would have offered, but for her incompetency, and as such he might be said to stand in the place of the mother, and therefore within the fourth degree. This may seem somewhat an anomaly, but it is in accordance with Hindu law. The objection, if tenable, would have excluded many persons whom our Courts have always admitted.

Grish Chunder and Pran Nath are both heirs according to the principle of oblation laid down in the Dayabhaga. They are both sapindas of the deceased proprietor. The question next for consideration is—Who has the preference in regard to the succession? Grish, as being the nephew's daughter's son offers one oblation, and that to the father of the deceased proprietor. Pran Nath, as being the uncle's daughter's son, offers two oblations, and that to the grandfather and great grandfather. It is contended that, as the oblations are of the same kind, being both in the paternal line of the deceased, Pran Nath, offering two such oblations, should be preferred to Grish Chunder, who offers only one. But here we have an express text of the Dayabhaga to guide us in the solution of the question. In vv. 5 and 6, chap. xi, sec. 6, the author of the Dayabhaga has given preference, in such a case, to the one who offers oblation to the father. He has given preference to the brother's son and grandson over the paternal uncle, because they are "a giver of oblations to the deceased owner's father, who is the person principally considered." Applying the same reasoning, [463] Grish Chunder precedes Pran Nath in the order of succession, because the former offers oblations to the father of the deceased, who is the person to be principally considered.

Prinsep, J.—I am of the same opinion. The judgment of the Full Bench in the case of *Guru Gobind Shaha Mandal v. Anand Lal Ghose* (5 B. L. R., 15), which has long been accepted as settled law, merely lays down what is known as the principle of the efficacy of oblations in determining questions of disputed succession among Hindus. I agree with my learned colleague, that, in applying this principle, regard must be had, not merely to the number of such oblations, but to their propinquity to the deceased. In the present case, Grish Chunder, who offers oblations to the father of the deceased, stands higher in the order of succession than Pran Nath, who offers oblations only to the grandfather and great grandfather.

The appeal must, therefore, be dismissed with costs.

Appeal dismissed.

NOTES.

[DAYABHAGA LAW OF SUCCESSION—

The rule of preference laid down in this case is one of the settled canons of inheritance. The following rules of preference prevail :—The *sapindas* (agnatic or cognatic) are preferred to *sakulyas* and *samanodakas*, 9 Cal., 563; 16 C.L.J., 342; 14; those offering oblations to the deceased first come in; then those offering oblations to both the paternal and maternal ancestors: (1 I. A. 147; 1 Cal., 27); those who offer to the *paternal* ancestors alone (26 Cal. 285); those who offer to the *nearer* of such ancestors (8 Cal. 460); those who are agnates in the same line (15 Cal. 780) &c. Babu Sarvadhicari, Babu Golap Chunder Sarcar Sastri, and Babu J. C. Ghosh, give in their treatises, different positions in the line of heirs, to the several daughter's sons.]

[8 Cal. 465 : 10 C. L. R. 447]

APPELLATE CIVIL.

The 17th February, 1882.

PRESENT :

MR. JUSTICE CUNNINGHAM AND MR. JUSTICE TOTTENHAM.

Ghunshyam Singh.....Defendant

versus

Tara Proshad Coondoo and another.....Plaintiffs.*

Enhancement of rent—Notice of enhancement—Suit for arrears of rent.

The plaintiffs sued for the arrears of rent of the years 1284, 1285, and also for the arrears of rent of the year 1286, the latter at an enhanced rate. The notice of enhancement was not proved, and the defendant insisted that the suit should be dismissed.

Held, that though the notice of enhancement had not been proved, the plaintiffs were not thereby precluded from the arrears of rent at the old rate.

Soorasoondery Dabee v. Golam Ally (15 B. L. R., 125; S.C., 19 W. R., 142), *Brojonath Tewaree v. Grant* (22 W. R., 13), *Bhugwan Dutt Jha v. Sheo Mungul Singh* (22 W. R. 256) and *Bhubo Soonduree Chowdhraïn v. Kasheenukh Acharjee* (22 W. R. 351) referred to.

[466] THE plaint in this suit was filed on the 26th August 1879. The facts of the case are thus stated in the judgment of the Court below :—"This is a suit for rent. The rent is claimed from 1284 to 1286 Fasli (1877--1879). The rent for the year 1286 Fasli was claimed at a higher rate on the basis of a notice for enhancement. But the claim at enhanced rate has been dismissed, on the ground that service of notice of enhancement has not been proved. The plaintiffs do not appeal against this portion of the decision. As regards the old rate, the defendant pleads that his old rate was Re. 1 per bigha. As regards this rate, the Court below has found that there is no sufficient and satisfactory evidence on the part of the plaintiffs to prove their alleged old rate of Rs. 3 per bigha, and on this ground a decree has been passed for the rent at the rate admitted by the defendant. In dissatisfaction with this portion of the decree the plaintiffs have appealed, urging that the rate alleged by them is proved." [The Judge here went into the evidence and found that the rate alleged by the plaintiffs had been proved.] "The defendant urges a plea that the plaintiffs' claim to the rent of 1284 Fasli (1877) is barred by limitation; for, in June 1877, he deposited the rent in the Court to the amount alleged by him; and that, as regards the amount in excess, the suit should have been brought within six months. The Munsif has allowed this plea. But limitation would only have applied had the defendant proved that he had carried the rent to the collection officer, and that he refused to receive it; and then he should have proved that a notice of the deposit was duly given to the plaintiffs, or to the place where collection is made; for the Act, in which six months' time is allowed, lays down a rule for deposit in the manner stated above. Hence, unless the deposit is made according to that rule, and unless the due service of a notice for deposit is proved, limitation cannot apply simply on the ground of money being deposited."

The learned Judge, for these reasons, gave the plaintiffs a decree.

* Appeal from Appellate Decree, No. 1373 of 1880, against the decree of Hafiz Abdool Kurrim, Subordinate Judge of Bhagalpore, dated the 30th April 1880, modifying the decree of Syud Fukhruddin Hossain, Munsif of Monghyr, dated the 18th February 1880.

The defendant appealed to the High Court on the grounds :—(i) that, according to the principle laid down by the Privy Council in the case of *Soorasoondery Dabee v. Golam Ally* (15 B. L. R., 125; s.c., 19 W. R., 142) [467] the plaintiffs' suit, which was for enhancement of rent, should have been dismissed, as the plaintiffs in such a suit were not entitled to arrears of rent at the old rate; (ii) that the Court had erred in law in holding that the plaintiffs' suit was not barred by limitation under Beng. Act VIII of 1869, s. 3, the suit having been brought after the expiry of twelve months from the time of the deposit of rent in Court.

Baboo Amarendro Nauth Chatterjee for the Appellant.

Baboo Gopee Nath Mookerjee for the Respondents.

The **Judgment** of the Court (CUNNINGHAM and TOTTENHAM, JJ.) was delivered by

Cunningham, J.—In this case it was urged with regard to the year 1286 (1879), for which rent at an enhanced rate was claimed, that the Courts below ought to have dismissed the plaintiffs' claim altogether instead of giving them rent at the rate found to be the proper one. In support of this contention the rule laid down by the Privy Council in the case of *Soorasoondery Dabee v. Golam Ally* (15 B. L. R., 125; s.c., 19 W. R., 142), was brought to our notice; but we find that the application of that rule has been discussed in the subsequent cases of *Brojonath Tewaree v. Grant* (22 W. R., 13), *Bhugwan Dutt Jha v. Sheo Mungul Singh*, (22 W. R., 256) and *Bhubo Soonduree Chowdhraim v. Kasheerath Acharjee* (22 W. R. 351), and that it has been held, that the rule prescribed by their Lordships in that case does not apply to cases where the suit is not simply a suit for enhancement, but a suit for rent at the old rate as regards some years and at an enhanced rate for others.

We, therefore, think that the Courts below are right.

The appeal is dismissed with costs.

Appeal dismissed.

[10 C.L.R. 396.]

[468] APPELLATE CIVIL.

The 21st February, 1882.

PRESENT :

MR. JUSTICE CUNNINGHAM AND MR. JUSTICE TOTTENHAM.

Imam Ali and another.....Defendants

versus

Poresh Mundul and another.....Plaintiffs.*

Easement—Right to passage of water—Water in defined channel.

From time immemorial a certain 'al' formed the boundary of two pieces of land belonging to the plaintiffs and the defendants respectively. The plaintiffs' land was on a higher

Appeals from Appellate Decree, Nos. 1040 and 1044 of 1880, against the decree of Hafiz Abdool Kurrim, Subordinate Judge of Bhagalpore, dated the 11th March 1880, reversing the decree of Moulvie Ameer Ali, Second Sudr Munsif of that district, dated the 29th August 1879.

level than that of the defendants, and from time immemorial the surplus water used to flow from the plaintiffs' land through certain passages in the 'al' and across the defendants' land. The defendants closed up the passages and increased the height of the 'al'.

Held, that, it having been established that, for a long series of years, the waters from the plaintiffs' lands had been accustomed to escape in a particular direction, and by certain separate passages across the defendants' land, the defendants could not do anything which would interfere with the plaintiffs' rights in this respect.

THESE were two second appeals from the judgment of the Subordinate Judge of Bhagalpore. The points raised in both being the same, the appeals were heard together. The facts of the cases and the arguments are set out in the judgment of the Court.

Mr. *Twisdale* and Mr. *Mendies* for the Appellants.

Babu *Mohney Mohun Roy* and Babu *Juggut Chunder Banerjee* for the Respondents.

The **Judgment** of the Court (CUNNINGHAM and TOTTENHAM, JJ.) was delivered by

Cunningham, J. In this case the plaintiffs and defendants are land-holders of two jaghirs, co-terminous throughout their entire length of 20 bighas, and separated from each other by an 'al,' running east and west. The plaintiffs say, that the rain water from their lands used, from time immemorial, to pass over the [469] defendants' land by flowing over the 'al' through certain passages (khurhi or nulla), but that the defendants have raised the height of the 'al' by 2 or 2½ cubits, so as to form a new bandh for a distance of 11 bighas, have closed all the khurhis, and have laid two new pipes, a cubit high, through the 'al'; that, owing to these acts, rain-water accumulated on the plaintiffs' lands and occasioned damage to the crops of the plaintiffs in one suit amounting to Rs. 150, and of the plaintiffs in the other suit amounting to Rs. 180. The plaintiffs accordingly claim (i) a declaration of their prescriptive right; (ii) an order reducing the 'al' to its proper height; (iii) the opening the passages and removal of the two pipes. The original Court found that the lands of the plaintiffs are half a cubit higher than those of the defendants, and that the natural flow of water is from the one to the other, and that, for more than twenty years, water has passed in rainy seasons from one to the other; that the 'al' is the boundary between the two estates, and that the defendants have heightened it: that the water previously passed from the plaintiffs' lands to those of the defendants' by three or four passages, which at present do not exist; that the pipes do not afford an outlet; and he accordingly has given the plaintiffs a decree.

The lower Court has, with some modifications not now under consideration, upheld the finding of the original Court.

In special appeal it is urged that the right alleged by the plaintiffs to have the surface water of their lands escape over the 'al' to the lands of the defendants, is one which could not be legally acquired.

We do not consider that there is any ground for this contention. There is a well-recognised servitude of lower lands to receive the natural drainage of adjoining lands on a higher level—*Smith v. Kenrich* (7 C. B., 515); and as, in the present case, it is established that, for a long series of years, the waters from the plaintiffs' lands have been accustomed to escape in a particular direction and by certain separate passages across the defendants' lands, the defendants cannot now do anything which would interfere with the plaintiffs' right in this respect.

We think it unnecessary to discuss the question, which has [470] been raised in the appeal, of the rights of an owner to protect himself from unusual floods, and of the liability which he may incur if, in so doing, he injures the land of another *The King v. Trafford* (1 B. & Ad., 874; s.c., on appeal, 8 Bing., 204), *Nield v. London and North-Western Ry. Co.* (L. R., 10 Exch., 4); because there is no evidence that the escape of water was, with reference to the ordinary conditions of an Indian climate, in any sense exceptional.

The present case falls, in our opinion, clearly within the remarks of BRAMWELL, B., in the latter case as to the liability of a person who for his own purposes diminishes a natural escape of water to any one who is injured by his act. The appeal is dismissed with costs.

Appeals dismissed.

NOTES.

[RIPARIAN RIGHTS—

Where the channel is defined; the upper owner acquires by prescription the right to discharge the water. 4 Cal. 168; (1901) 8 C. W. N. 244; and the lower owner, the right to such water. (1863) Marsh. 506. See also (1887) 11 Mad. 16 as regards defined channel.

For the natural right to protect oneself against the water by suitable works, see (1906) 29 Mad. 539; 16 M. L. J. 582; 1 M. L. T. 333; (1901) 27 Mad. 409; (1900) 24 Mad. 202; 1 N. L. R. 182; 10 Cal. 158; 17 C. L. J. 368; 17 C. W. N. 306; 18 L. C. 824 F. B.]

[8 Cal. 470 : 10 C.L.R. 416]

APPELLATE CIVIL.

The 21st February, 1882.

PRESENT :

MR. JUSTICE MORRIS AND MR. JUSTICE O'KINEALY.

Mahomed Afsuruddin.....Plaintiff

versus

Beer Chunder Manikya and others.....Defendants.*

Res judicata Rent-suit Intervenor Civil Procedure Code
(Act X of 1877), s. 13.

A sued B for rent in the Court of the Deputy Collector of Tipperah, under the provisions of Act X of 1859. C intervened, claiming that the land in respect of which the rent was claimed was his property, and the suit was dismissed. On appeal, the District Judge of Tipperah reversed this decision and decreed the claim, on the ground that C had no right whatever to the land. In a subsequent suit brought by C against A and B for possession of the same lands---

Held, that the previous decree of the District Judge did not constitute the plaintiff's claim a *res judicata*, and was no bar to the suit.

Dunauth Bose v. Kali Kumar Roy, (B.L.R., Sup. Vol., 364; s. c., 5 W.R., Act X Rul. 23) followed.

THIS was a suit for possession of certain land. Several defences were raised, and several issues were settled by the Courts below; but the only one material for the purposes of [471] this report was that of *res judicata*, which was the only one dealt with by the lower Appellate Court in the following judgment:—

* Appeal from Original Decree, No. 22 of 1881, against the decree of F. McLaughlin Esq., Judge of Nonkhally, dated the 10th September 1880.

"The first issue is, whether this suit is barred by s. 13 of the Civil Procedure Code, with reference to a judgment of the Tipperah Judge's Court, dated the 26th of May 1869. That judgment was in appeal from a rent-decree of the Deputy Collector of Tipperah, dated the 17th of February 1869. By this and four other suits, in which the now plaintiff intervened, the then plaintiff, now the second defendant, sought to recover rents of the property now in suit. The now plaintiff intervened under s. 77 of Act X of 1859, and successfully, the plaintiff losing his suits on account of this intervention. The now plaintiff, then intervenor, pleaded the property was his by purchase thereof in July, 1868. The then plaintiff appealed to the District Judge, who reversed the lower Court's decision, holding that the now plaintiff, then intervenor, had no rights under his said purchase. That judgment was allowed to become final, and it decreed that the now plaintiff had no right under the purchase he now sues to establish. But, argues the plaintiff, it is not valid, being only a judgment in a rent-suit. This is a point that has been raised often ere this, and it appears settled law that a decision in a rent-suit, tried after Beng. Act VIII of 1869 transferred such suits to the Civil Court, will bind. The next question is, will it bind when the decision was passed before Beng. Act VIII of 1869, as here? The principle involved is very fully discussed in (among others) *Hurri Sunker Mookerjee v. Muktarani Patro* (15 B. L. R., 238). In *Gobind Chunder Koodoo v. Taruck Chunder Bose* (I. L. R., 3 Cal., 145; s.c., 1 C. L. R., 35), the point is discussed, and its treatment affirmed in *Prannath Sandyal v. Ram Coomar Sandyal* (2 C. L. R., 33). The two last are not quite on all fours with the present suit, since the intervention was in rent cases tried by Civil Courts after Act VIII of 1869. But in view of the principle enunciated in the first named ruling *Hurri Sunker's case* (15 B. L. R., 238) the decision of the Judge's Court [472] pleaded in this suit should be held of full force, because the Deputy Collector's judgment was reversed, and the decision now relied on was that of a Court, the Judges of which would have been the very same appellate tribunal under the later Act; and the passing or non-passing of Act VIII of 1869, which has throughout been held to affect jurisdiction, nowise affected the powers of the Court concerned. And scrutiny of the sections of Act X of 1859 confirms the view now taken. If a Collector decided adverse to a person on a point of title, a suit lay to be brought within a year. But there is no such provision as to an appeal from a District Judge."

The learned Judge then dismissed the suit, and the plaintiff appealed.

Moonshee *Serajul Islam*, for the Appellant.

Bahoo *Doorga Mohun Doss* and Bahoo *Kali Mohun Doss*, for the Respondents.

The **Judgment** of the Court (MORRIS and O'KINEALY, JJ.) was delivered by

Morris, J.—In this case the District Judge holds the view that though a decision of the Collector under s. 77, Act X of 1859, is not final, and is liable to be set aside by a suit brought in a Civil Court, yet the decision of the Judge passed on appeal against an order passed by the Collector under s. 77, Act X of 1859, is final, because his Court is a Court of competent jurisdiction and is precisely the same Appellate Court as that in which an appeal is tried under Beng. Act VIII of 1869. This view appears to us to be erroneous. The decision of the Court on appeal against an order passed under s. 77, stands in no higher position than the decision of the lower Court, whether passed by the Collector or by the Deputy Collector in cases referred to him by the Collector. This point has been expressly determined by a Full Bench of this Court in the case of *Dinanath Bose v. Kali Kumar Roy* (B. L. R., Sup. Vol.,

364; s.c. 5 W. R. Act X Rul., 23). The judgment of the Full Bench, delivered by the [473] late Chief Justice, Sir B. PEACOCK, concludes with these words:—
 “We think that the words of the Legislature must receive a reasonable construction, and that the right of either party, who may have a legal title to the rent, to establish his title by suit in the Civil Court, is not barred or affected by the decision of the Court of First Instance, or of the Court of appeal, if the suit in the Civil Court is instituted within one year from the date of the decision against him.” In this view, therefore, the decision of the lower Court must be set aside, and the case remanded to that Court to be tried on the merits.

Case remanded.

[8 Cal. 473]

CRIMINAL REFERENCE.

The 7th March, 1882.

PRESENT :

MR. JUSTICE CUNNINGHAM AND MR. JUSTICE TOTTENHAM.

Empress

versus

Tegha Singh.

*Arms Act (XI of 1878), s. 19, cl. (f), and ss. 25, 30. Arms in a temple
 Confiscation of arms used for purposes of worship—Inspector specially
 empowered. License to possess arms—Criminal Procedure Code
 (Act X of 1872), s. 579 and sched. iv—“Offences
 against other laws.”*

A collection of fire-arms, consisting of four small cannons, four pistols, and thirty-one muskets, had been kept as objects of worship in a Sikh temple in Patna for upwards of two centuries. The Mohunt of the temple neglected to take out a license in respect of these arms under Act XI of 1878. A Police Inspector, who was appointed to see that the provisions of the latter Act were obeyed, searched the temple on information received, and, having found the arms, prosecuted the person who had charge of the temple. The latter was convicted by the Deputy Magistrate of Patna, under s. 19, cl. (f) of Act XI of 1878, and sentenced to pay a fine of Rs. 50, or to be rigorously imprisoned for two months. The Deputy Magistrate also ordered the arms to be confiscated, and directed that their value and the fine should be divided between the informer and the Police Inspector. On a reference from the Sessions Judge of Patna—

Held, with reference to Act X of 1872, s. 579, and the last heading to [474] sched. iv of the same Act, and to s. 19, cl. (f) of Act XI of 1878, that the proceedings of the Police Inspector and the conviction of the accused were not illegal.

* Criminal Reference, No. 240 of 1881, and Letter No. 549, from the order made by H. Beveridge, Esq., Sessions Judge of Patna, dated the 29th December, 1881.

There is nothing in the Arms Act to exempt the custodians of a temple from complying with the requirements of the Arms Act, either by taking out a license or obtaining exemption under s. 27.

Section 25 of the Arms Act appears to refer to cases in which the Magistrate considers that arms, whether under a license or not, are possessed for an illegal purpose, or under circumstances such as to endanger the public peace.

Section 30 of the Arms Act appears to contemplate the presence of some specially empowered officer besides the officer conducting the search.

THIS was a reference under s. 296 of the Code of Criminal Procedure, from the Sessions Judge of Patna. The terms of the reference are as follows :

There is, in the city of Patna, a famous Sikh temple, called the Har Mandir. It is said to be built on the site of the birthplace of Guru Govind Singh, and his cradle and a book bearing his signature are preserved in it. The latter was the subject of a law-suit, which is reported in the number of the Indian Law Reports for the current month, page 767, *Dhurrum Singh v. Kissen Singh* (I. L. R., 7 Cal., 767). In the temple there were some old fire-arms, one or two of which might perhaps come within the definition of cannon. The Police Inspector describes them as "four little cannons." There were also four jingals, four pistols, and thirty-one guns (muskets). These weapons had been in the temple for about two centuries, and this fact alone shows that they could not be of much use in warfare. They are kept in the temple, as the Deputy Magistrate admits, as objects of worship. There is a Police Inspector appointed to see that the Act is obeyed, and some one told him that there were unlicensed fire-arms in the temple. He made a search and found them, and sent up the man who was, in the absence of the Mohunt, in charge of the temple. The Deputy Magistrate convicted him under s. 14 (more correctly s. 19, cl. f) of the Act, and sentenced him to pay Rs. 50 fine or to be rigorously imprisoned for two months. He also ordered that the fire-arms should be confiscated, and that their value and also the fine should be divided between the Inspector and the informer. It appears to me that the Deputy Magistrate's proceedings are illegal for the following reasons :

(1.) The only witness examined was the Police Inspector Digam Lal, but his evidence was inadmissible as he had no right to search the [475] temple. He is appointed under the Act, but that does not empower him to search houses without a Magistrate's warrant. He had no warrant from a Magistrate under s. 25, nor could he have got one without the Magistrate's having reason to believe not only that there were weapons, but also that they were in the temple for an unlawful purpose. Section 30, under which the Inspector presumably acted, only refers to the Code of Criminal Procedure and gives no authority to the Police to search in non-cognizable cases. Now the mere possession of arms is a non-cognizable offence, though the going armed may, under s. 13, be cognizable,—that is, the Police may arrest a person so doing without a warrant and disarm him. Section 17, cl. (d) has also no application to the present case, nor can I find any other section or rule which empowers the Police to make a search without a Magistrate's warrant. If Digam Lal's proceedings were illegal, his evidence should, I think, be rejected, and then there is no evidence except Tegha Singh's statement, and he does not say that the weapons are cannons.

(2.)—The man who has been convicted is the temporary manager of the temple. He has not been charged with being in possession of the weapons, but with having them under his control. This probably is not correct, for it is not likely that he has power to remove them or otherwise dispose of them.

He is only ex-officer in charge of them, and it is perhaps doubtful if he can be personally fined and be sent to jail in default. It is perhaps only the property of the temple which can be attached in realization of the fine.

(3) I doubt if the Act applies to temples. Its language is wide enough to include them; but it might, I think, be argued that its provisions must be held to be controlled by, what I presume, is the higher authority of the Queen's Proclamation of 1858. That document declared that no one should be molested or disquieted by reason of his religious faith or observances, and strictly charged all in authority under the Queen to abstain from interference with the religious belief or worship of any of her subjects. Admittedly the fire-arms are in the temple as objects of worship, and have been so for many years, and it certainly is an interference with the Sikh religion to insist on their being licensed and to order their confiscation. The Deputy Magistrate says that the Mohunt should have taken out a license for the weapons, and it would have been better for himself if he had done so, but if the weapons are really cannons, no Magistrate, and not even the Local Government could have given him a license.

Finally. Even if the Magistrate's proceedings are not illegal, his [476] order should, I think, be set aside on the ground that the punishment is too severe. A nominal fine was all that should have been inflicted.

No one appeared on the reference.

The **Judgment** of the Court (CUNNINGHAM and TOTTENHAM, JJ.) was delivered by

Cunningham, J. With reference to s. 579 of the Criminal Procedure Code and the concluding heading of the fourth schedule ("offences against other laws,") and s. 19, cl. (f) of the Arms Act, XI of 1878, we are not satisfied that there has been any illegality in the proceedings either of the Police Inspector in this case or in the conviction of the accused.

Section 25 of the Arms Act appears to refer to cases in which the Magistrate considers that arms, whether under a license or not, are possessed "for an illegal purpose," or under circumstances such as to endanger the public peace, neither of which conditions is suggested as existing here. It is not clear from the Sessions Judge's reference whether the Police Inspector was specially empowered under s. 30. That section appears to contemplate the presence of some specially empowered officer besides the officer conducting the search.

There is nothing in the Act to exempt the custodians of the temple from complying with the requirements of the Act either by taking out a license or obtaining exemption under s. 27.

On the other hand, they may well have imagined that the Act did not extend to weapons which were objects of interest or worship rather than 'arms' in the proper sense of the word.

We set aside so much of the Deputy Magistrate's order as refers to the division of the value of the fire-arms and the fine imposed between the informer and the Inspector, and we direct that the case be submitted for such orders as the Government of Bengal may be pleased to pass.

[10 C.L.R. 517]
[477] APPELLATE CIVIL.

The 8th March, 1882.

PRESENT :

MR. JUSTICE FIELD AND MR. JUSTICE O'KINEALY.

Luchmeeput Singh.Decree-holder

versus

Sita Nath Doss.....Judgment-debtor.

Civil Procedure Code (Act X of 1877), ss. 2, 244, cl. (c), ss. 546, 588—

*Appeal from order— Decree— Execution of decree— Security
for restitution of property.*

Where an order, requiring the decree-holder to give security within three days, is made under s. 546 † of the Code of Civil Procedure, by the Judge of the Court in which the decree was passed, and in which the execution is pending, such order is appealable as a decree under the provisions of the Code of Civil Procedure, s. 2 and s. 244, † cl. (c).

THE facts of the case are sufficiently set forth in the judgment of the Court.

Baboo *Bipin Doss Mookerjee* for the Appellant.

Baboo *Kali Mohun Doss* and Baboo *Surendronath Motilall* for the Respondent.

The **Judgment** of the Court (FIELD and O'KINEALY, JJ.) was delivered by

Field, J.—In this case an order was made under s. 546 of the Code of Civil Procedure that security be given for the restitution of property, which was about to be taken in execution of decree. The decree was a decree of the Second Subordinate Judge of the 24 Parganas, and the execution was pending in his Court. Now the first point with which we have to deal is concerned with an objection made by the pleader for the respondent to the effect that no appeal lies in this case. Undoubtedly, this particular matter does not fall within the enumeration contained in s. 588 of the Civil Procedure Code ;

* Appeal from Original Order, No. 309 of 1881, against the order of Baboo Krishna Mohun Mookerjee, Second Subordinate Judge of the 24 Parganas, dated the 3rd September 1881.

† [Sec. 546 :- If an order is made for the execution of a decree against which an appeal is pending, the Court which passed the decree shall, on sufficient cause being shown by the appellant, require security to be given for the restitution of any property which may be taken in execution of the decree, or for the payment of the value of such property, and for the due performance of the decree or order of the Appellate Court,

or the Appellate Court may for like cause direct the Court which passed the decree to take such security. And when an order has been passed for the sale of immoveable property in execution of a decree for money and an appeal is pending against such decree, the sale shall on the application of the judgment-debtor be stayed until the appeal is disposed of, on such terms as to giving security or otherwise as the Court which passed the decree thinks fit.]

Questions to be decided by Court executing decree. † [Sec. 244, cl.(c):—The following questions shall be determined by order of the Court executing a decree and not by separate suit (namely):

(c) any other questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution of the decree.

Nothing in this section shall be deemed to bar a separate suit for mesne profits accruing between the institution of the first suit and the execution of the decree therein, when such profits are not dealt with by such decree.]

[478] but we think that the question which has been decided by the order of the Subordinate Judge is within the meaning of cl. (c), s. 244—a question arising between the parties to the suit in which the decree was passed and relating to the execution of the decree; that it was a question decided between the parties is admitted; that it related to the execution of the decree is, we think, manifest from the fact that the execution of the decree has been stopped in consequence of the security having been rejected.

The order of the Subordinate Judge is as follows:—"The property which the decree-holder wishes to place in security is situate in the district of Purnea. No enquiry could be made of the validity of the security from this distance. I must not, therefore, act upon such security. The decree-holder may adduce promissory notes or any other tangible security within three days." Now, if the Subordinate Judge meant to say that he could in no case accept as security the immoveable property situate within any other district than that of the 24 Parganas in which district his Court is located, we think that he was wrong. We think that any such general proposition as this cannot be supported; but having regard to the facts of this particular case, we think that this appeal must be dismissed.

The property offered as security belonged, not to the decree-holder himself, but to his son, and his son does not join in the application, or in any other way express his willingness that his property should be hypothecated as security. Then, the title-deeds of the property, or a copy of the *torji* of the Purnea Collectorate, was not tendered, and the Subordinate Judge, in fact, had no materials whatever upon which he would be justified in approving of the execution of the security-bond which was tendered with the application. Under these circumstances, we think it impossible to say that the Subordinate Judge was wrong in refusing to accept this security; and we shall, therefore, dismiss this appeal with costs, but without prejudice to any other proper application for security which may be made to the Subordinate Judge.

Appeal dismissed.

NOTES.

[Similarly, the following questions have been held to fall within C. P. C. 1908 s. 47 : C. P. C. 1882 : 1877 sec. 214 : amount of security required in execution (12 Bom. 30) ; stay of execution (7 All. 73 ; 13 Cal. 111 ; 12 Cal. 621) ; order setting aside sale to decree-holder the proceeds whereof went towards adjustment of the decree : 10 Cal. 110 ; etc. See also 14 C. L. J. 189.]

[10 C.L.R. 519]

[479] APPELLATE CIVIL.

The 8th March, 1882.

PRESENT :

MR. JUSTICE FIELD AND MR. JUSTICE O'KINEALY.

Kaminy Mohun Somoddar.....Decree-holder.

versus

Gopal and anotherJudgment-debtors. *

Civil Procedure Code (Act X of 1877), s. 245—Application for execution of decree—Amendment—Time fixed by Court—Jurisdiction—Ultra vires.

On the 9th of April 1880, A applied for execution of a decree, which he had obtained against B. On the 20th of April 1880 the Judge of the Court, under the provisions of s. 245 of

*Appeal from Appellate Order, No. 264 of 1881, against the order of F. McLaughlin, Esq., Judge of Backergunge, dated the 26th May 1881, reversing the order of Baboo Doorga Churn Sen, Sadr Munsif of that District, dated the 19th March 1881.

the Code of Civil Procedure, ordered the application to be amended within seven days. This order was disobeyed, but no order rejecting the application was asked for or passed. On the 11th of May 1880 the applicant prayed leave to make the amendment, which prayer was granted.

Held, that the order of the 11th of May 1880, granting leave to amend, was not *ultra vires* of the Judge, under the provisions of s. 245 of the Code of Civil Procedure.

THE facts of this case are set out in the judgment of the lower Appellate Court, which is as follows :—

“The admitted facts are these: On the 26th of February 1877 the respondent, decree-holder, obtained a decree for costs, etc., about Rs. 178, against the appellants, judgment-debtors. On the 20th of April 1877 application was made for execution, and on the 6th of August 1877 it was struck off. On the 9th of April 1880 a fresh application was made, but was irregular in form. On the 20th of April 1880 the Munsif ordered amendment within seven days. This order was disobeyed. On the 11th of May 1880 a prayer was made for amendment, and this prayer was granted. On the 27th of July 1880 an affidavit should have been filed, and for default the lower Court refused to send for the record. On the 10th of August 1880 a prayer was made for reversal, and this was allowed.

“The appellants urged below, unsuccessfully, that the lower Court's order of the 11th of May 1880 was *ultra vires*. The [480] same point is taken here, and it is objected that even now the execution prayer is irregular, the last column, among others, being improperly filled, it specifying no details, but referring the Court to some former application, and only asking that notice to issue to the judgment-debtors. The objection that the Munsif, when granting further time on the 11th of May 1880, acted *ultra vires*, is apparently well-founded and fatal. Section 245 of the Code of Civil Procedure is clear, prescribing imperatively that if the application be not so amended as ordered by the Court, it shall be rejected. The respondent urges that if a Court could extend it once, it might extend the time twice, as here, or thrice, or as often as it thought fit, and that its order of the 11th of May 1880 was an extension of time (order No. 2). But scrutiny of the amended section (245), and comparison thereof with the original section, militate against this argument. The language contemplates speedy amendment. ‘Then and there’ is mentioned in both old and new sections. And the whole tendency of the new Civil Procedure Code was to expedite executions and do away with the old dawdling, dilatory style. Section 230, as enacted with the due diligence proviso, is a marked indication of this resolve.”

The learned Judge then reversed the decision of the Munsif, and dismissed the application with costs.

From that decision the decree-holder appealed to the High Court.

Bahoo *Bycunt Nath Doss* for the Appellant.

Baboo *Doorga Mohun Doss* for the Respondents.

The **Judgment** of the Court (FIELD and O’KINEALY, JJ.) was delivered by

Field, J.—The question in this case is one of limitation. The original decree was dated 26th February 1877. An application for execution was made on the 20th April 1877. Within three years from this latter date,—that is to say, on the 9th April 1880,—a fresh application for execution was made; but this application was found not to be in the form prescribed by [481] the Code of Civil Procedure. The Munsif, under the provisions of s. 245, directed that the application should be amended, and he fixed seven days as the period within which the amendment was to be made; but the applica-

tion was not amended within this period of seven days, and subsequently,—that is to say, on the 11th of May 1880,—a further application for amendment was made and allowed. Now, the Judge of the Court below has held, with reference to the language of s. 245 of the Code of Civil Procedure, "if the application be not so amended, it shall be rejected," that it was compulsory upon the Munsif to reject the application of the 9th April 1880, because it was not amended within the seven days allowed by the Munsif's order, and that the Munsif has no discretion to allow the amendment of the 11th May. We do not concur in this construction. We think that, inasmuch as the Munsif had not rejected the application and so finally disposed of it, it was within his competency to fix a further time for making the amendment, or to allow the amendment to be made within a further time after the seven days originally fixed had elapsed. We think, therefore, that the order of the Judge must be set aside and that of the Munsif restored.

This appeal is decreed with costs.

Appeal allowed.

NOTES.

[See now C.P.C. 1908 O. 21, r. 17 as to amendment; and, sec. 153 thereof as regards the power to enlarge time.]

[8 Cal. 481]

APPELLATE CRIMINAL.

The 10th March, 1882.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

In the matter of the Petition of Ameruddin.

Ameruddin

versus

Farid Sarkar and another.*

Committal on two separate charges—Trial as for one offence—Criminal Procedure Code (Act X of 1872), s. 454—Separate trial.

Where persons are charged with rioting and also with causing hurt, although they may be tried as for one offence under s. 454 of the Criminal Procedure Code, it is not illegal to try them for both offences separately.

[482] FARID SARKAR, Ali Sarkar, and Nizamdi were charged with the offence of rioting by entering forcibly into a cutcherry: the case was tried in a regular manner, the evidence being recorded in full. Farid Sarkar and Ali Sarkar were also charged by one Ameruddin, a peon, with having caused him hurt at the time of the riot. This latter case was tried summarily under s. 227 of the Criminal Procedure Code.

The Magistrate recorded but one judgment in both cases, and sentenced the accused in the first case to two months' rigorous imprisonment under s. 147 of the Penal Code; and the accused in the second case to a fine of Rs. 50 under s. 323 of the Penal Code.

* Criminal Motion, No. 323 of 1881, against the order of T. M. Kirkwood, Esq., Sessions Judge of Mymensingh, dated the 16th September 1881.

The prisoners in the rioting-case appealed to the Sessions Judge, and the accused who had been fined applied, on motion to the Sessions Judge, to have the finding and sentence set aside.

The Sessions Judge held, that, under s. 454 of the Criminal Procedure Code, there should have been but one trial, and himself treating the whole matter together, reversed the convictions.

Ameruddin applied to the High Court to have the order of the Sessions Judge set aside.

Baboo Bama Churn Banerjee for the Petitioner.

Baboo Bykunt Nath Dass for the accused persons.

The **Judgment** of the Court (MITTER and MACLEAN, JJ.) was delivered by

Mitter, J.—Farid Sarkar and Ali Sarkar and others were charged with the offence of rioting by entering forcibly into a zamindar's cutcherry. Against the first two there was a separate complaint by one Ameruddin, a peon in that cutcherry, of having caused hurt to him in the course of the rioting, which formed the subject-matter of the first-mentioned case. The Magistrate convicted the accused persons in both cases. He recorded one judgment, in which he says that he tried the riot-case regularly, and the hurt-case summarily. The punishment awarded in the latter case was a fine of Rs. 50 each. Both [483] cases went before the Sessions Judge,—the former by way of appeal, and the latter by way of motion. The Judge, holding that, under s. 454 of the Criminal Procedure Code, there should have been one trial, treated the whole matter together, and reversed the conviction. Although we are inclined to agree with the Judge that, under s. 454, there could have been one trial, yet it does not seem to us that it was illegal to try the two cases separately; therefore, the Judge had no jurisdiction to reverse the conviction in the hurt case. His order, so far as it relates to this case, must be cancelled.

We have perused the record of the summary trial made under s. 227 of the Criminal Procedure Code, and as we find it is not open to any objection, we direct that the order of the Magistrate, adjudging Farid Sarkar and Ali Sarkar to pay a fine of Rs. 50 each, be restored.

Application granted.

[8 Cal. 433 11 C.L.R. 57]

FULL BENCH.

The 11th March, 1882.

PRESENT :

**SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE PONTIFEX,
MR. JUSTICE MORRIS, MR. JUSTICE MITTER, AND MR. JUSTICE PRINSEP.**

Kalidhun Chuttapadhyaya and another.....Plaintiffs

versus

Shiba Nath Chuttapadhyaya.....Defendant.*

Declaratory decree—Subsequent suit for consequential relief—Civil Procedure Code (Act VIII of 1859), ss. 7 & 15—Civil Procedure Code (Act X of 1877), s. 43—Splitting claim.

The plaintiffs brought a suit to have themselves declared entitled to an account, and obtained such a declaratory decree without asking for or obtaining any consequential relief.

The defendants took no steps to render an account, and the plaintiffs brought another suit against them "for the amount of such Company's papers and other debts that might be found due by the defendant on an adjustment of accounts."

[484] *Held*, that the plaintiffs were not barred from bringing such a suit, s. 15 of Act VIII of 1859 being intended to modify the provisions of s. 7 of the same Act.

Tulsi Ram v. Gunga Ram (I. L. R., 1 All., 252) followed and approved.

THIS was a reference to a Full Bench by (PRINSEP and FIELD, JJ.), the reference being in the following terms :—

Field, J.—The facts of this case are briefly as follow :—

There were five brothers, Dena Nath, Hara Nath, Bhola Nath, Tara Nath, and Shiba Nath, who acquired a considerable amount of property, moveable and immoveable, and lived together as members of a joint Hindu family. In the Bengali year 1261, 1851-55, Tara Nath separated in mess from the other four brothers, who continued to live together till the end of the year 1262. It is alleged that, after this separation of Tara Nath, Shiba Nath (the defendant in the present case) had the management of the property and the charge of the cash. In Bysakh 1263 (April 1856), Dena Nath, who is the father of the plaintiffs in the present suit, separated in mess; but it appears that the family-property continued to be joint, and (as has been stated in the course of the argument) there has been no partition of this property up to the present time. In Assin 1272 (September 1865), Dena Nath, the plaintiffs' father, died, and the plaintiffs were admittedly then minors. It is alleged that Shiba Nath having, as already mentioned, commenced to manage the joint property upon Tara Nath's separation, continued to conduct the management from the beginning of 1262 to Assin 1277 (*i.e.*, 1855 to September 1870); and that, after this latter date, he began to pay and receive the debts relating to his share separately, and gave up the management of the plaintiffs' share. In 1872, the plaintiffs (one of whom Kalidhun Chuttapadhyaya, being then a major, acted on behalf of himself and his minor brother Krishnadhun Chuttapadhyaya) instituted a suit, No. 38 of that year, for the purpose of obtaining from the defendant Shiba Nath a settlement of the accounts for the years 1262 to 1277. In that suit the plaintiffs asked for a declaration of their right to have an

* Full Bench Reference made by Mr. Justice Prinsep and Mr. Justice Field, dated the 8th August 1881, in the Appeal from Original Decree, No. 176 of 1880.

account; and we think there can be no doubt that they also asked in that suit to have an account taken; but it appears that, in the course of the suit, so much of the prayer of their plaint as asked that an account be taken was abandoned; and the decree, which was ultimately passed, was simply a decree declaring the plaintiffs' right to have an account. That decree was never carried into effect [485] by anything in the nature of an attempt to execute it; and, indeed, there could not have been any actual execution, seeing that the decree was a declaratory decree only, and gave no consequential relief.

The present suit was instituted on the 30th of December 1879, and the plaintiffs here ask "that the Court may be pleased to pass a decree against the defendant for the amount of cash, Company's papers, and other sort of debts that may be found due by the defendant to the plaintiffs on an adjustment of accounts, by declaration of right to the same, after calling upon the defendant to submit an account agreeably to the decree passed by the High Court, &c." In other words, the plaintiffs now seek to have the consequential relief which they might have had in the former suit. It may be well to say here that, although it would appear that this consequential relief was asked in the plaint in the former suit, no case has been made that the plaintiffs, having withdrawn from this portion of their prayer without the permission of the Court, are precluded on this ground from renewing their claim to consequential relief. The case has been treated throughout as if the former suit had been brought merely to obtain a declaratory decree—i.e., a decree declaring the right to have an account.

The Subordinate Judge has dismissed the present suit, holding that it is barred by limitation; and we are of opinion that, so far as regards the major plaintiff, this decision is correct.

We think that the period of limitation applicable must be taken to be six years, as provided by art. 120ⁱ of the second schedule of the present Limitation Act, XV of 1877; and that this period of six years commenced in Assin 1277 (September 1870), when the defendant's managership admittedly and practically came to an end.

It has been contended by the learned counsel for the appellants that s. 10^l of the Limitation Act ought to apply to this case; that Shiba Nath ought to be regarded as a trustee; and that the *nullum tempus* provision of that section should be held applicable.

Now the case of *Saroda Pershad Chuttopadhyay v. Brajo Nath Bhuttacharjee* (I. L. R., 5 Cal., 910) is opposed to this contention; and if we were prepared to differ from the decision in that case, we should still be of opinion that the provisions of s. 10[†] were not intended to apply to the case of an implied or constructive trust. Whether the Law of Trusts, in the sense in which this term

* [Art. 120:—

Description of suit.	Period of limitation.	Time from which period begins to run.
Suit for which no period of limitation is provided elsewhere in this schedule.	Six years	... When the right to sue accrues.]

† [Sec. 10:—Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration) for the purpose of following in his or their hands such property, shall be barred by any length of time.]

is understood in Courts of Justice in England, has operation in India outside the Presidency towns, is a question upon which there is some difference of opinion.

[486] It is unnecessary for us to attempt to deal with this question on the present occasion. We may, however, observe that, in different systems of jurisprudence, certain portions of law are sometimes differently classified; and that, under the head of 'Trusts' as a branch of English Jurisprudence, are included portions of law which under another system might be differently classified. It is not necessary for us to decide whether s. 10 of the Limitation Act is to be restricted in its application to what are known as express trusts in English law: it is sufficient for the purposes of the present case to say that, if Shiba Nath can be regarded as a trustee, he is not, in our opinion, "a person in whom property has become vested in trust for a specific purpose" within the meaning of s. 10 of the Limitation Act.

We are also unable to assent to the further argument advanced by the learned counsel, Mr. *Bell*, that the declaratory decree ought to be regarded in the nature of a contract between the plaintiffs and the defendant, upon which the plaintiffs are entitled to sue as upon a new cause of action. We, therefore, think that this suit is barred by limitation so far as regards the major plaintiff, Kalidhun Chuttapadhyaya.

With reference to the minor plaintiff, Krishnadhun Chuttapadhyaya, the question which we have to decide is more difficult. He was a minor when the cause of action accrued, and he continued to be a minor when the previous suit was instituted, and also when the present suit was instituted. Now, in the previous suit, No. 38 of 1872, he was represented by his major brother. There is no contention that, according to the law then in force, he was not properly represented; and we must, therefore, assume that he was duly represented in that suit through his brother acting as his guardian and next friend. This being so, he is as much bound by the decision as if, being of full age, he had been a party—(*Gregory v. Molesworth* (3 Atk., 626).

Unless the previous suit is a bar to the present suit, the minor can sue by a next friend at any time during his disability, or in person within three years after attaining his majority; and the present suit would not, therefore, be barred by limitation so far as the minor is concerned (see s. 7 of the Indian Limitation Act, XV of 1877).

But the question is raised—Has the cause of action been split, is the present suit not maintainable, because a previous suit has already been brought upon the same cause of action? It is contended on behalf of the defendant, respondent, that the cause of action was the [487] non-delivery of the accounts to which the plaintiffs were entitled; and that, as they asked in the former suit merely for a declaration that they were entitled to have an account from the defendant, and omitted to ask for the consequential relief which the Court would have been able to afford them in that suit, they cannot now ask to have an account taken and to have a decree for such sum as may be found due upon the taking of this account, because this is really suing for another portion of a single claim arising out of the same cause of action, the previous suit having been brought for one portion of the same claim.

It is important to observe that the previous suit was instituted while the old Code, Act VIII of 1859, was in force. There is an important difference between the language of s. 7 of that Code and the language of the corresponding section (43) of the present Code. Section 7 was as follows:—"Every suit

shall include the whole of the claim arising out of the cause of action, but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of the Court. If a plaintiff relinquish or omit to sue for *any* portion of his claim, a suit for the portion so relinquished or omitted shall not afterwards be entertained."

Section 43 consists of two portions. The first portion, until altered by the amending Act, XII of 1879, was almost *verbatim* the same as the above s. 7. The second portion is wholly new. The following are the two portions of the section, as they now stand, since the passing of the amending Act :

First portion.—"Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. If a plaintiff omit to sue in respect of, or intentionally relinquish, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished."

Second portion.—"A person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies, but if he omits (except with the leave of the Court obtained before the first hearing) to sue for any such remedies, he shall not afterwards sue for the remedy so omitted."

The questions which arise upon these sections are—

First.—Do the claim (a) to have a decree declaring the right to an account, and the claim (b) to have an account taken by the Court and a decree for the amount found to be due upon taking such account, arise out of the same cause of action ?

[488] *Second.*—Are (a) and (b) portions of one claim, or are they separate claims ?

Third.—Are what is asked in (a) and what is asked in (b) remedies or portions of one remedy, and so different from claims or portions of the same claim ?

We think that, if the present suit could have been maintained under the old Code, the previous suit having been instituted under that Code, the alteration of language in s. 43 of the new Code would not have the effect of rendering this present suit not now maintainable. We think that this is the effect of s. 6 of the General Clauses Act, I of 1868.

The meaning of the term 'cause of action' has undergone considerable discussion in connection with different contexts in which it has been used by the Legislature. The 59th section of the 9th and 10th Vict., c. 95 (an Act for the more easy Recovery of small Debts and Demands in England), enacted, that "it shall not be lawful for any plaintiff to divide any cause of action for the purpose of bringing two or more suits in any of the said Courts," &c. In *Grimbley v. Aykroyd* (12 Jur., 357) the facts were as follow :—The defendant was a railway contractor employing a large number of labourers, whom he paid partly in cash and partly by tickets, which were orders on tradesmen for goods. The plaintiff was a grocer, and by the defendant's order, as he alleged, he supplied articles to a number of the labourers who presented to him these tickets. Not having been paid, he commenced in the County Court 228 actions—one on each ticket—against the contractor. It was decided that he could not do this—that the understanding in the case of goods supplied by a tradesman, where the debtor has a bill running on from day to day, is that each item shall be united with other items and form one demand. The Court

of Exchequer were of opinion that the term 'cause of action' in the above context meant cause of one action, and was not to be limited to an action on one separate contract—also that it was not "intended to cover all contracts executed, however dissimilar in character, that could be included in one indebitatus count, which, according to the modern practice, may comprise any number of separate unconnected contracts, whenever made, each having ended in a debt before the commencement of the suit." The modern practice here spoken of is incorporated in Order XVII, rule 1, of the Rules of Court made under the Supreme Court of Judicature Act; and in s. 8 of the old, and in s. 45 of the new Code, [489] which allow causes of action by and against the same persons to be joined in the same suit. The case of *Grimbley v. Aykroyd* (12 Jur., 357) was followed in *Wood v. Perry* (3 Exch., 442), and it was again held, that 'cause of action' meant 'cause of one action,' and was not to be limited to an action upon one separate contract. These two cases were followed by the Court of Common Pleas (JERVIS, C.J.) in *Bonsey v. Wordsworth* (2 Jur., N. S., 491). In the case now before us there is no contract. The right to have an account arises out of the relation of the parties. It may be said that the right to have the account taken in the particular instance arises out of the antecedent right to an account; and the right to receive the amount found due on the taking of the account arises out of the two rights first mentioned; but it would seem clear that all these rights in the particular case constitute one cause of action, —i.e., according to the above decisions, the cause of one action: that there was in fact *eadem causa petendi*, —i.e., as rendered by Lord Westbury in *Hunter v. Stewart* (31 L. J., Ch., 346), the same ground of claim, or one and the same case for relief.

The meaning of the term 'cause of action' was again considered in connection with the 18th section of the Common Law Procedure Act, 15 and 16 Vict., c. 76, which allowed a British subject residing out of the jurisdiction of the Superior Courts, in any place except in Scotland or in Ireland, to be sued in any of those Courts, if the Court or a Judge were satisfied upon affidavit that there was "a cause of action which arose within the jurisdiction, or in respect of a breach of a contract made within the jurisdiction," &c. In *Allhusen v. Malgarejo* (37 L. J., Q. B., 169; s.c., L. R., 3 Q. B., 340), the Contract was made abroad, but was to be performed in England. The breach, therefore, took place in England. The Court of Queen's Bench held, that the cause of action within the meaning of the 18th section of the Common Law Procedure Act had not arisen within the jurisdiction, and that the contract must be made and the breach take place within the jurisdiction in order to bring the case within the section. In other words, the term 'cause of action' was held to include both the contract and the breach. This case was followed by the Court of Queen's Bench in *Cherry v. Thompson* (L. R., 7 Q. B., 573). The Court of Common Pleas, on the other hand, were of opinion that 'cause of action' in this section meant not the whole cause of [490] action, i.e., the contract and breach, but the act on the part of the defendant which gives the plaintiff his cause of complaint, i.e., the breach—*Jackson v. Sprittall* (L. R., 5 C. P., 542),

In the case of *Durham v. Spence* (L. R., 6 Exch., 46), the Judges of the Court of Exchequer were divided in opinion. Pigott and Cleasby, BB., took the same view as the Court of Common Pleas. Kelly, C. B., taking the view of the Court of Queen's Bench, thus expressed himself:—"If the words 'cause of action' are to be read as equivalent to the words breach of contract, I can see no reason why, inasmuch as the latter words are used in the second branch of the alternative, they should not also have been adopted in the first, instead

of the ambiguous phrase 'cause of action.' But, further, it appears to be contrary to the plain and ordinary meaning of the terms, to say that the act, which thereby completes the cause of action, is the cause of action. Of itself, the act or omission, the non-payment, non-acceptance, or non-delivery, does not constitute a cause of action; what makes it such, that without which it would have no legal quality at all, is the contract that the person, whose default is complained of, should pay, accept, or deliver. To make up a cause of action, therefore, it is necessary to import the preceding contract."

- CLEASBY, B., who took the contrary view, said: "Now the cause of action must have reference to some time, as well as to some place; does then the consideration of the time when the cause of action arises give us any assistance in determining the place where it arises? I think it does. The cause of action arises when that is not done which ought to have been done, or that is done which ought not to have been done. But the time when the cause of action arises determines also the place where it arises, for when that occurs which is the cause of action, the place where it occurs is the place where the cause of action arises. I cannot avoid the conclusion that a cause of action arises where that takes place which first makes a cause of action; the contract does not make a cause of action; but a cause of action does arise when and where the person who has entered into the contract does or omits to do that which gives a cause of action. But the whole cause of action, in the sense which makes it include both the contract and the breach, arises nowhere."

In the case of *Vaughan v. Weldon* (L. R., 10 C. P., 17), it was announced that the Judges of all the Courts had agreed to follow the view taken by the [491] Court of Common Pleas in *Jackson v. Spittal* (L. R., 5 C. P. 542); and, in accordance with this view, rule 1 of Order X now provides that service out of the jurisdiction may be allowed, whenever the contract which is sought to be enforced or rescinded was made or entered into within the jurisdiction, and whenever there has been a breach within the jurisdiction of any contract, wherever made.

This view appears to be in unison with the ordinary use of the word 'cause' in the sense of the immediate or proximate cause. If a man is killed by a gunshot wound, we say that the wound is the cause of death. A surgeon will go even nearer to the effect and will say that the cause of death was shock to the system or loss of blood from the wound. Now the wound could not have been caused without a gun and a bullet and gunpowder; but none of these is ordinarily spoken of as the cause of death. If a man is injured by a blow of a club, it is the blow, not the club, that is spoken of as the cause of the injury. If a person is in grief on account of the death of a child or a friend, the cause of grief is the death, not the child or the friend; though if the child had never existed, the grief could not have been caused. "It were infinite," said BACON, "for the law to consider the causes of causes and their impulsions one of another; therefore it contenteth itself with the immediate cause."

In many of the cases above referred to, the meaning of the term 'cause of action' was considered only in connection with contracts. But the term, as used in the Code of Civil Procedure, has a much wider meaning, and applies to torts as well as contracts. Mr. Austin's definition of a 'right' also includes both:—"Right—the capacity or power of exacting from another or others acts or forbearances—is nearest to a true definition. I say that a party has a right, when another or others are bound or obliged by the law to do or to forbear towards or in regard of him" (Lecture XVI). If we accept this definition

of a 'right,' every infringement or violation of a right affords a cause of action. In this view the origin of the right is immaterial, and this is in accordance with the principle of Roman law that the identity of the question is not destroyed by the origin of the right being different—See Savigny, p. 412, *Chinniya Mudali v. Venkatachella Pillai* (3 Mad., H. C. Rep., 320), *Kashee Kishor Roy Chowdhry v. Kristo Chander Sandyal Chowdhry* (22 W. R. 464), *Denobundhoo Chowdhry v. Kristomonee Dossee* (I. L. R., 2 Cal. 152), [492] and the *Sivagunga case* (11 Moore's L. A., 50). In the present case the defendant is bound or obliged by law to do an act or acts towards the plaintiffs, - i.e., to render a proper account and pay the amount due thereupon. In other words, the plaintiffs have the power of exacting these acts from the defendant. It is the refusal to do these acts the violation of this right - that constitutes the cause of action. It may be said that there are two acts --(i) the rendering the account, (ii) the payment of the amount due thereupon; that there are therefore two violations two rights - two causes of action. The better view is, that the whole thing constitutes one act: but those who will not concede this, must admit that the two acts, if two they are, are more closely connected so as to constitute a cause of one action than the 228 acts in *Crimbley v. Aykroyd* (12 Jur., 357). The view that every right of action arises from an injury or violation of some other right was Mr. Austin's view, and though it has been objected to and severely criticized (see, for example, the remarks of Mr. Justice HOLLOWAY in the case of *Pattaravay Mudali v. Audimula Mudali*, 5 Mad. H. C. Rep., 419), it is the view which, as most practically useful, has been finally adopted by the Courts in England, as already shown.

The term 'cause of action' was used in s. 2 of the old Code of Civil Procedure: "The Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or parties under whom they claim." If there may be several claims or remedies in respect of one cause of action, and if one only be made or asked, and the cause of action be heard and determined thereupon, it may well appear that this section is a bar to the other claims or remedies being made or asked. There are many cases which support this view; and if this is so, s. 2 of the old Code includes all that is in s. 7 of the same Code and s. 43 of the present Code. The term 'cause of action' in this context was found embarrassing, and it is not used in s. 13 of the new Code, which corresponds with s. 2 of the old Code.

The term 'cause of action' was used in s. 5 of the Beng. Reg. II of 1803; is used in s. 5 of the old Code; in s. 17 of the new Code; and in s. 12 of the Letters Patent (1862) of the High Court all which sections allow a suit to be instituted in the Court with which they are respectively concerned, if the cause of action shall have arisen within the local limits of its jurisdiction. The meaning [493] of the term in these sections has been discussed in several cases, which I now proceed to notice.

I shall first refer to those cases in which the same view is taken as was taken by the Court of Queen's Bench. In the case of *Desouza v. Coles* (3 Mad., H. C. Rep., 384), HITTLESTON, J., dealing with a case under s. 12 of the Letters Patent, examined the whole of the cases in a very elaborate judgment, and came to the conclusion that the term 'cause of action' in the above section meant the whole cause of action,—that is, both the contract and the breach: and HOLLOWAY, J., took it "to be abundantly clear on authority, English and Roman, that, in actions arising from obligations, it is the obligation and its

breach which are together the cause of action " an opinion which he expressed still more strongly in the later case of *Pattaravy Mudali v. Audimula Mudali* (5 Mad. H. C. Rep., 419). In the case of *Rajendra Rau v. Rama Rau* (1 Mad. H. C. Rep., 436), the Madras High Court had already taken the same view. It may be observed that, in both these cases, no particular place had been fixed for the payment of the money; and that, therefore, there might have been some difficulty in saying that the breach took place within the jurisdiction. In the case of *Kishen Kinkur Ghose v. Burroda Kant Roy* (Marsh., 533), the Calcutta High Court (PEACOCK, C. J., and LEVINGE, J.) held, that the term 'cause of action' meant the whole cause of action; and that, in a suit for breach of contract, not only must the contract have been made, but the breach must also have been committed within the jurisdiction. In the case of *The Indian Carrying Company v. Macarthy* (1 Ind. Jur., N. S., 61), a promissory note was delivered out of the jurisdiction, but was payable within the jurisdiction; and PHEAR, J., held, that the cause of action did not arise within the jurisdiction because the whole cause of action had not arisen within the jurisdiction. The same learned Judge took the same view in *Hajibai Das v. Bhagwan Das* (7 B. L. R., 102). All these cases were decided before the case of *Vaughan v. Weldon* (L. R., 10 C. P., 47), in which, as has already been pointed out, all the Courts in England agreed to adopt the view taken by the Court of Common Pleas.

Turning now to the cases in which the contrary view has been adopted, we find that they are at least as numerous, and one of them has the authority of the Privy Council. In the case of *Lachmee Chand v. Zorawar Mull* (8 Moore's I. A., 291), a contract was made at Rutlam, in the Independent State of Malwa, between a firm residing and carrying on business at Muttra within the jurisdiction of the Agra Court, and another firm carrying on business at Rutlam, for the establishment of partnership for the purchase and sale of opium. This partnership was carried on principally at Muttra, and the business was there conducted with the capital advanced by the Muttra Firm. The partnership books were kept at Muttra, and a balance was struck at Muttra at the close of the partnership, which was attended with loss. Upon this balance a debt was due by the Rutlam Firm to the Muttra Firm. The Muttra Firm sued for this debt in the Agra Court. This Court, and the Sudder Court on appeal, held, that the cause of action had not arisen within the jurisdiction, because the contract was made at Rutlam, out of the jurisdiction. The Privy Council reversed this decision, holding that the cause of action had arisen within the jurisdiction of the Agra Court, because Muttra was the central place of business; because the partnership books were kept at Muttra, and the partners would there have recourse to the books to ascertain the state of the transaction between them; and, if in the result a balance was due to either party, Muttra would be the place where the payment of that balance would have to be made. In the case of *DeSouza v. Coles* (3 Mad. H. C. Rep., 384), already referred to, HOLLOWAY, J., considered that this case established the following propositions:—

(i) The making of the contract is a matter perfectly indifferent, and is no part of the cause of action.

(ii) The place at which an obligation is to be performed is its seat and the place of jurisdiction.

In the case of *Chunilal Maniklabhai v. Mahipatrawalal Khundu* (5 Bom. H. C. Rep., A. C. J., 33), a contract to sell and deliver goods to the

defendant was made at A. The goods were to be delivered at B; and, in default of delivery, the value of the goods was to be paid at the market-rate of A. Default was made; and it was held, in an action to recover the value of the goods, that the cause of action had arisen at B, where the breach took place.

In the Full Bench case of *Premshook v. Bheekoo* (3 Agra H. C. Rep., 242), the consideration for a bond passed at D. The defendant executed the bond at S. The money was payable to the plaintiff at D; and it was held, that the cause of action arose at D.

In this state of the authorities it may well be that the meaning of [495] the term 'cause of action,' which was finally adopted by the Courts in England in the case of *Vaughan v. Weldon* (1 L. R., 10 C. P., 47) ought to be followed in this country. In this case now before us, the defendant was bound to render an account to the plaintiffs. By refusing to render that account, he infringed or violated the plaintiffs' right, and thus gave the plaintiffs a *causa petendi*, a cause of action—a ground of claim. If this *causa petendi* did not exist, the plaintiffs would have no ground upon which they could ask the Court (a) to declare them entitled to an account; (b) to take this account; or (c) to make a decree for any sum of money which may be found to be due to them upon taking such account. I think, therefore, that (a), (b), and (c) arise out of the same cause of action.

Then come the two questions:—

Are (a), (b), and (c) portions of the same claim, or are they separate claims?

Are (a), (b), and (c) portions of the same remedy, or are they separate remedies?

What is a 'claim' as distinguished from a 'remedy.' A 'claim (*clamer* *clamer*)' is a demand of right, a challenge of interest of something which is not in the possession of the claimant. A remedy is the legal means to recover a right. If A is entitled to recover a debt of one hundred rupees from B, A makes a claim for one hundred rupees; and the remedy he asks is a decree for rupees one hundred with costs, which can be executed in the manner provided in the Code of Civil Procedure so as to compel B to pay a hundred rupees to A. The mode in which the decree is to be enforced (see ss. 252 to 255, and 259 to 265, of the Code of Civil Procedure) is never stated in the plaint, and can scarcely be regarded as a remedy within the meaning of the second portion of s. 43 of the Code. If A is entitled to an estate which is in the possession of B, A makes a claim for the estate, and the remedy which he asks is a decree for possession which can be executed by turning B out of possession and putting A into possession. If A made a claim for fifty rupees in the first case, intending to make a second claim for the other fifty rupees; or if, in the second case, A made a claim for a portion of the estate only, intending to make a further claim for the remaining portion, it is clear that the claim would be split or divided in each case.

The case of more than one remedy in respect of the same cause of action (in the unamended Code of 1877, it was 'in respect of the [496] same claim') is not so simple. From the instances above given, the remedy appears to be the mode of enforcing the legal claim. In this view a case of more than one remedy seems to suppose more than one claim. The words 'more than one remedy' in s. 43 can scarcely mean a remedy against more than one person—*Subeer Khan v. Kullu Das Dey* (1 W. R., 199). The recovery of

immoveable property, and the recovery of mesne profits, are treated, not as separate remedies, but as separate causes of action (s. 44¹). In mortgage cases we get more than one remedy—*Doss Money Dossee v. Jonmenjoy Mullick* (1. L. R., 3 Cal., 363; s.c. 1 C. L. R., 447), *Syud Emam Momtazodeen Mahomed v. Haran Chunder Ghose* (14 B. L. R., 408; s.c., 23 W. R., 187). In the following cases also, perhaps, we find instances of more than one remedy in respect of the same cause of action :—*Okhoy Coomar Chuttopadhyaya v. Mahatap Chunder Bahadoor* (1. L. R., 5 Cal., 21), where a patnidar, who had previously obtained a decree for abatement of rent, was allowed to maintain a second suit for a refund of the excess rent paid before the institution of the suit for abatement ;—*Tarini Prasad Ghose v. Raghab Chandra Banerjee* (5 B. L. R., 184; s.c., 13 W. R., 203), *Tarini Prasad Ghose v. Khudumani Debia* (5 B. L. R., 187; s.c., 13 W. R., 261), *Lalla Luchmun Sahoy v. Ramsarn Sandyal* (20 W. R., 144), and *Routledge v. Hislop* (2 B. and F., 519). In many cases there is an option of suing on the contract, or for breach of the contract, and in these cases there are more than one remedy, but the remedies are alternative.

It is not very easy to define what constitutes a 'claim' as distinguished from a 'remedy' for the former appears to include the latter to some extent. Doubtless the two terms were intended to overlap, and the second portion of s. 43 was added for more abundant caution and in consequence of the different form in which s. 2 of the old Code was drafted, when it became s. 13 of the new Code. A declaratory decree can scarcely be termed a 'remedy,' although there are cases—see *Tulsi Ram v. Gangra Ram* (1. L. R., 1 All., 252)—in which it is spoken of as a remedy. I can understand an injunction being a relief or remedy—*Marsh v. Keith* (1 Drew and Sm., 312), but I do not understand how a decree, which declares a right merely and gives no relief, can be termed a remedy.

I think that (a), (b), and (c) ought to be regarded as portions of one [497] claim arising out of the same cause of action. I take it that (a), (b), and (c), and the execution of the final decree, all together, constitute one remedy. Without (a) there cannot be (b); and without (c) and the execution of the decree there is no effectual remedy.

In this view there was a splitting of the cause of action within the meaning of s. 7 of the old Code of Civil Procedure, and the present suit is barred.

The following cases are, however, opposed to this view :—

(i) *Sabeer Khan v. Kali Das Dey* (1 W. R., 199). In this case a taluq was sold for arrears of rent, and certain surplus sale-proceeds were deposited in Court. This taluq had belonged to three persons, A, B, & C, but C's share (which was two annas) had been sold in execution in 1265, and purchased by P, the plaintiff. P had applied to the Collector for a two-anna share of these

Only certain claims to be joined with suit for recovery of land.

*[Sec. 11.—Rule c.—No claim or fraction shall, unless with the leave of the Court, be joined with a suit for the recovery of immoveable property, or to obtain a declaration of title to immoveable property, except—

(a) Claims in respect of mesne profits or arrears of rent in respect of the property claimed,

(b) Damages for breach of any contract under which the property or any part thereof is held, and

(c) Claims by a mortgagee to enforce any of his remedies under the mortgage.

Claims by or against executor, administrator, or heir.

Rule b. No claim by or against an executor, administrator or heir as such, shall be joined with claims by or against him personally, unless the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor, administrator or heir.]

surplus sale-proceeds; but as his purchase had not been registered, the Collector would not recognize him. *P* brought a suit against the other co-sharers in the taluq in order to obtain a decree declaring his right to a two-anna share. Having succeeded in that suit, he then brought a second suit to recover from the co-sharers, including *C*, the rent for the period prior to his purchase, which rent had been satisfied out of the sale-proceeds of the taluq. It was held, that his second suit could be maintained, and that there had been no splitting of the cause of action within the meaning of s. 7 of the old Code. With this case compare the cases of *Tarini Prasad Ghose v. Raghab Chundra Banerjee* (5 B. L. R., 184; s.c., 13 W. R. 203) and *Tarini Prasad Ghose v. Khudumani Debta* (5 B. L. R. 187; s.c., 13 W. R., 261).

(ii) *Tulsi Ram v. Ganga Ram* (1. L. R., 1 All., 252). In this case the father of *B* had executed in favour of *A* a deed of sale of certain land on the 23rd December 1862, but had failed to put *A* in possession, whereupon *A* sued *B*, on the second June 1864, for a declaration of his rights under the deed of sale, and obtained a declaratory decree. When this suit was instituted, *A* was out of possession; and was, therefore, in a position to ask for possession as consequential relief. *A* brought a second suit to obtain possession. The Court of First Instance held, that this second suit was barred by s. 7 of the old Code. The lower Appellate Court considered that this section applied only to cases in which the plaintiff omits to seek relief in respect of a portion of his claim, and does not apply to cases in which, although he may be entitled to claim [498] more than one kind of relief, he seeks for the time one remedy only. The Allahabad High Court approved of this view. They said:—"We have not now to consider whether the plaintiff ought to have obtained that relief in an ordinary suit for possession. We have to determine whether, in seeking a declaratory decree to establish his purchase-deed, and omitting to sue for possession, he can be held to have omitted any portion of the claim arising out of the cause of action he then put in suit. The cause of action he then put in suit did not necessarily involve any breach of the contract to deliver possession. The plaintiff might have obtained a declaratory decree without entering on the question of possession."

(iii) *Darbo v. Kesho Rai* (1. L. R., 2 All., 356). In this case, which was decided by a Full Bench, the plaintiff, a widow, upon her husband's death, sued one Kesho Rai for a declaration of her title to succeed as her husband's heir to certain property, and for a declaration that the defendant was not the adopted son of her late husband. The Court of First Instance dismissed her suit, on the ground that she was not in possession of a large portion of the property, and should, therefore, have sued for possession. On appeal the High Court held, that she was entitled for the protection of property in her possession to a decree; that the defendant was not the adopted son of her deceased husband; and in respect of property, of which she was not in possession, the High Court referred her to a suit for possession. She then brought a second suit for possession of this latter property, and the High Court held, that this second suit was not barred by s. 7 of the old Code. They said:—"She is seeking a different relief, and the relief she formerly sought was refused her in respect of this property, on the ground that the Court ought not to exercise its discretionary power of awarding a declaration of title when relief can be obtained by an ordinary suit for possession." It is to be observed in connection with this case, that the High Court had in the first suit expressly referred the plaintiff to a suit for possession of the property of which she was not in possession; and, as nothing was heard and determined as to this property, the principle of *res judicata* could not apply.

(iv) *Gobind Mohun Chuckerbutty v. Sheriff* (1. L. R., 7 Cal., 169). In this case the plaintiff employed the defendant to collect certain debts. The defendant's term of service expired in November 1864. He refused to render any accounts, and the plaintiff, in 1875, sued him for the delivery of his accounts and obtained a decree. In execution of [499] this decree the plaintiff obtained accounts on the 11th June 1877, and after examining them he found that the defendant had misappropriated a sum of Rs. 500. He then instituted a suit in September 1877 to recover this amount, and also prayed for a decree for whatever sum might be found due on taking the accounts. The defendant contended that the suit was barred by ss. 2 and 7 of the old Code, because the plaintiff had prayed for the same relief, and the Commissioner appointed by the Court had found that Rs. 83 only were due to the plaintiff. The learned Chief Justice said :—"The decree merely orders the defendant to render proper accounts to the plaintiff, and it has not been proved how or why the Commissioner was appointed, nor that the report of the commission was approved by the Court. It was, therefore, competent for the plaintiff, after the accounts had been filed by the defendant, and adjusted by the Commissioner, either to accept the money found by the Commissioner to be due to him, or to sue the defendant in a fresh suit for the sums which he now claims." The learned Chief Justice then notices the *mofussil* practice in suits for accounts, and adverts to this practice and that on the Original Side of the High Court. He says :—"On the Original Side, the prayer of the plaint is not only for an account, but to have the account adjusted, and the balance ordered to be paid to the party entitled to it. The case is referred to the Registrar for this purpose; and after the account has been taken and the balance ascertained by the Registrar, the case comes again before the Court, and a final decree is made. Both parties have a full opportunity, if they please, of going into evidence before the Registrar, and afterwards objecting to the Registrar's findings; and the whole matter is thus adjusted finally in one suit."

It will be important to examine some of the cases decided in England upon the question of splitting claims. In the case of *Lord Bagot v. Williams* (3 B. and C., 235), Williams the defendant was the plaintiff's steward between November 1821 and April 1822. He received various sums between these two dates, and two other sums in June 1822. He ceased to be the plaintiff's steward in September 1822. The plaintiff sued him in an inferior Court at Ruthven in Wales for the money received by him on the plaintiff's behalf and obtained a decree. A subsequent suit was then brought for a further amount, and the learned Judge, before whom the case came, was of opinion, that whatever constituted a subsisting debt at the time when the first suit in the inferior Court was instituted, and was known to be so, was to be considered as [500] included in and constituting one entire cause of action. A rule to set aside the verdict was obtained but discharged. This was clearly a case of a second suit for a portion of the same claim. In the case of *Dunn v. Murray* (9 B. and C., 780), a servant, who had been wrongfully dismissed before the expiry of the year of service, brought his action before the expiry of the year. There were counts for wages, work, and labour, &c. There was then a reference of all matters in difference to an arbitrator, who gave the plaintiff a sum equal to wages up to the date upon which the action was commenced. The plaintiff then brought a subsequent suit for damages for wrongful dismissal. TENDERDEN, C.J., said :—"The present claim was within the scope of the former reference: it was the duty of the plaintiff to bring it before the arbitrators, if he meant to insist upon it as a matter in difference; and he cannot now make it the subject-matter of a fresh action." This case may be regarded as one of several

remedies arising out of the same cause of action. In the case of *Henderson v. Henderson* (3 Hare, 100), the next-of-kin of an intestate filed their bill in equity in the Supreme Court of Newfoundland against A, the brother and deceased partner of the intestate, for an account of the estate of the father of A and of the intestate, possessed by A, and an account of the partnership transactions, and the dealings of A with the estate since the death of the intestate. The bill was taken *pro confesso* against A in the Colonial Court, and, on a reference, the Master reported that certain sums were due to the several next-of-kin on the account of the estate of the intestate's father possessed by A; but that no account between A and the intestate had been laid before him. The Supreme Court decreed that the sums found by the Master to be due to the next-of-kin and the costs should be paid to them by A. The next-of-kin then brought their actions in England against A upon the decree. A filed his bill in Chancery against the next-of-kin and personal representative of the intestate, stating that the intestate's estate was indebted to him on the partnership accounts, and on private transactions; alleging various errors and irregularities in the proceedings in the Supreme Court, and that A intended to appeal therefrom to the Privy Council; and praying that the estate of the intestate might be administered, the partnership accounts taken, the amount of the debt due to A ascertained and paid, and the next-of-kin restrained by injunction from proceeding in their actions. A demurrer for want of equity was allowed on the ground that the whole of the matters were in question between the [501] parties, and might properly have been the subject of adjudication in the suit before the Supreme Court of Newfoundland. The Vice-Chancellor said:—"I believe I state the rule of the Court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertance, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. Those who have had occasion to investigate the subject of bills of review in this Court will not discover anything new in the proposition I have stated, so far as it may apply to proceedings in this country."—See and compare *Unatara Devi v. Krishna Kamini Dasi* (2 B. L. R., A. C., 102), and the same case before the Privy Council (11 B. L. R., 158), *Muthu Madava Naik v. Sevatta Muthu Madava Naik* (7 Mad. H. C. Rep., 160), *Janaki Ammal v. Kamalath Ammal* (7 Mad. H. C. Rep. 263), *Kashe Kishore Roy Chowdhry v. Krishto Chunder Sandyal Chowdhry* (22 W. R. 464), and *Denobundhoo Chowdhry v. Kristomonee Dasi* (I. L. R. 2 Cal., 152).

In the case of *Bowden v. Horne* (7 Bing., 716), it was determined, that if a plaintiff obtains an interlocutory judgment for his whole claim, but afterwards attends before the Master to have his damages assessed on one item only, and enters a *nolle prosequi* as to the others, this will bar any future action for the last-mentioned items. The case of *Hunter v. Stewart* (31 L. J., Ch., 346) is a case which the profession have found some difficulty in reconciling with the other decisions on the same subject. In that case a bill in equity had been filed in the Supreme Court at Sydney, by which the plaintiff

claimed to be admitted as a shareholder in respect of certain shares. That bill was dis-[502]missed. A fresh bill was filed in the Court of Chancery in England, and it was held, that the dismissal of the first bill at Sydney was not conclusive as against the plaintiff. But the real ground of the decision was, that the allegations and equity of the bill at Sydney were different from the allegations and equity of the bill in England. Lord WESTBURY said :—" It is a different equity. It is indeed true that the case made by the second bill must be taken to have been known to the plaintiff at the time of the institution of the first, and might have been then brought forward, and it may be said, therefore, that it ought not now to be entertained ; but I find no authority for this position in civil suits, and no case was cited at the Bar, nor have I been able to find any, in which a decree of dismissal of a former bill has been treated as a bar to a new suit asking the same relief, but stating a different case, giving rise to a different equity." The law here laid down does not accord with the law for India as settled by the decisions above quoted. Whatever force these observations may have in a country in which there is no express statutory provision against the institution of a second suit, such as is to be found in the Indian Code of Civil Procedure, there can be no doubt that they cannot apply where such an express statutory prohibition does exist. In the case of *Moonshee Buzloor Ruheem v. Shumsunnessa Begum* (11 Moore's I.A., 551; s.c., 8 W. R., P. C., 3), their Lordships of the Privy Council were of opinion, that this prohibition, as contained in s. 7 of the old Code of Civil Procedure, is a strict prohibition, not to be controlled by any consideration of the motives of the party to whom it is to be applied, nor limited by what the Judges who apply it may suppose to have been the reasons for enacting it. In *Daniel's Chancery Practice* (5th ed., p. 569), it is stated that " a decree or order of the Court, by which the rights of the parties have been determined, or another bill for the same matter dismissed, may be pleaded to a new bill for the same matter; and this, even if the party bringing the new bill were an infant at the time of the former decree: and, if the plaintiff, after the case has been set down to be heard, causes it to be dismissed on his own application, or if the cause is called on to be heard in Court, and the plaintiff makes default, and by reason thereof the bill is dismissed, such dismissal, unless the Court otherwise orders, is equivalent to a dismissal on the merits, and can be pleaded in bar to another suit for the same matter." At page 280 of the same work it is stated that " a bill must be brought for the whole subject; and the Court will [503] not permit a bill for part of a matter only, so as to expose a defendant to be harassed by repeated litigations concerning the same thing; it, therefore, as a general rule, requires that every bill shall be so framed as to afford ground for such a decision upon the whole matter, at one and the same time, as may, as far as possible, prevent future litigation concerning it. It will not allow a plaintiff who has two distinct claims upon the same defendant, or to whom the same defendant may eventually prove liable, to bring separate bills for each particular claim, or to bring a bill for one and omit the other, so as to leave the other to be the subject of future litigation; and it is a good cause of demurrer that a bill is brought for part of a matter only, which is properly one entire account, because the plaintiff shall not split causes and make a multiplicity of suits; and the ground of this rule is the prevention of circuity of remedy." The rule strictly applies where " the whole matter is capable of being immediately disposed of: but if the situation of the property in dispute is such, that no immediate decision upon the whole matter can be come to, the Court may lend its assistance to the extent which the actual state of the case, as it exists at the time of the filing of the bill, will warrant." The

rule that a plaintiff will not be allowed to make two litigations when the whole matter can be disposed of in a single suit, is based upon the maxim *nemo debet bis vexari pro eadem causâ*.

But it may be said that the rule as to declaratory decrees really engrafts an exception upon this general principle—it may be said that it could not have been the intention of the Legislature, when allowing a declaratory decree to be made by a Civil Court, to preclude the party, in whose favour that decree is made, from afterwards seeking consequential relief. In order to deal with this argument, some examination of the law relating to declaratory decrees in this country will be necessary. The rule that a Civil Court may make a declaratory decree without consequential relief was first enacted in a statutory form in the 15th and 16th Viet., c. 86, s. 50. That section was re-enacted in India for the old Supreme Courts in s. 29 of Act VI of 1851. It was then re-produced in the same form as s. 15 of the old Code of Civil Procedure:—"No suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby; and it shall be lawful for the Civil Courts to make binding declarations of right without granting consequential relief." Some doubt and difference of opinion at first prevailed as to the scope of this section, and in several cases the High Courts appear to have thought that a very wide discretion indeed was conferred by this provision upon Civil Courts in India. But in the case of *Strimathoo Moothoo Vija Rugoonadah Ranees Kolandassuree Natchiar v. Dorasinga Tever* (L. R., 2 I. A., 169; s.c. 15 B. L. R., 83), the Privy Council, after examining the authorities, English and Indian, expressed a very decided opinion that the Indian enactment is to be construed in the same manner as the English Courts have construed the similar provision in the English Statute. Their Lordships then referred to the cases of *Jackson v. Turnley* (22 L. J., ch., 949) and *Rooke v. Lord Kensington* (2 K. & J., 753) as deciding that the English section contemplated a case in which the Court is capable of giving consequential relief. In the first of these cases Vice-Chancellor KINDERSLEY, referring to the words of the section—"It shall be lawful for the Civil Courts to make binding declarations of right without granting consequential relief" said:—"This seems to import that it supposes a case in which the Court was capable of granting consequential relief, if consequential relief had been asked or desired." In the second case, Vice-Chancellor WOOD said:—"The form of that section of the Statute implies that there is a consequential relief which might be granted in each case when the right has been so declared, but that the parties are not to be compelled to ask for that relief, and they may satisfy themselves by simply asking a declaration of right, and not pursuing the matter further." There are many cases in which a declaration of right may be sufficient for all purposes; but it is one thing to say that a plaintiff may have such a declaration of right without consequential relief; and another thing to say that, if he chooses to rest contented with a declaration merely, he will still have the right to harass his adversary by a second suit for consequential relief. In the case of *Sadat Ali Khan v. Khaja Abdul Gunny* (11 B. L. R., 203, at p. 226), the Privy Council said:—"It must be assumed that there must be cases in which a merely declaratory decree may be made without granting any consequential relief, or in which the party does not actually seek for consequential relief in the particular suit; otherwise the fifteenth section of the Code of Civil Procedure would have no operation at all. What their Lordships understand to have been decided in India on this article of the Code, and in the Court of Chancery upon the analogous provision of the English Statute is, that the Court must see that the declaration of right may be the foundation of relief to be got somewhere." Now, in a country where there are

[305] different Courts, administering different portions of the substantive law, it may be quite possible that a right may have to be established in one Court before consequential relief can be had in another Court. But where the same Court has jurisdiction to declare the right and to grant the consequential relief, there does not exist the same necessity for a provision which allows merely a declaratory decree to be made. If it really were the intention of the Legislature that in every case there may be a declaration of right obtained in one suit, and consequential relief obtained in a second suit, although the declaration of the right and the relief might have been obtained in one and the same suit, I think that harassing litigation would be largely increased in this country by such a provision. The judgment of the Privy Council in the case of *Strimathoo Natchiar v. Dorasinga Tever* (L. R., 2 I. A., 169; s.c., 15 B. L. R., 83) was delivered in February 1875, and probably reached this country a month or two afterwards; and it is observable that s. 42 of the Specific Relief Act, 1877, which was passed on the 17th February 1877, or about two years after this decision, differs materially from s. 15 of the old Code, which was repealed thereby. This section is as follows:—"Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief: Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so." What is the meaning of the term 'right as to any property' in this section? Does it mean an incorporeal right, such a right as is implied by the same term in s. 13 of the Indian Evidence Act—see the Full Bench case of *Gujju Lall v. Futteh Lall* (I. L. R., 6 Cal., 171). Some of the Illustrations appended to the section favour this view, while some of them are not easily reconcilable therewith; at any rate, under this section of the Specific Relief Act, no such declaration could have been made as was made in the case of *Tulsi Ram v. Gunga Ram* (I. L. R., 1 All., 252). And here it may be observed that it is not easy to reconcile the decision in that case with the observation in the case of *Keshoree Lall v. Gobind Ram* (4 All. H. C. Rep., 70), where it was said that, if a declaration of the right to recover damages had been made in one suit, [306] a second suit to recover those damages would be barred by s. 7 of the old Code. The omission in s. 42 of the Specific Relief Act of the words "and it shall be lawful for Civil Courts to make binding declarations of right without granting consequential relief" is significant, and the proviso appears to show that the Legislature intended to restrict bare declarations of right to those cases only in which no immediate consequential relief is possible or necessary. In the case of *Strimathoo Natchiar v. Dorasinga Tever* (L. R., 2 I. A., 169; s.c., 15 B. L. R., 83), their Lordships of the Privy Council expressed their dissent from the view taken by HOLLOWAY, J., that s. 15 of the old Code must be used generally for the purpose of quieting titles; and, as already pointed out, their Lordships intimated their opinion that, in construing this section of the Code, regard was to be had to the construction placed upon the corresponding section of the English Statute by the Courts in England. It will have yet to be decided how far the law as thus settled by the Privy Council has been altered or intended to be altered by s. 42 of the Specific Relief Act; see the case of *Poran Sookh Chunder v. Parbutty Dossee* (I. L. R., 3 Cal., 612).

It will be important to say a few words about the practice as to obtaining an account and a decree for such sum as may be found to be due upon the taking of that account in this country and in England; and this more especially, as

there seems to be an idea that the plaintiff could not have had in a former suit the relief sought in the present suit. The fact that the plaintiff did in a former suit ask to have an account taken by the Court, although this prayer was subsequently abandoned (because, as it would seem, the plaintiff did not wish to pay the additional court-fee stamp) is strong to show that the plaintiff was under no misapprehension on this point. A good summary of the action of account in England is given in Mr. Justice Story's *Work on Equity Jurisprudence*, ss. 447 *et seq.* In an action of account, there were two distinct courses of proceeding. In the first place, the party might interpose any matter in abatement or bar of the proceeding, as for example, that he was not liable to render an account; and, if he failed in this, then there was an interlocutory judgment, that he should account before auditors. After that judgment was entered, the Court assigned auditors who proceeded to take the accounts. This was a common law action, and for reasons to which it is unnecessary to refer here, it was found to be tedious, expensive, and inconvenient. A [507] Court of Common Law could not grant discovery; and a discovery of facts was, in most cases of account, very essential to a complete recovery. It thus became the practice for persons requiring an account to resort to the Court of Chancery: and it was held that the Court having once a rightful jurisdiction of the cause ought to proceed to give relief in order to avoid multiplicity of suits. Thus it happened that Courts of Equity acquired jurisdiction in matters of account; and in accordance with the principle usually followed in these Courts, complete relief is given in one suit (i) by taking an account, and (ii) by making a decree for the amount found to be due to the plaintiff upon the taking of such account. See s. 455 and following paragraphs of Mr. Story's *Work*.

Now the Courts in India are Courts of Equity, and it would seem to be reasonable that the same course should be followed in this country; and that would also appear to have been the intention of the Legislature in enacting both the old and the new Codes of Civil Procedure. Section 181 of the old Code enacted as follows:—"In any suit or other judicial proceeding, in which an investigation or adjustment of account is necessary, it shall be lawful for the Court to appoint such officer or other person as aforesaid (that is, as mentioned in s. 180) to be a commissioner for the purpose of making such investigation or adjustment, and to direct that the parties, or their attorneys, or pleaders shall attend on the commissioner during such investigation or adjustment." The remainder of the section contains further provisions to enable the commissioner to investigate and adjust accounts. Sections 394 and 395 of the present Code contain similar provisions. It thus appears that at the time when the plaintiffs brought their first suit they might have asked and obtained all the relief which they seek in the present case. I may refer to the following authorities as showing that the High Court have on many occasions pointed out and explained the practice in matters of account to the lower Courts in the mofussil--*Syud Shah Ali v. Mussummat Bibi Nasibun* (24 W. R., 70), *Annoda Persad Roy v. Dwarka Nath Gangopadhyaya* (I. L. R., 6 Cal., 754), *Shoshi Bhooshun Pal v. Guru Churn Mookhopadhyaya* (I. L. R., 7 Cal., 89); and page 12 of the Memorandum of Practice prefixed to the edition of the High Court Circular Orders published in 1876.

The questions, then, which we desire to refer to a Full Bench are the following:—

I. If a person, who is in a position to ask (a) a declaration of right [508] and (b) immediate consequential relief, asks and obtains a declaration of right only, can he afterwards maintain a suit for the consequential relief, which he might have asked and obtained in his first suit?

II. If a person, who is entitled to have an account, and a decree for whatever amount may be found due to him upon the taking of such account, asks and obtains merely a decree declaring his right to have an account, can he maintain a second suit for an account, and the amount which may be found due to him upon the taking of such account?

The result will be that, so far as the major plaintiff is concerned, this appeal will be dismissed; and that, so far as the minor plaintiff is concerned, the determination of the appeal will depend upon the decision of the Full Bench upon the questions submitted. If the result of this decision should be that the present suit can be maintained so far as the minor plaintiff is concerned, then there is another question as to which it is desirable to make a few observations. It is said that there is not a single cause of action in respect of the account for the whole of the period from 1262 to Assin 1277, but that there is a separate cause of action in respect of the account of each year. The determination of this question will depend upon the validity of the will, which is to be found at pages 16, 17, and 18 of the Paper-Book. If that will is genuine, according to the direction contained at the close of the first paragraph (page 18), there was to be an yearly adjustment of accounts at the close of each year; and upon that adjustment the surplus profits were to be divided into five equal shares, one share going to each of the five brothers. If the will is established in this suit, or ought to be held to have been established in the previous suit, it may follow that the right of action in respect of the account of each year accrued upon the adjustment directed to be made at the close of the year. This is a point with which, if necessary, we shall deal when the questions submitted to the Full Bench shall have been determined.

Prinsep, J.—As regards the plaintiff Kalidhun Chuttapadhyas, there can be no doubt that the suit is barred. It is necessary, however, having regard to the two decisions of the Allahabad High Court in the case of *Tulsi Ram v. Gunga Ram* (I. L. R., 1 All., 252) and *Darbo v. Kesho Rai* (I. L. R., 2 All., 356), and to the decision in the case of *Gobind Mohun Chuckerbutty v. Sheriff* (I. L. R., 7 Cal., 169), that the question now in issue regarding the minor [509] plaintiff should be determined by a Full Bench. The question which would arise for the determination of the Full Bench is, whether, after having obtained a decree declaring his right to obtain accounts for a certain period from the defendant, the plaintiff can bring a second suit for those accounts and any money due thereon, or whether such a suit is barred by s. 7 of Act VIII of 1859 or s. 43 of the present Code, inasmuch as it relates to a claim arising out of the same cause of action as in the declaratory suit. I, therefore, concur in referring the case, as regards the minor, for the decision of a Full Bench on this point. Should it be held that the suit is not barred, it will be necessary to determine the other points raised on this appeal.

Mr. H. Bell, Baboo Juggut Chunder Banerjee, and Baboo Bama Churn Banerjee for the Appellants.

Mr. Evans and Baboo Ambica Churn Banerjee for the Respondent.

Mr. H. Bell for the Appellants.—The reference gives to the words 'cause of action' a wider meaning than they will bear; the cause of action is confined to the particular suit. The right to account depended on the fiduciary relationship of the parties; out of that relationship a number of causes of action may arise. In the declaratory suit, the issues were—(i) was the defendant the guardian and manager of the minors? (ii) had the accounts been duly rendered? (iii) did the will save him from accountability? The decree simply declared the plaintiffs' right to have an account; the defendant was bound to have given

the account, and if nothing was due, there was an end of the matter. No cause of action for money due can arise till the accounts are taken. The cause of action then is the neglect of the defendant to pay over the money; whether the decree should have been declaratory is a different question. It was open to the Court to have refused a declaratory decree. The essence of a declaratory decree is, that it is the foundation of future relief, as was the case in *Tulsi Ram v. Gunga Ram* (1 L. R., 1 All., 252). The true test of the proper application of s. 7 of Act VIII of 1859 is given in *Rao Kurun Sing v. Nawab Mahomed Fyz Ali Khan* (14 Moore's I. A., 187; s.c., 10 B. L. R., 1). [310] A suit against an executor for an account is no bar to a suit for breach of trust—*Dhonender Chunder Mookerjee v. Mutty Lall Mookerjee* (14 B. L. R., 276). The cause of action is limited to the immediate cause which entitled the party to relief. A plaintiff who has sued for and obtained a decree for an abatement of rent may afterwards sue for refund of rent paid in excess prior to the institution of the first suit, notwithstanding he might have joined the two causes of action—*Okhoy Coomar Chuttopadhyaya v. Mahatap Chunder Bahadoor* (I. L. R., 5 Cal., 24). The true test is, whether it is an integral part of the same cause of action—*Pratap Chandra Burua v. Ram Swarnamayi* (4 B. L. R., F. B., 113), *Balam Bhutt v. Bhoobun Lall* (6 W. R., 78), in which *Buzloor Ruheem v. Shumsoonessa Begum* (11 Moore's I. A., 551; s.c., W. R., P. C., 11) is explained. A suit to declare a right to an account is different from a suit for money due on the account; see *Gobind Mohun Chuckerbutty v. Sheriff* (I. L. R., 7 Cal., 169).

Mr. Evans for the Respondent.—The cause of action was a liability to render an account, and the defendant's refusal is no reason why the plaintiffs should split their cause of action; all points should have been raised in the first suit; the suit is to include the whole claim arising out of the cause of action. The word 'claim' in s. 43 of the Code covers the whole of the demand. [MITTER, J.—That is, a demand to recover something from the defendant; a demand for some remedy; a declaratory decree could not be a claim. [PONTIFEX, J.—It was not necessary to have sued for a declaration. Section 15 of Act VIII of 1859 merely follows the English Act—*Jackson v. Turnley* (22 L. J., Ch., 949).] Declaratory decrees without giving consequential relief are only to be given in England in cases in which there is some equitable relief which might be granted if the plaintiff chose to ask for it—*Rooke v. Lord Kensington* (2 K. & J., 753). The plaintiffs brought this suit to harass the defendant; they had all the accounts with them. The plaintiffs have clearly relinquished part of their cause of action in not asking for the account to be taken: See *Buzloor Ruheem v. Shumsoonessa Begum* (11 Moore's I. A., 551; s.c., 8 W. R., P. C., 11) and *Radha Kishore Debia v. Ram Coomar Chowdhry* (12 W. R., 79): They have split their claim—*Tarnu Prasad Ghose v. Khudumani Debia* (5 B. L. R., 187; s.c., 13 W. R., 261).

The **Opinion** of the Full Bench was as follows:—

Garth, C. J.—In the year 1272, the plaintiffs brought a suit against their uncle, the defendant Shiba Nath Chatterjee, who had been the manager for many years of certain family property in which they were co-sharers. In that suit the plaintiff Kalidhun, who was of age, acted on behalf of himself and of his brother, the plaintiff Krishna Dhun, who was a minor. The object of the suit was to obtain from the defendant an account of the property from the year 1262 to 1277, Fasli; but from the form of the plaint it seemed doubtful whether the plaintiffs meant to sue for the account itself, or only for a declaration of their right to it. The stamp-fee on the plaint was Rs. 10, which would have been the proper stamp if the plaintiffs only sued for a declaration of right; but the defendant took the objection, that the stamp was insufficient, because the plaintiffs had in their prayer apparently asked for an account.

An issue was raised upon this point ; but the Subordinate Judge considered that the plaintiffs' claim was for a declaration of right only, and eventually made a decree to that effect ; and this judgment was afterwards affirmed on appeal by the District Judge. Having obtained that decree, and the defendant having taken no steps to render an account, the plaintiffs, on the 30th of December 1879, brought their present suit " for the amount of cash, Company's papers, and other debts that might be found due by the defendant to the plaintiffs on an adjustment of accounts." In other words, the plaintiffs in this suit sued for the consequential relief, which they undoubtedly might have had in the first suit, if they had only insisted upon it.

The lower Court decided that the suit was barred by limitation, and the plaintiffs appealed to this Court from that decision.

The Division Bench, before whom the appeal was heard, con-[512]sidered that, as regards the plaintiff Kalidhun, the suit was barred : but as regards the other plaintiff, as he was still a minor at the time when the suit was brought, they held that limitation did not apply. They have, however, referred to a Full Bench another and more difficult question which has been raised by the defendant,—namely, whether the suit is barred by s. 7 of Act VIII of 1859, which was the Code of Procedure in force at the time when the former suit was brought ?

That section enacts, that " every suit shall include the whole of the claim arising out of the cause of action ; and that if a plaintiff relinquish or omit to sue for any portion of his claim, a suit for the portion so relinquished or omitted shall not afterwards be entertained."

A provision to the same effect is contained in s. 43 of the present Code, and the substantial question referred to us is Whether the fact of the plaintiffs having omitted to press for an account in the former suit, prevents them from suing for such an account in the present suit ?

If s. 7 stood alone, unqualified by any other provision in the law, it would, indeed, be very difficult to contend, that the present suit is not barred. It is obvious that the plaintiffs' real object in the first suit was to obtain an account from the defendant, and that the declaratory decree, with which they were then content, was only a means to effect that end. It would seem, therefore, impossible to say that, in suing for that decree, they sued for their whole claim in respect of their cause of action.

But then it is contended that s. 15 of the Code is intended to modify s. 7, and removes any difficulty which the plaintiffs might otherwise have had in enforcing their present claim. That section is as follows :—" No suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby ; and it shall be lawful for the Civil Courts to make binding declarations of right without granting consequential relief."

This provision is precisely similar to that of s. 50 of the English Statute 15 and 16 Vict., c. 86, which was passed " for the improvement of the jurisdiction of the Courts of Equity;" [513] and it has received an interpretation from the highest judicial authorities in England, which, as the plaintiffs contend, impliedly, if not expressly, justifies their present suit. It has been held by the Privy Council, in accordance with decisions of the English Courts of Equity, that a declaratory decree cannot be made under s. 15, unless the plaintiff is entitled to obtain some consequential relief. In the case of *Sree Narayan Mitter* (11 B. L. R., 171), their Lordships, quoting with approbation the rule laid down by V. C. WOOD in *Rooke v. Lord Kensington* (2 K. & J., 753), say :—" It has been held

that, under the 15 and 16 Vict., s. 50, a declaratory decree cannot be made unless the plaintiff would be entitled to consequential relief if he asked for it :” and further on in p. 162 of the same judgment they say :—“ It is not a matter of absolute right to obtain a declaratory decree. It is discretionary with the Court to grant it or not, and in every case the Court must exercise a sound judgment as to whether it is reasonable or not, under all the circumstances of the case, to grant the relief prayed for.” And again, “ it must be assumed that there may be cases in which a merely declaratory decree may be made, without granting any consequential relief in the particular suit ; otherwise s. 15 of the Code of Civil Procedure would have no operation at all.”

And in the well-known *Shiva Gunga case* (11 Moore's I. A., 50), Sir JAMES COLVILLE says :—“ It appears, therefore, to their Lordships, that the construction which must be put upon the clause in question (s. 15) is, that a declaratory decree cannot be made, unless there be a right to consequential relief capable of being had in the same Court, or in certain cases in some other Court.”

Having regard to these rulings, the plaintiffs contend, apparently with good reason, that their case comes directly within the scope of s. 15. They might in their first suit [to use the language of V. C. WOOD in *Rooke v. Lord Kensington* (2 K. & J., 753)], have obtained consequential relief if they had pressed for it, but the Court in its discretion thought fit to give them a declaratory decree only ; and as the defendant has disregarded that [514] decree, the plaintiffs have now brought a second suit to enforce their right.

It seems to me that this contention is well founded. I think that s. 15 is intended to modify the provisions of s. 7, and the present case is just one of those to which the section is intended to apply. This was evidently the view taken by the Allahabad High Court in *Tulsi Ram v. Gunga Ram* (I. L. R., 1 All., 252), and I entirely agree with that decision.

It may be that, in the plaintiffs' first suit, the Court did not exercise its discretion wisely in acting upon s. 15, when it might have disposed of the plaintiffs' whole claim at once. There certainly seems no good reason why it should not have done so. But the Subordinate Judge having exercised his discretion in that suit, and given the plaintiffs a declaratory decree only, we are clearly not called upon, nor indeed competent in this suit, to say whether in so doing the Subordinate Judge was right or wrong. We have only to determine whether, having obtained in that suit a declaratory decree, the plaintiffs are barred in this suit from obtaining the account to which they have been declared entitled, and it seems to me that, according to the true meaning of the Privy Council rulings, they are so entitled.

It would indeed seem almost a mockery to empower a Civil Court to declare a plaintiff entitled to relief, and then, when the defendant refuses him that relief and disregards the Court's order, to tell the plaintiff that he is wholly without remedy, and that the Court has no power to assist him.

As s. 15 has now been virtually repealed by s. 42 of the Specific Relief Act and as no similar provision has been re-enacted in the new Civil Procedure Code, it is probable that the result of our present judgment will not be very material in the future.

I am of opinion that the answer to the question referred to us should be that the plaintiffs, under the circumstances, are not barred from bringing their present suit.

The plaintiffs should have their costs of this reference to the Full Bench.

[515] **Prinsep, J.**—No doubt a suit for a declaratory decree without consequential relief would lie, but I have much hesitation in holding that, as in the present case, a suit could be brought for the consequential relief for which the plaintiffs could have asked, but omitted to ask in their former suit. The law now in force, s. 42, Specific Relief Act (I of 1877), provides for such a contingency, and, therefore, I do not think it necessary to differ from the judgment of my learned colleagues.

NOTES.

[I. DECLARATIONS "IN THE AIR"—

The statutory changes in the law may be noted :—

In England, previous to the Chancery Procedure Act, 1852, (15 & 16 Vict., c. 86, s. 50) neither the Court of Chancery nor the Chancery Division would in general make declarations "in the air" (*i.e.*, declarations which were not asked for as a step towards obtaining some present relief.)

Sec. 50 thereof empowered the Court of Chancery "to make binding declarations of right without granting consequential relief," but this was construed to apply *only where* the plaintiff *would be entitled to consequential relief if he chose* to ask for it (*Rooke v. Lord Kensington*, (2 K. & J. 753).

That section was introduced in India by VI of 1854, sec. 29; and it was embodied in Act VIII of 1859, sec. 15, "No suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Civil Courts to make binding declarations of right without granting consequential relief." The qualification laid down in *Rooke v. Lord Kensington* was also held to apply; and it was held that "the Court must see that the declaration of right may be the foundation of relief to be got somewhere" (11 B. L. R. 203; 15 B. L. R. 83).

The present Indian Law is that embodied in sec. 42 of the Specific Relief Act, 1877. The present English rule (O. 25, r. 5 of the rules of the Supreme Court) empowers the Court to "make binding declarations of right *whether any consequential relief is or could be claimed or not.*" Under this rule, actions can be brought merely to declare rights—what they are and what they will be—even in cases where no substantial relief can at present be given. See for instances, *The Annual Practice* (of 1913, at pp. 108-410).

See also 5 All. 315 (353) **F. B.**

II. THE BAR TO SUBSEQUENT SUIT FOR OMITTED CLAIM OR REMEDY—

This case was decided with reference to the wording in ss. 7 and 15 of the C.P.C., 1859. Both these sections have been altered (see C.P.C. 1908, O. 2, r. 2 C.P.C. 1882, 1877, s. 43; Sp. Relief Act, s. 42) and the question has to be considered with reference to these—see 8 Cal. 825; 8 Cal. 819; (1910) 8 I.C. 9 *per* KARAMAT HUSAIN, J.

III. MEANING OF CERTAIN EXPRESSIONS—See **FIELD, J.'S JUDGMENT**—

'Cause of action'—Comprises every fact which is material to be proved to enable the plaintiff to succeed:—*Cooke v. Gilt*, L.R. 8 C.P. 116; comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment:—*Read v. Brown*, 22 Q.B.D. 131; 16 All. 165; 18 All. 131; 432; 26 Mad. 760. The grounds or the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour:—16 Cal. at 102 P.C.; includes the entire set of facts which gives rise to an enforceable claim, *i.e.*, the right and its infringement:—22 Cal. at 839; 21 Mad. at 157. Ex. III to sec. 17 in the previous Code of 1882 has been omitted in the C.P.C. of 1908, as it makes it immaterial whether the *whole or part only* of the cause of action arose within the jurisdiction—see sec. 20.

'Claim'—'Remedy'—See *Hukm Chand*, Civil Procedure (1900) Vol. I, p. 558; 4 All. 261].

[8 Cal. 515]

APPELLATE CIVIL.

The 15th March, 1882.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE.

Jantoo.....Plaintiff

versus

Radha Canto Doss.....Defendant.*

Stamp-duty on appeals arising out of suits under s. 77 of the Registration Act (III of 1877) - Court Fees Act (VII of 1870), sched. iv, cl. 12, art. 17.

The court-fees payable on all appeals to the High Court arising out of suits brought under s. 77 of the Registration Act of 1877, is a fee of ten rupees, irrespective of the value of the suit.

REFERENCE to the High Court under s. 5 of the Court Fees Act.

This was originally a suit brought under s. 77 of Act III of 1877 to enforce the registration of a certain deed purporting to convey landed property of the value of Rs. 609. The plaintiff failed in both the Court of First Instance, and on appeal to the Subordinate Judge. He then appealed to the High Court, affixing to his memorandum of appeal a stamp of Rs. 10. The stamp was objected to, and the question as to whether an *ad valorem* stamp was necessary, or whether a stamp of Rs. 10 would be sufficient, was heard before the Taxing Officer, where it was [516] contended, on behalf of the plaintiff, that a fee of Rs. 10 only was required under art. 17, cl. 12, sched. iv of the Court Fees Act, as the suit was one to 'obtain registration,' and the nature of such a suit rendered it impossible to estimate the suit at a money-value; and that, notwithstanding that in a similar reference [*Chunnamul Johori v. Brojonath Roy* (appeal from Original Decree, No. 142 of 1881)], it had been decided that an *ad valorem* stamp was necessary, yet that decision was made on special grounds,—viz., that "the question virtually at issue was, whether the defendant was or was not a minor at the time when he executed the deed, and whether the deed as against him was a valid document," and the case was distinguishable.

The Taxing Officer was of opinion that an *ad valorem* stamp was necessary; but on account of the distinction sought to be drawn between this case and the decision in *Chunnamul Johori v. Brojonath Roy* (appeal from Original Decree, No. 142 of 1881) he referred the matter to the Chief Justice.

The Opinion of the Chief Justice was as follows :

Garth, C.J.—I have had great doubt about this question. But having regard to what appears to be the general opinion of the Judges, and also to the inconvenience that would arise, if the stamp-fee upon such appeals were to

* Reference in Special Appeal, No. 392 of 1882.

vary according to the nature of the issues raised in each case, I think it will be advisable to order that a uniform fee of Rs. 10 should be charged in all such cases.

NOTES.

[REGISTRATION ACT (1877, s. 77)—SUITS (AND APPEALS TO ENFORCE REGISTRATION)—STAMP DUTY—

In (1901) 12 M. L. J. 87 suits to enforce registration were held to be suits in which consequential relief was prayed for, within sec. 7 (4) of the Court Fees Act 1870, but this view was not accepted in (1902) 12 M. L. J. 88, and by the Full Bench in (1907) 31 Mad. 89 17 M. L. J. 573. The latter report gives full notes of the arguments urged for and against the view.

Such suits were held to be incapable of valuation and the Madras High Court, in 31 Mad. 89 F. B., laid down that for *purposes of jurisdiction* of Courts, the valuation should be not that fixed by the plaintiff (31 Cal., 352; 28 All., 545), but one determined by the Court itself.]

[10 C.L.R. 489 : 6 Ind. Jur. 579]

[517] APPELLATE CIVIL.

The 1st August 1881.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE FIELD.

Ramphul Singh and others.....Defendants

versus

Deg Narain Singh and another.....Plaintiffs.*

*Hindu Law - Mitakshara— Sale or mortgage of joint family property—
Suit by son to recover possession of share— Limitation—Presumption
as to property acquired while family joint- Parties---
Right of purchaser at execution-sale.*

A suit by a Hindu governed by the Mitakshara law, to recover possession of property sold during his minority by his father, is within time if brought within three years after he attains the age of twenty-one.

The presumption is, that all acquisitions made while a family is joint, are made from the joint funds, and the burden is upon the person who alleges that any property is self-acquired, to prove that allegation.

A father governed by the Mitakshara law may alienate the family property to discharge debts incurred by him for purposes not illegal or immoral. If the son seeks to set aside such alienation as to his own interest, he will have to show that the purposes of the alienation were illegal or immoral.

* Appeal from Original Decree, No. 162 of 1880, against the decree of Moulvie Hafiz Abdul Karim, First Subordinate Judge of Bhagulpore, dated the 24th April 1880.

If the son, being adult, has joined in the conveyance, or led the alienee by his conduct to suppose that he assented to the alienation, he will be estopped from disputing its validity. These propositions apply to a mortgage, so as to place the purchaser at an execution-sale under a decree upon the mortgage-bond in the position of an alienee by private sale.

If the son has been a party to the suit in which the decree upon the mortgage-bond was obtained, he is concluded; but if he has not been a party to the suit, he is not concluded, but must show that the original debt was contracted for illegal or immoral purposes, in order to recover his share of the property from the purchaser. Where the father has neither aliened nor mortgaged the family property, but it is sought by suit to make that property liable to satisfy a debt incurred by the father, the son, as well as the father, must be a party to the suit.

When the creditor sues the father alone for a debt contracted by him alone, and in execution sells the right, title, and interest of the father only, the purchaser at this sale does not take the son's interest.

THIS was a suit for possession of a share in certain property, which had been sold in execution of a money-decree.

The plaintiffs, who alleged that they were governed by the [518] Mitakshara school of law, were respectively the son and wife of one Gobind Dyal Singh, who was made a party defendant to the suit. It appeared that, on the 12th September 1865, in execution of a decree against the defendant Gobind Dyal Singh, his right and interest in certain properties were sold to one Honuman Singh. The plaintiff Deg Narain Singh was at that time a minor, and his mother, the plaintiff Mussanut Luchman Dai Koeri, by virtue of a certificate under Act XL of 1858, became the manager of his estate. Deg Narain Singh attained the age of twenty-one years on the 28th January 1879. The plaintiffs now sued the representatives of Honuman Singh, and also Gobind Dyal Singh, alleging that, in the decree in execution of which the right and interest of Gobind Dyal Singh were sold, the plaintiff Deg Narain Singh was no party, and that the decree was not binding upon him. They alleged that a 1a. 2g. 2½k. share had been acquired out of joint funds belonging to the family. They prayed that their share in the property sold might be placed in their possession, and for mesne profits. The representatives of Honuman, in their written statement, contended, that the suit was barred by limitation; that the family of Gobind Dyal Singh was governed by the Mithila law, and that the property alleged to have been acquired out of joint funds was the self-acquired property of Gobind Dyal Singh. They also stated that a regular suit for confirmation of possession had been brought by their ancestor against Gobind Dyal Singh and decreed in his favour. The Subordinate Judge gave the plaintiffs a decree.

The defendants appealed to the High Court.

Mr. R. E. Twidale, Baboo Saligram Singh, and Baboo Doorga Prasad for the Appellants.

Baboo Mohesh Chunder Chowdhry, Baboo Taruck Nath Sen, and Baboo Amarendra Nath Chatterjee for the Respondents.

The following **Judgments** were delivered by the Court (PRINSEP and FIELD, JJ.):—

Field, J.—Four points have been taken before us in this appeal. The first is concerned with the question of limitation.

[519] On this point we agree with the judgment of the Court below. We think that, having regard to the provisions of s. 3* of the Indian Majority Act, IX of 1875, the plaintiff No. 1, Deg Narain Singh, attained his majority upon completing his age of twenty-one years; and as this suit was instituted within three years after he so came of age, it is within time. We may observe that there is now no contention before us that this plaintiff was born on a date prior to that set forth in the plaint.

The second point is concerned with the 1a. 2g. 2½k. share, which the plaintiffs allege, though not very distinctly, to have been acquired out of the joint funds belonging to the family. The defendants, on the other hand, contended, that this was their self-acquired property. The Subordinate Judge has, in a very hesitating manner, disposed of the question thus raised. He does not believe the evidence on either side, but he comes to the conclusion that, as the burden lay upon the defendants to prove that this share of the property was purchased out of their funds exclusively, and as they have failed to discharge this burden, it must be held that the property was acquired from the joint funds of the family. There can be no doubt that the presumption is, that all acquisitions made while the family is joint are made from the joint funds; and that the burden is upon the person who alleges that any property is self-acquired to prove this allegation. In this case we think that the defendants have not discharged the burden which thus lay upon them; and we think, moreover, that the balance of evidence is in favour of the plaintiffs. We are, therefore, of opinion that this 1a. 2g. 2½k. share must be regarded as joint property.

The third point raises rather a difficult question concerned with Mitakshara law. It is contended that the son, who is the plaintiff No. 1, cannot succeed in this suit, unless he can prove that the debt, upon which the decree was passed, was a debt incurred for immoral purposes; and the fourth contention is, that if we hold that the plaintiff No. 1 can succeed in the present suit without proving that the debt was incurred for immoral purposes, because he was not a party to the suit in which the decree for that debt was passed, then there ought to be an inquiry into the question, whether or not that debt was incurred for necessary purposes.

[520] These last two points are, to a certain extent, intermixed, and will have, therefore, to be considered together. The argument upon both of them assumes that the share of the son was made liable to satisfy the debt, and passed by the execution-sale to the purchaser. If this were so, there would be much force in the argument addressed to us. If, on the contrary, the share of the son was not made liable and did not pass, the case becomes altogether different. It will be important to examine the cases bearing on the question. In the case of *Deen Dyal Lal v. Jugdeep Narain Singh* (I. L. R., 3 Cal., 198; S.C., I. L. R., 4 I. A., 247), the son sued to recover back the whole of the estate. The Subordinate Judge, gave him a decree for one moiety, - i.e., his own share; the father and the son being the only persons entitled to share upon a partition. The District Judge dismissed the suit altogether, holding that legal

* [Sec. 3:—Subject as aforesaid, every minor of whose person or property a guardian has been or shall be appointed by any Court of Justice, and every minor under the jurisdiction of any Court of Wards, shall, notwithstanding anything contained in the Indian Succession Act (No. X of 1865) or in any other enactment, be deemed to have attained his majority when he shall have completed his age

of twenty-one years and not before:

Subject as aforesaid, every other person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of eighteen years and not before.]

necessity for the alienation had been proved. The High Court reversed the decree of the District Judge, and, on appeal to the Privy Council, their Lordships were of opinion, that legal necessity had been proved, but that this point was immaterial, as the case ought to be decided upon another ground,—the ground namely, that the father's right, title, and interest only had been sold in execution of the decree; and the purchaser at the execution-sale was entitled to nothing more. Their Lordships of the Privy Council say: "This issue," that is the issue of legal necessity, "seems to their Lordships to be immaterial in the present suit, because whatever may have been the nature of the debt, the appellant cannot be taken to have acquired by the execution-sale more than the right, title, and interest of the judgment-debtor. If he had sought to go further, and to enforce his debt against the whole property and the co-sharers therein who were not parties to the bond, he ought to have framed his suit accordingly and have made those co-sharers parties to it. By the proceedings which he took, he could not get more than what was seized and sold in execution, *viz.*, the right, title, and interest of the father. If any authority be required for this proposition, it is sufficient to refer to the cases of *Nugendur Chunder Ghose v. Sreematty Kaminee Dossee* (11 Moore's I. A., 241), and *Baijun Doobey v. Brij Bhookun Lall Amusti* (L. R., 2 I. A., 275)." See the report of *Deen Dyal Lal v. Jugdeep Narain Singh*, in the I. L. R., 3 Cal., at pp. 204, 205. Now, in the case before us, there can be no doubt that what was sold at the execution-sale was, not the whole property, but the right, title, and interest of the father Gohind Dyal Singh alone, and, therefore, so far as this point is concerned, the present case is on all fours with the case in the Privy Council just quoted. But it is contended by Mr. *Twisdale*, that, although the decree was obtained only as against the father, we ought to presume that it was obtained against the father not only in his personal capacity, but also in his representative capacity as guardian of his minor son and manager of the family-property; and that, in this way, the decree binds all the members of the family and the whole of their interest in the property sold. It is sought, moreover, to distinguish this case from that of *Deen Dyal Lal v. Jugdeep Narain Singh* (I. L. R., 3 Cal., 198; s.c., L. R., 4 I. A., 247), on the ground that, in that case, Jugdeep Narain Singh was a major when the suit on the bond was brought, while in the present case the plaintiff Deg Narain Singh was a minor when the suit was instituted and the decree obtained. It has been argued that, although it does not so appear from the published report, Jugdeep Narain Singh was a major at the time referred to; but the judgment of the Privy Council does not in any way turn on this. It will, however, be useful to examine the authorities which Mr. *Twisdale* has quoted in support of that argument. The first case is that of *Girdharee Lall v. Kantoo Lall* (L. R., 1 I. A., 321; s.c., 14 B. L. R., 187). There, in what is called "the first appeal" (page 328 of the report in L. R., 1 I. A.), the father had sold the property by private sale, and it was not a case of a purchase at an execution-sale. The father had sold not merely his own interest, but the property itself. Their Lordships of the Privy Council were of opinion, that this sale was justified by the necessity of discharging the father's debt, which had not been shown to have been incurred for an immoral purpose, and which was, therefore, properly discharged from the ancestral property. In the second appeal (page 333 of the report in L. R., 1 I. A.), the purchaser was a purchaser at an execution-sale. The property purchased had been mortgaged by the father (see the report of this case at pages 188-189 of 14 B. L. R.), a decree had been made upon this mortgage-bond, and the Court had given an order for this particular property to be put up for sale under the execution. The property itself, and not merely the father's interest therein, had been sold,

and in this respect that case differs from the case of *Deen Dyal Lal v. Jugdeep Narain Singh* (I. L. R., 3 Cal., 198 ; s.c., L. R., 4 I. A., 247), and from the case now before us. The father had in fact exercised the power of a managing member of a Hindu family to bind the family property by the mortgage-bond. A decree was subsequently obtained upon this bond : and, as the Lords of the Judicial Committee observed, if this decree was a proper one (and that it was an improper one was not shown), the interest of the sons, as well as the interests of the father, in the property, although it was ancestral, were liable for the payment of the father's debt. The question, whether a decree against the father in a suit to which the son was not a party would bind the son and his interest in the property, was not raised in those cases, and therefore nothing was decided on this point by the Privy Council.

The next case relied on is that of *Tachmi Dai Koori v. Asman Singh* (I. L. R., 2 Cal., 213 ; s.c., 25 W. R., 421). Here the exact point which we have now to decide was not raised or determined.

The case of *Gonesh Panday v. Dabi Doyal Singh* (5 C. L. R., 36) was a case of a mortgage-bond and of a purchaser in execution of a decree upon this mortgage-bond, and is, therefore, not in point, as it is on all fours with the case of *Girdhari Lal v. Kantoo Lal* (L. R., 1 I. A., 321 ; s.c., 14 B. L. R., 187). It may be convenient to notice that this case decided a point which is also material in the case now before us—viz., that a decree-holder, who purchases in execution of his own decree, cannot be considered to be in the favourable position of a purchaser for valuable consideration without notice. This is also in accordance with [523] the decision of the Full Bench in *Luchmun Dass v. Giridhar Chowdhry* (I. L. R., 5 Cal., 855). We may here observe that the decree, in execution of which the property was sold in the case now before us, was a simple money-decree, and was apparently obtained upon a simple money-bond. We think that there is a distinction between a simple money-decree upon a money-bond and a decree upon a mortgage-bond. In the case of a mortgage it would perhaps make no difference whether the decree obtained upon the mortgage-bond were a simple money-decree or a decree to enforce the lien against the mortgaged property ; as in either case the mortgagee's lien would (so far as the present question is concerned) be satisfied and extinguished by the sale of the mortgaged property. See the Full Bench case of *Syud Emam Montazooddeen Mahomed v. Raj Coomar Dass* (14 B. L. R., 408) ; also *Narsidas Jitram v. Joglekar* (I. L. R., 4 Bom., 57) and *Munbasi Koorer v. Nourutton Koorer* (8 C. L. R., 428). In the present case it has not been proved that the decree was a decree made upon a mortgage-bond. The property of a joint family governed by Mitakshara law may be bound in two ways. It may be bound by the father if he sells or mortgages it for the liquidation of a debt due by him and not incurred for immoral purposes. If the father does not, in the exercise of the power which he has as manager, himself sell or mortgage, then the only other way in which the family property can be made liable is by a decree of Court ; and according to the decision of the Privy Council in the case of *Deen Dyal Lal v. Jugdeep Narain Singh* (I. L. R., 3 Cal., 198 ; s.c., L. R., 4 I. A., 247), the decree will bind only those persons who are parties to the suit in which it was made. In the present case the father was the only person sued, and we are not prepared to assent to the argument addressed to us, that, although the minor was not expressly made a party to the suit through his natural guardian or a guardian *ad litem* appointed by the Court in the suit, still we ought to assume that the father was a defendant, not only for himself and his own interest, but also as representing his minor son and the interest of such son in the family property. The next case is [524] that of *Gunga Pershad v. Sheo Dyal Singh* (5 C. L. R., 224). This was a case of an alienation

by the father, and not a case of a purchaser at an execution-sale, and with reference to what has been already said, it was not in point, as the father was competent to alienate the property for a debt not incurred for immoral purposes. The case of *Bissessar Lall Sahoo v. Luckmessur Singh* (L. R., 6 I. A., 233; s.c., 5 C. L. R., 477) is also not in point. It was there expressly found that the decrees were substantially in respect of the joint debt of the family, and that they were passed against the representative of the family, in other words, it was found that the person sued represented all the members of the family. The next case is that of *Upooroop Tewary v. Lall Baudjee Sahay* (I. L. R., 6 Cal., 749; s.c., 8 C. L. R., 192). This also was a case in which the father had mortgaged, and there was also this additional ground for the decision that the son, being an adult, stood by and allowed the creditors, with whom his father was dealing, to believe that he was a consenting party. Then we have the case of *Gobardhon Lall v. Singessur Dutt Kooer* (I. L. R., 7 Cal., 52; s.c., 8 C. L. R., 227). Here a decree was made against the father, the family property was attached, and after the attachment the father died. No sale took place in pursuance of the attachment, and therefore this case also is not in point. The case of *Munbasi Kooer v. Nourrutton Kooer* (8 C. L. R., 428), was a case of a sale in execution of a decree obtained upon a mortgage-bond, and, for the reasons already given, is not in point. The last case relied upon by Mr. Twidale is that of *Narayana Charya v. Narso Krishna* (I. L. R., 1 Bom., 262), and this case is in support of his contention, but it is not a decision of this Court.

We now turn to examine the cases quoted on the other side, and we think that the following four cases are against Mr. Twidale's argument, and support the contention of the respondents—*Roodur Prokash Misser v. Hirday Narain Sahoo* (5 C. L. R., 112), *Pursidh Narain Singh v. Hanooman Sahay* (I. L. R., 5 Cal., 845; s.c., 5 C. L. R., 576), *Bhagwat Dassa v. Gouri Koonwar* (7 C. L. R., 218), and *Hanooman Sahay v. Pursidh Narain [525] Singh* (7 C. L. R., 465). We may observe that the last case is the case of a mortgage, and therefore conflicts with some of the decisions already referred to. We may further refer to the case of *Laljee Sahoy v. Fakeer Chaud* (I. L. R., 6 Cal., 135), where it was held, that the interests of an adult son could not be affected by a decree against the father alone. The decision of that case turned, however, upon another point.

We think that the following propositions will be found to be established as the result of all the cases:—

1st. The father may alienate the family property to discharge debts incurred by him for purposes not illegal or immoral.

2nd.—If the son seeks to set aside such alienation as to his own interest, he will have to show that the purposes of the alienation were illegal or immoral.

3rd.—If the son, being adult, has joined in the conveyance or led the alienee by his conduct to suppose that he assented to the alienation, he will be estopped from disputing its validity.

4th.—The above three propositions apply to a mortgage so as to place the purchaser at an execution-sale under a decree upon the mortgage-bond in the position of an alienee by private sale.

5th.—If the son has been a party to the suit in which the decree upon the mortgage-bond was obtained, he is of course concluded.

6th.—If the son has not been a party to the suit, he is not concluded, but must show that the original debt was contracted for illegal or immoral purposes, in order to recover his share of the property from the purchaser.

7th.—Where the father has neither aliened nor mortgaged the family-property, but it is sought by suit to make that property liable to satisfy a debt incurred by the father, the son, as well as the father, must be made a party to the suit.

8th.—When the creditor sues the father alone for a debt contracted by him alone, and in execution sells the right, title, and interest of the father only, the purchaser at this sale does not take the son's interest.

The case of *Laljee Sahoy v. Fakeer Chand* (I. L. R., 6 Cal., 135) was the case of an adult son. The present case is that of a minor son. Does [526] this difference make any difference in the application of the eighth and last proposition? It has always been well understood in this country that where it is sought to affect the interests of a minor by a suit, such minor must be made a party to such suit by his natural guardian or a guardian appointed by the Court. The present Code of Civil Procedure lays down more precise rules than were contained in the former Code for making minors parties to suits, and having them properly represented by guardians *ad litem*. But there is no pretence for saying that, before the passing of the present Code, minors were not made parties to suits affecting their interests, or that, when they were not made parties, they could be affected by the decrees passed in such suits.

We are, therefore, of opinion that the plaintiff No. 1 in this case cannot be affected by the decree or by the sale in execution of that decree, seeing that, being a minor when the suit was instituted in which that decree was obtained, he was not made a party in the manner usual under the procedure then in force. In conclusion, we may notice one more case which has been referred to in the course of the argument, and that is the case of *Suraj Bansi Koor v. Sheo Prosad Singh* (L. R., 6 I. A., 88; s.c., I. L. R., 6 Cal., 148). In that case the father executed a mortgage-bond. There was then a decree against the father upon this bond; and the father, the judgment-debtor, died while the execution-proceedings were pending. The minors then came in before the sale, and objected that the father had incurred the debt without justifying necessity, the money having been applied to debauchery and sensuality. They were referred to a separate suit, and, having instituted such separate suit, it was held therein that, as they had raised objections before the sale, the purchaser at that sale must be held to have had constructive notice of those objections. The decision, as regards the actual merits proceeded on the ground that the debt in respect of which the father had executed the bond, was found to have been incurred without justifying necessity; and the allegation of the sons in this respect being proved, they succeeded in recovering their shares from the purchaser at the sale. It will be observed that [527] this case also was a case in which the father had bound the family-property in the exercise of that power, which is a good power when exercised within the limits and for the purposes allowed by law.

The conclusion then at which we arrive is, that it was unnecessary for the plaintiff No. 1 to prove that his father's debt was incurred for an immoral purpose, and it was equally unnecessary to enter into the question of justifying necessity, because the father did not alienate or bind the family-property, and the proceedings in the former suit and the execution were not directed to make the son's interest liable for the father's debt. The creditor in fact dealt with the father alone, and sought to enforce his claim by suit against the father and the father's interest only, and the purchaser under the decree passed in that suit cannot give to his purchase an operation wider than the scope of the suit, the decree, and the execution of the decree.

For these reasons we are of opinion that the decree of the lower Court is correct, and that this appeal must be dismissed with costs.

Prinsep, J.—I am also of opinion that this appeal should be dismissed, because, under the decree under which the defendants acquired their title, only the right, title, and interest of plaintiff's father was sold, the plaintiff being no party to the suit either personally or as represented by his father.

Appeal dismissed.

NOTES.

[HINDU LAW—WHEN SON'S INTEREST PASSES AT AN EXECUTION SALE—

This decision is only partially correct. Of the propositions of law summed up at p. 525, those numbered 1 to 6 are still good law. The seventh proposition is wrong, as it is not *necessary for the purpose* of binding the son's interest, to make the son a party, whether the suit is on mortgage or on an unsecured debt (13 Cal. 21 P. C.; 9 Cal. 389 : 495). The son *may* be made a party in order (1) to remove possible ambiguity as to what passed at the sale in execution, and (2) to prevent his re-agitating the matter in a suit of his own (13 Cal. 21 P. C.). As regards the eighth proposition, it is correct except to the extent that it appears to lay undue emphasis on the description at sale of "the right, title and interest" of the father. See the notes to 3 Cal. 198 in the LAW REPORTS REPRINTS.

As regards the son's being a party, see also 8 Bom. 481 (488) ; 4 Bom. L. R. 587.]

[328] APPELLATE CIVIL.

The 5th January, 1882.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Gujadthur Pauree and another.....Defendants

versus

Naik Pauree and another.....Plaintiffs.*

Payment into Court—Departmental Rules directing all moneys to be paid into the Treasury—Rule No. 9, High Court Rules and Circular No. 4, 1881, p. 37 Beng. Act VIII of 1869, s. 52.

Where a decree directs the payment of money into Court within a limited time, it is a sufficient compliance with such decree if the judgment-debtor bring the money into Court within that time and diligently take the necessary steps required by the Departmental Rules for its actual payment into the Treasury.

THE plaintiffs sued the defendants for arrears of rent and asked for ejectment. The claim for arrears was decreed on the 16th December 1878, and it was by the decree ordered "that should the defendants not deposit in Court, or pay to the plaintiffs the amount decreed within fifteen days from the date of the decree, possession of the land on which the arrears accrued should be given to the plaintiffs."

On the 30th December 1878, the defendants paid into Court the money, and obtained in return a chalan, from which it appeared that the money was credited in the treasury on the 9th January 1879.

On the 16th August 1879, the plaintiffs applied for execution of the decree, ignoring the payment. The Munsif ordered execution and gave the plaintiffs delivery of possession.

* Appeal from Appellate Order, No. 277 of 1881, against the order of J.B. Worgan, Esq. Judge of Shahabad, dated the 14th June 1881, reversing the order of Moulvi Syed Ahmedulla Munsif of Sasaram, dated the 4th October 1879.

On the 24th September 1879, the defendants applied to the Court to have this order set aside, filing the chalan in Court. The Munsif thereupon released the land on the ground that payment had been made in time, and that the defendants could not be blamed for the delay in crediting the money in the treasury.

[529] The plaintiffs appealed against this order to the District Judge, contending that the money had not been "paid into Court" within the meaning of s. 52 of Beng. Act VIII of 1869, until it was actually paid into the treasury.

The District Judge was of opinion that the payment of the 9th January 1879 was out of time, and that the decree of the 16th December 1878 had not been complied with by the defendants; that "the payment into Court" under the Act must be held to mean payment into the treasury as well as payment to the Court-Nazir, he therefore, reversed the Munsif's order and allowed the appeal.

The defendants appealed to the High Court.

Baboo *Rash Behari Ghose* for the Appellants.

No one appeared for the Respondents.

The **Judgment** of the Court (MITTER and MACLEAN, JJ.) was delivered by

Mitter, J.—We think that, in this case, the judgment of the lower Appellate Court is erroneous, and must be set aside. There was a decree against the appellants before us for rent, and that decree directed, that if the amount decreed be not paid into Court within fifteen days from the date of the decree, the defendants should be ejected from the tenure. It is found by the Courts below that the amount decreed was actually brought into Court within fifteen days; but this money was not received by it, because, according to certain Departmental rules, it was to have been paid into the treasury. It is also found by the lower Appellate Court that there were no laches on the part of the judgment-debtors in complying with the Departmental rules for actually paying the amount decreed into the Government treasury. We think that this was a sufficient compliance with the decree. Where a decree directs the payment of money into Court within a limited time, it would be a sufficient compliance with the decree if the judgment-debtor bring the money into Court within that time and diligently take the necessary steps required by the Departmental rules for its actual payment into the treasury. For these reasons we are of opinion that the Munsif's decision is right. We accordingly reverse the judgment of the lower Appellate Court and restore that of the Munsif with costs. We may also point out to the Munsif that, under the spirit of the existing rules of the year 1881, Rule No. 9 to be found in p. 37 of the General Rules and Circular Orders of this Court, if this case was governed by them, the Munsif would have been bound to receive the payment of the money if it had been tendered by the judgment-debtors within the time limited by the decree. We assess the hearing-fee at Rs. 16.

Appeal allowed.

NOTES.

[PAYMENT INTO COURT—

The production in Court and later payment into Treasury (1883, 7 Mad. 211) or into Court again as required by Court when according to the rules it should have been paid into the Treasury at the very outset, (1908 18 M. L. J. 168), was held to be sufficient payment into Court. But **not** payment into the Post Office for being sent by Postal Money Order:—(1896) 22 Bom. 415.]

[8 Cal. 530]

APPELLATE CIVIL.

The 11th January, 1882.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Gopal Sahoo.....Plaintiff

versus

Gunga Pershad Sahoo and others.....Defendants.*

Mortgage—Mortgaged property, conveyance of, to mortgagee—Attachment and sale of same property under another decree—Suit by mortgagee to recover money advanced on mortgage-bond—Avoidance of conveyance—Lien.

In 1874, the plaintiff advanced money to P. and Z. on the security of a mortgage of certain properties. In 1875, the plaintiff took a conveyance of the properties mortgaged to him, setting off the money due to him under the mortgage against the consideration-money. At the time of this conveyance, the same property was under attachment under a decree obtained by another person, and the property was, in execution of this decree, put up for sale, and purchased by one G.

In a suit brought by the plaintiff on the mortgage-bond (to recover the money lent, and asking that the properties might be made liable to satisfy the debt) against P., Z., and G., it was *held*, that the conveyance of 1875 being void as against G., the plaintiff was entitled to fall back upon the lien created by the mortgage-bond.

Bissen Doss Singh v. Sheo Prosad Singh (5 C. L. R., 29) followed.

IN November 1874, one Gopal Sahoo lent to Faridunnessa, a purdanasheen lady, through Zahmal Huq, the sum of Rs. 105, [531] and took as security a mortgage of certain properties; the money so advanced was made payable in February and March 1876.

On the 2nd September 1875, the property mortgaged was sold by the mortgagor to Gopal Sahoo, and the original bond-debt was set off against the consideration-money of the bill of sale. At this time the mortgaged property was under an attachment in the suit of certain other parties who had obtained a decree, and in execution of which, one Gunga Pershad Sahoo subsequently purchased the property.

Gopal Sahoo then brought this suit against Faridunnessa, Zahmal Huq, and Gunga Pershad Sahoo to recover the principal sum advanced, together with interest, and praying that the mortgaged property might be declared liable to satisfy the debt.

Gunga Pershad alone appeared and contested the claim, stating that the debt was not in existence at the time when the suit was brought, it having been satisfied by the consideration given for the conveyance of the property made in September 1875. The Munsif found that the mortgage-bond had been duly executed by the two defendants, Faridunnessa and Zahmal, and the money paid to Faridunnessa, and that the deed of sale of September 1875 was also genuine; but he held, that the original mortgage-debt had been satisfied by the conveyance of September 1875. and, refusing to charge the property mortgaged, gave a personal decree against the executants of the bond.

* Appeal from Appellate Decree, No. 1791 of 1880, against the decree of Baboo Koylash Chunder Mookerjee, Second Subordinate Judge of Tirhoot, dated the 11th June 1880, affirming the decree of Syed Abdul Kurim Khan, Munsif of Durbhunga dated the 7th April 1879.

The plaintiff appealed to the Subordinate Judge, who held, that the mortgage had been satisfied by the conveyance of 1875, and that the plaintiff could not enforce his lien on the property, and dismissed the appeal.

The plaintiff appealed to the High Court.

Baboo *Mohesh Chunder Chowdhry*, for the Appellant, contended, (i) that the deed of 1875 had not the effect of extinguishing the plaintiff's right under the mortgage-bond; (ii) that the sale under the conveyance of 1875, being void against the auction-purchaser by reason of the subsisting attachment, and the purchase at the auction-sale being subject to the mortgage of the plaintiff, the lower Courts should have held that the property pledged was liable to satisfy the mortgage-debt.

[532] Baboo *Chunder Madhub Ghose* and Mr. *Sandel* for the Respondents.

The **Judgment** of the Court (MITTER and MACLEAN, JJ.) was delivered by

Mitter, J.—We think that the decisions of the lower Courts in this case are not correct, and must be set aside. The plaintiff brought this suit against the defendants Nos. 1 and 2, upon a mortgage-bond executed on the 30th Kartick 1282 (corresponding to the 15th of November 1874). The mortgage-bond was executed by the defendant No. 1, who is a purdanasheen lady, through the defendant No. 2. In that bond a sixteen-ganda share of Mouza Futtehpore was hypothecated as security for the loan. The plaintiff brought the suit to recover the money due by enforcing his mortgage lien. The suit was brought against the executants of the bond and Gunga Pershad Sahoo, who became the auction-purchaser of the property, mortgaged after the execution of the bond. In the written statement of Gunga Pershad, who alone defended the suit, it is alleged that, on the 2nd of September 1875, the property mortgaged, *viz.*, the sixteen-ganda share of Futtehpore, was sold by the mortgagors to the plaintiff, and the original bond-debt was set off against the consideration-money of the bill of sale.

On these facts Gunga Pershad contended, in the lower Courts, that the mortgage-debt was not in existence at the time when the suit was brought. The plaintiff, although he does not allege in the plaint that this bill of sale of September 1875 had been cancelled, gave evidence to that effect at the trial. The first Court, being of opinion that the original mortgage-debt was satisfied by the bill of sale of the 2nd September 1875, and disbelieving the plaintiff's allegation that that bill of sale was subsequently cancelled, decreed the claim only against the executants of the bond, dismissing the plaintiff's suit for the enforcement of the lien under the bond. The plaintiff appealed against that decree, and the Subordinate Judge, being of opinion that the bill of sale, after it was executed, could not be cancelled, and that the original mortgage-debt was satisfied by the execution of the subsequent bill of sale, dismissed the appeal of the [533] plaintiff. It may be mentioned here that there is no dispute that, on the date when this bill of sale was executed, *viz.*, on the 2nd September 1875, the mortgaged property was under attachment under the decree in execution of which the defendant Gunga Pershad Sahoo subsequently became the purchaser. It is quite clear, therefore, that even supposing that the kobala of the 2nd September 1875 was not cancelled as alleged or attempted to be proved by the plaintiff, it was absolutely void against the auction-purchaser Gunga Pershad. That being so, we think that, in accordance with the principle laid down in the case of *Bissen Doss Singh v. Sheo Prosad Singh* (5 C. L. R., 29), the plaintiff in this case is entitled to fall back upon the lien created by the bond of the 30th Kartick 1282. We are, therefore, of opinion that the plaintiff's appeal to the lower Appellate Court ought to have been decreed. We accordingly direct

that that appeal be decreed. The decree passed by the Munsif was against the executants of the bond. Whether that decree is right or wrong it is not for us to consider in this second appeal, because there was no appeal against that decree by the defendants against whom it was passed. That decree will, therefore, stand. But we think that the plaintiff will also be entitled to realize the amount decreed in his favour with costs by the sale of the mortgaged premises. The plaintiff will recover costs of the first Court from the defendants jointly, and the costs of the lower Appellate Court and of this Court from the defendant Gunga Pershad Sahoo.

Appeal allowed.

NOTES.

[SUBROGATION—

See also 10 Cal. 567 and the notes to 10 Cal. 1035 P.C. in the LAW REPORTS REPRINTS, CAL. VOL. 5.]

[534] APPELLATE CIVIL.

The 19th January, 1882.

PRESENT:

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

In the matter of the Petition of Nasibun and others.

Nasibun and others

versus

Preosunker Ghose.*

Bond—Stamp Act (XVIII of 1869), s. 2, cl. 5—Definition of Bond—Promissory Note.

The definition of the word 'bond' in the Stamp Act of 1869 is not exhaustive; the word 'includes' in cl. 5 of s. 2 has an extending force, and does not limit the meaning of the term to the substance of the definition.

THE plaintiffs had obtained a decree against the defendant, and had applied for its execution; but before any order was passed on the application, the parties came to the following compromise contained in a letter addressed to one only of the plaintiffs:—

"To the respected Baboo Nibaran Chandra Chuckerbutty,—The executrix of Sheikh Asmatullah, deceased, Bibi Nasibun, executed a kistibandi against me in the Narail Munsif's Court in the execution case, No. 60 of 1875, which was struck off on the 31st May 1875. By way of compromise, I consent to pay to you Rs. 150, being the amount fixed, in satisfaction of the said decree; you are requested to ask the decree-holders to stay execution of the decree.

* Rule, No. 1026 of 1881, against the order of Baboo Upendra Chundra Mullick, Judge of Small Cause Court at Jessore, dated the 4th August 1881.

I will pay you Rs. 50 cash in June next, and Rs. 10 in every consecutive month from July till the debt is discharged. I will execute a regular instrument for the above purpose. Dated 20th May 1878.

(Sd.) PREOSUNKER GHOSE."

This letter was addressed to the plaintiff No. 3 in the present suit (who was the mukhtar and agent of the two original plaintiffs), engrossed on plain country-made paper, but was unstamped. The defendant neither paid the instalments as they fell due, nor executed any further deed. The two ladies and their agent thereupon brought a suit on the document above set out in the Court of Small Causes at Jessore, contending that it was a bond.

The defendant contended that the document being unstamped [535] was inadmissible in evidence, and that being in reality a promissory note, it could not be stamped on payment of a penalty.

The Judge was of opinion, that the document was a promissory note, and being unstamped was inadmissible in evidence, and that no penalty could be levied under s. 34 of Act I of 1879, nor could parol evidence be received to prove the contents of the document, and that there being no other evidence of any consideration, the suit must fail.

The plaintiffs obtained a rule calling upon the defendant to show cause why the decision of the Small Cause Court Judge should not be set aside on the ground that the instrument was a bond and not a promissory note.

Baboo Saroda Churn Mitter and Baboo Golap Chunder Sircar for the Petitioners.

Baboo Rash Behary Ghose showed cause against the rule.

The **Judgment** of the Court (MCDONELL and FIELD, JJ.) was delivered by

Field, J.--The question in this case is, whether the Judge of the Small Cause Court at Jessore is wrong in holding that a certain instrument is a promissory note, and requires to be stamped as such. It appears that the plaintiffs, who obtained this rule, had a decree against the defendant; that this decree was being executed; that the parties came to a compromise; and that the instrument with which this rule is concerned was executed thereupon. The instrument, leaving out the immaterial portions, runs as follows:—

एक्षणे नडाईलेर द्वितीय मुनासिफअदालते सन १८७५ सालेर ई नं
जारी करिले ऐ सनेर ३१ मेतारीखे नम्बर खंरिज हय । ऐ डिक्री
जारिर मय खरचा रफासूरत १५० टाका आमि आमनाके दिते
स्वीकार हइलाम आपनि ऐ डिक्रीदार गोणके बलिया डिक्रीजारी क्षान्त
करीबेन । आमि आगामी जून मासे ५० टांका नगद ओ
जुलाईमास हइते मास २ दस टाकार हिसावे दिया उक्त टाका
परिशोध करिब ।

Now this instrument recites the fact of the decree having been under execution and the fact of the execution-proceedings having been struck off. It then recites that 'you,' that is the mukhtar, in whose favour the instrument was executed "having spoken to the decree-holders, will adjust the decree" [536] (for this we take it, is the proper signification of these words) and then the

instrument goes on to state that the amount will be paid by instalments on certain dates. The argument addressed to us is, that this instrument is not a promissory note but a bond. The definition of a bond as given in the Stamp Act, XVIII of 1869 (which governs the case) is as follows :— "Bond includes every instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be." The argument addressed to us has turned upon this language only ; but we may observe that this language does not contain an exhaustive definition of the term 'bond.' The word 'includes' has an extending force, and does not limit the meaning of the term to the substance of the definition. We have in the instrument now before us a promise to pay money, and, according to our construction of the instrument, there is no condition that this promise or obligation shall be void if a specified act is performed, or is not performed. The plaintiffs' vakeel contends

that the words **खीआनत कोरीबन** mean stay the execution of the decree, and that the sentence in which these words occur is to be construed as a condition precedent to the payment of the money, that if the decree be not stayed, the money will not become payable. Now, in the first place, it is admitted on both sides, that the decree never was executed after the date of this instrument, and it appears to us, that if the decree-holders had sought to execute the decree, they could have been restrained from doing so. We consider that this instrument was to all intents and purposes a complete adjustment of the decree ; and that, if the judgment-debtor had applied to the Court under the provisions of s. 258 of the Code of Civil Procedure, the instrument must have been treated as an adjustment of the decree, and it would have been the duty of the Court to make an entry accordingly in its register. We think, therefore, that the payment of the money did not depend on any condition, that the promise to pay was absolute, and that the instrument is a promissory note. There is a further passage in the instrument upon which one of the [537] arguments addressed to us has been based. That passage is as follows :—

जो ताहार रीतिमत दलिल लिखिया दिब. Now, it is said that this shows that it was not the intention of the parties to treat this instrument as a promissory note, and that this was really an agreement to execute a subsequent document. If this argument can prevail, the necessary result will be, that the plaintiffs' suit must fail, because this suit has not been brought to compel specific performance of any agreement to execute a subsequent document, and a suit of this nature must, we may observe, have been brought, not in the Small Cause Court, but in the regular Civil Court. The present suit has been brought not with the object of obtaining specific performance, but for the purpose of recovering the amount set out in the agreement ; and this being so, it appears to us that the plaintiffs themselves have treated the instrument as one which entitles them to recover the amount set forth therein. Having regard, however, to the fact that this instrument was executed in favour of the mukhtar, we think that the reasonable meaning of this latter passage is, that as soon as the decree would be adjusted, the judgment-debtor would execute another document in favour of the decree-holders themselves instead of the note in favour of the mukhtar. In the present suit, the mukhtar has been joined as a plaintiff, and this being so, the suit was in proper form. Under these circumstances, we think that this rule must be discharged with costs.

Rule discharged.

[8 Cal. 537 : 6 Ind. Jur. 584 : 10 C.L.R. 401.]

APPELLATE CIVIL.

The 20th January, 1882.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Damoodur Misser and another.....Defendants

versus

Senabutty Misrain and others.....Plaintiffs.*

Hindu Law—Mithila school—Partition of share of minor—Unmarried daughter's share—Suit by mother and minor children for partition—Malversation.

A suit cannot be brought by or on behalf of a minor to enforce partition unless on the ground of malversation, or some other circumstances which make it for his interest that his share should be set aside and secured for him. [538] Property sufficient to defray the expenses of the nuptials should be given to unmarried daughters.

According to the leading authorities of the Mitakshara school, both mother and step-mother are equal sharers with the sons.

Revenue-paying estates must be partitioned by the Collector; they cannot be partitioned by metes and bounds by the Civil Court. Ameen: and if the shares in such an estate are not separate estates, but are mere fractional shares of integral estates, they cannot be partitioned in the absence of the other co-sharers.

THE plaintiff, Senabutty, on her own behalf and as the widow and guardian of her minor children, Madho and Josoda, sued for the partition of the property left by her late husband, Mokoond Misser, claiming to share equally with the defendants, who were another widow of the deceased Mokoond Misser, and her sons.

The defendants contended that the suit could not proceed, as no sufficient grounds had been put forward such as would justify a partition on behalf of a minor; that the widows and unmarried daughter were not entitled to any share; that Senabutty had received her *stridhan*, and that this should be deducted from any share that she might get; that the widows were only entitled to maintenance; and that Josoda was only entitled to her marriage expenses. The parties were governed by the Mithila law. The Subordinate Judge found that the two families were not on good terms, and that sufficient ground had been made out for partition; that Senabutty had received no *stridhan* from her husband; and awarded one-fourth of one-sixth to Josoda, the unmarried daughter, for her marriage expenses and for her maintenance, and divided the residue into five equal parts, allotting two-fifths to Madho and Senabutty, and the remainder to the defendants.

The defendants appealed to the High Court.

* Appeal from Original Decree, No. 167 of 1880, against the decree of Baboo Koylash Chunder Mookerjee, Officiating Second Subordinate Judge of Tirhoot, dated the 13th May 1880.

Mr. Branson (with him Baboo Chunder Madhub Ghose and Baboo Rajender Nath Bose) for the Appellants, contended, that partition ought not to have been decreed, as it was not shown that there had been any malversation of the minor's property. Mayne's Hindu Law, s. 400. A widow is not entitled to any [539] share out of the portion allotted to her step-sons—see *Cally Churn Mullick v. Janova Dossee* (1 Ind. Jur., N. S., 284), and therefore Senabutty was not entitled to share.

The Advocate-General (Mr. G. C. Paul) (with him Baboo Mohesh Chunder Chowdhry, Baboo Hem Chunder Banerjee, and Baboo Unakali Mookerjee) for the Respondents.—There was sufficient reason shown why the minor sons should have their share secured for them. The unmarried daughter was entitled to a fourth of the share allotted to a brother; see *Vyvada Chintamani*, 248.

The **Judgment** of the Court (MITTER and MACLEAN, JJ.) was delivered by

Mitter, J.—This suit was brought for the partition of the estate left by one Mokoond Lall Misser, who died in Joist 1285 (May 1878), leaving him surviving two widows, *viz.*, Mussamut Senabutty Misrain and Belashbutty Misrain; Madho, a son; Josoda, a daughter by Senabutty; Damoodur Misser and Keshub Misser, sons; Bhuggobutty, daughter by Belashbutty. At the time when the suit was brought, Madho, Josoda, and Keshub were minors, and they are still minors. Bhuggobutty is not a party to the suit; she is admittedly not entitled to any share in the estate, she having been married during her father's lifetime. The plaintiffs are Senabutty and her minor son and daughter through herself as guardian. The plaintiffs' prayer is, that the estate be divided into six equal shares, and three of these shares be allotted to them.

The defendants, *viz.*, Belashbutty and her sons, contend, (i) that the suit cannot proceed, because no sufficient ground has been stated which would justify a partition on behalf of a minor; (ii) that the widows and the unmarried daughter are not entitled to any share; (iii) that, conceding that the widows are entitled to shares, Mussamut Senabutty having received *stridhan* from her husband, her share should be subject to deduction to the value of that *stridhan*. With reference to the [540] second ground of defence it is stated, that the widows are only entitled to maintenance, and the unmarried daughter is entitled only to an amount sufficient to defray her marriage expenses. It is further stated, that 2a. 13g. 1c. 1k. share of Mouza Bishenpore Bahas, purchased by Mokoond Lall in the name of Senabutty, was given to her as *stridhan*.

The lower Court has awarded one-fourth of a sixth share to the unmarried daughter for her marriage expenses and for her maintenance till her marriage, and dividing the residue into five equal parts, has allotted two of them to Madho and Senabutty. The defendants have preferred this appeal.

The first question raised before us is, that the partition should not be decreed in this case, because it is not shown that there has been any malversation of the minor's property.

The true rule upon this point is, we think, correctly laid down in Mayne on Hindu Law. He says (s. 400): "But a suit cannot be brought by or on behalf of a minor to enforce partition, unless on the ground of malversation, or some other circumstances which make it for his interest that his share should be set aside and secured for him."

We think sufficient grounds have been shown to justify a decree for partition. It is proved to our satisfaction that there have been constant disputes and differences between the two branches of the family. In this state of things,

it is but natural to find that the joint estate should be mismanaged. This is deposed to by a witness examined by the defendants themselves. Witness Bagesuri says :—" When both the brothers who are parties in this suit agree, then the collection is made, otherwise the collection is stopped. Such is also the case with ziraat,—that is, when the parties in this suit agree, then the cultivation is made, otherwise it is stopped. This state of things exists since Assin last year. The dispute is growing more serious daily, and it has not abated. The parties to this suit have separated in mess since last year. I, by guess, say that the two co-wives are not on good terms with each other." Moreover, the appeal is valued at Rs. 9,799-5-3, the estate sought to be partitioned being of the value of Rs. 27,992. The defendants valued the appeal, questioning the lower Court's [541] decree only, so far as it allows shares to Senabutty and Josoda. This objection must, therefore, fail.

As regards the share allowed to the daughter Josoda, the law on this subject is thus laid down in Vyvada Chintamoni, which is the highest authority in districts governed by Mithila law (see page 248). Menu says :—" To the unmarried daughters by the same mother, let their brothers give portions out of their own allotments respectively according to the classes of their several mothers; let each give a fourth part of his own distinct share; and they who refuse to give it shall be degraded.

" Their own allotments mean the allotments of the brothers. Therefore the meaning is, that a quarter of the share ordained for a brother of the class to which she belongs should be given to a maiden sister.

" Here the mention of a quarter is not essential. Property sufficient to defray the expenses of the nuptials should be given, for this is ordained by Vishnu." &c., &c.

There is conflicting evidence adduced by the parties as to the expenses incurred in the marriage of Bhuggobutty, the eldest daughter, which took place in the year 1276 (1869). The lower Court finds that about 1,000 rupees were spent on that marriage. In that finding we agree. But that marriage took place twelve years ago. Having regard to the general rise in prices, to celebrate a marriage now in the style in which the marriage of Bhuggobutty was celebrated in the year 1276, the expenses would be now nearly double. Then again it is proved, that Bhuggobutty, since her marriage, has been residing in her father's house. It is, therefore, probable that she has not been married to a person in good circumstances of life. To secure a better match for Josoda, the family would have to spend more than what was spent on the marriage of the eldest sister. Having regard to all these circumstances, we think that the decision of the lower Court allowing one-twenty-fourth share of the estate (i.e., property worth Rs. 3,000) to Josoda is correct. We may suggest here that the lower Court in its final decree should provide, if that is practicable, that Rs. 3,000 be paid out of the estate to the guardian of the minor Josoda to be applied to her marriage expenses.

[542] The next question is—Whether Mussamut Senabutty is entitled to a share, and if entitled to a share, to what share? It has been urged on behalf of the appellants that, under Hindu law, a widow is not entitled to any share out of the portion allotted to her step-sons, and in support of this contention, the learned counsel for the appellants relies upon *Cally Churn Mullick v. Janova Dasse* (1 Ind. Jur., N. S., 284), which is a Bengal case. There is a difference upon this point between the Dayabhaga and Vyvada Chintamoni and other cognate works on Hindu law of the Mitakshara school.

According to the Bengal school, a step-mother having no issue is not entitled to any share. But according to the other school, she is entitled to a share.

Jimutavahana says (chap. iii, s. 2, vv. 29 and 30) :—"When partition is made by brothers of the whole blood, after the demise of the father, an equal share must be given to the mother. For the text expresses : the mother should be made an equal sharer.

"Since the term 'mother' intends the natural parent, it cannot also mean a step-mother. For a word employed once cannot bear the literal and metaphorical senses at the same time."

But Vachaspati Misser (Vyvada Chintamani), quoting another text of Vrihaspati, says on the same subject :—"On the death of the father, the mother (janani) has a claim to an equal share with her own sons. Mothers (matara) take the same share ; and the unmarried daughters each a fourth of a share.

"Mother (janani) means one who has male issue : mothers (matara) mean step-mothers who have no male issue. These females shall have equal shares with the sons."

The author of the Mitakshara on the same subject says :—"When a distribution is made during the life of the father, the participation of his wives equally with his sons has been directed ('If he make the allotments equal, his wives must be rendered partakers of like portions.') The author now proceeds to declare their equal participation, when the separation takes place after the demise of the father, text cxxiii-a--'Of heirs dividing after the death of the father, let the mother also take [543] an equal share'" (Mitakshara, chap. i, s. 7, v. 1). Although in this passage it is not explained whether the term 'mother' includes step-mother, yet that that is his opinion is clear, because he says, that the rule of law is the same whether the partition is effected by the father during his lifetime or after his death by the sons. From verse 8, chap. i, s. 2, it is evident that, on a partition during the father's lifetime, all his wives receive shares. That this is the meaning of the author of the Mitakshara appears further clear from the discussion upon the subject in question by Sreekishen Tarkalunkar in Dayakrama Sangraha, and by the author of the Viramitrodaya.

In chap. vii of Dyakrama Sangraha, Sreekishen, after laying down the law in the same way as his great master, viz., Jimutavahana, says in paras. 7 and 8 :—"But the followers of the Mithila school assert, that the word 'mother' in this text of Vrihaspati,—'The mother should, on the decease of the husband, be made an equal sharer with her sons'—intends also the step-mother, in support of which opinion they adduced the following text of that author of the same import. In his default, the mother is an equal sharer with her sons ; mothers are equal sharers with them, and daughters are entitled to a fourth part :

"'In his default'—In default of the father, when a partition is about to be made by grandsons.

"'The mother'—She who has male offspring.—'Mothers,' step-mothers destitute of male offspring : all these are sharers in equal proportions with their sons."

A similar view is taken in the following passage of Viramitrodaya, to be found at page 80 (Ch. II, pt. 1, sec. 19) :—"That all the wives of the father, whether sonless or having sons, are entitled to shares equally with the sons,

even in partition after the father's demise, appears to be the opinion of the learned author of the *Mitakshara*, since he introduces the text of *Yajnavalkya*—namely, 'The mothers also of those effecting partition after the demise, &c.' with these remarks: it has been ordained that the wives are entitled to shares equally with the sons in partition during the lifetime of the father. Now the sage declares that the wives [544] are entitled to shares equally with the sons in partition after the demise of the father."

"Accordingly also the author of the *Madanaratna* says: 'The use of the term indicates also the sonless step-mothers, as also the paternal grandmothers, agreeably to the text of *Vyasa*. The father's sonless wives, &c.'"

According to *Vyavahara Mayukha* (see chap. iv, v. 1) and *Smriti Chundrika* (see chap. iv) the word 'mother' includes step-mother.

Thus, according to *Vyavahara Chintamani* of *Vachaspati Misser* and all the leading authorities of the *Mitakshara* school, both mothers and step-mothers are equal sharers with the sons; therefore, the lower Court is right in its decision upon this point.

The next objection urged before us is, that the plaintiff, *Mussamut Senabutty*, having received *stridhan* from her husband, is not entitled to a full share on partition. The defendants' allegation, that 2a. 13g. 1c. 1k. share of *Bishenpore Bahas* was purchased by *Mokoond Lall* for *Senabutty*, is not made out. The plaintiffs, on the other hand, state that the *kobala* by which the purchase is said to have been effected, was merely a *benami* transaction.

We think that the lower Court is right in holding that it was a *benami* transaction; therefore this appeal fails upon all the grounds taken before us.

But the decree that has been passed seems to us to be open to objection. It is to the following effect:—"Accordingly I give the plaintiffs a modified decree, and they shall take by an actual partition the real and personal properties of *Mokoond Misser* as mentioned in the plaint to the extent of six-annas sixteen gandas share. The revenue-paying estates to be partitioned by the Collector, and in case he refuse to do so, they shall be partitioned by the Civil Court Ameen. Other properties also, moveable and immovable, to be divided between the parties, and plaintiffs shall get according to their share now decreed. In case any moveable property cannot be found or partitioned, the plaintiffs will get their proportionate costs with interest at 6 per cent. per annum from this day till realized from the defen-[545]dants, and their proportionate costs, with similar interest, should be borne by the plaintiffs."

The direction as to the partition of the revenue-paying estates seems to us to be erroneous. These estates must be partitioned through the Collector; they cannot be partitioned by metes and bounds by the Civil Court Ameen. Then also if the shares of these revenue-paying estates belonging to this family are themselves not separate estates, but are mere fractional shares of integral estates, they cannot be partitioned in the absence of the other co-sharers. If there be any estate or estates in this predicament, partition by metes and bounds of these estates cannot be effected in this suit. The lower Court must adopt some other equitable mode of partitioning the shares. As regards the shares to be allotted to the two widows, it should be made clear in the decree that they are allotted to them in lieu of their maintenance; the proprietary right in them shall remain vested in the sons subject to the widows retaining possession and enjoying the profits during their respective lives.

The respondents are entitled to recover the costs of this appeal from the appellants.

Appeal dismissed.

NOTES.

[I. PARTITION—MINOR COPARCENER—

A suit for partition is not allowed on behalf of a minor coparcener, except on grounds of malversation or unless it be for his benefit :—(1907) 31 Bom. 373 : 11 C. W. N. 769 : 9 Bom. L. R. 646 ; 29 All., 373 : (1894) 19 Bom., 99 ; (1888) 12 Mad., 401 ; 5 M. H. C. 193 ; 3 M. H. C. 94 ; 69 ; 31 Cal., 111.

An adult coparcener may bring a suit for partition without proving those conditions, and the guardian of the minor may consent to any arrangement for partition. The minor will be bound thereby, unless he can prove the partition to be unfair and prejudicial to his interest :—(1909) 31 All., 412 : 36 I. A. 71 : 13 C. W. N. 983 : 11 Bom. L. R. 878 ; (1894) 16 All., 231 ; 29 All., 37 ; 29 Mad. 62 ; 18 Bom. 197 ; 30 Cal. 738 at 752.

But an agreement for re-union cannot be validly made :— 37 Cal., 703 : 6 I. C. 441.

II. FEMALE SHARERS AT PARTITION—

The *mother* (whether the father be alive or dead, 8 Cal., 17) is entitled to a share at a partition (33 All., 118—not on other occasions) of joint family property between sons or sons and grandsons :—32 Cal., 234 ; 31 Cal., 262 (271) ; 16 Cal., 758 ; 12 Cal., 165 ; So is the *grandmother* :—15 Cal., 292 (303) ; 31 Cal., 1065 (1076).

As for the *great grandmother*, see *Trevelyan*, Hindu Law (1912) p. 320.

The *sister* is not entitled to a share but provision should be made for her marriage, 8 Cal., 537 ; (dowry gift by mother upheld : (1909) 13 C. W. N. 994 : 10 C. L. J. 545). This rule is not extended to the brothers themselves, for the necessary ceremonies of their children :— 31 Bom. 54.

The *step-mother* also is entitled (except in the Bengal school 16 Cal., 758) :—1 C. L. J. 142 ; 17 Bom., 271 ; 13 Cal., 39 ; 10 A. W. N. 124 ; 31 Bom. 54.

This right of the mother etc. is independent of her actual means of subsistence, though the amount of her share is regulated by the *stridhan* that she received from her husband or her father-in-law :— 36 Cal., 75.

The nature of the estate taken by these female sharers has been held by the Privy Council not to be *stridhan* :—(1912) 34 All., 231 **P. C. reversing** 32 All., 253 ; 24 All., 67 ; 82.

III. PARTITION OF REVENUE-PAYING ESTATES—

See also 8 Cal., 619 ; 16 Bom., 528 ; 24 Cal., 725.]

[8 Cal. 545 : 11 C.L.R. 41.]
APPELLATE CIVIL.

The 6th February, 1882.

PRESENT :

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

Chowdrani.....Defendant

versus

Tariny Kanth Lahiry Chowdry.....Plaintiff.*

*Hindu Law—Benami transaction—Purchase in name of Hindu wife—
Presumption—Onus—Joint family.*

Quere.—Whether, in the absence of any evidence to show the source from which the purchase-money was derived, there is a presumption that property purchased in the name of a Hindu wife is the property of her husband and has been purchased with his money?

Per FIELD, J. Semble.—There is no presumption one way or the other, but the burden of proof in each particular case must depend upon the pleadings and the position of the parties as plaintiffs or defendants.

IN this case it appeared that, some time previously to the year 1842, one Goloke Nath Chowdry entered into a bond as [546] surety for the due performance by one Jogul Kishore Sen of the latter's duties as treasurer of the Mymensing Collectorate. Jogul Kishore having become a defaulter, the Collector, on the 9th of June 1842, sold one-fourth (three gandas) of the rights of Goloke Nath Chowdry in a certain zamindari (which had been pledged in the bond) to Sreemutty Chowdrani, the wife of Goloke Nath Chowdry. In the present case the plaintiff alleged that that purchase was benami, and that the real purchaser was Goloke Nath himself. On the 6th of September 1871, the plaintiff, in execution of a decree obtained against Goloke Nath by one Mokhoda Debea, purchased the share of Goloke Nath in the zamindari. The plaintiff afterwards applied for registration under Beng. Act VII of 1876, but the defendant, Sreemutty Chowdrani intervened, claiming the three gandas share, which she declared she had purchased at the sale by the Collector in June 1842. Her claim was allowed by the Deputy Collector, and his order was upheld on appeal by the Collector of Mymensing on the 20th of September 1878.

The plaintiff brought the present suit on the 27th of February 1879, for possession of the three gandas claimed by Sreemutty Chowdrani, alleging that the purchase of the 9th of June 1842 was merely benami for Goloke Nath Chowdry. The defence was, *inter alia*, that the purchase was made *bond fide* with Sreemutty Chowdrani's own moneys, and that the suit was barred by limitation. The Subordinate Judge was of opinion that the purchase of June 1842 was benami for Goloke Nath Chowdry, and overruling an objection taken by the defendant that the plaintiff's sale-certificate was not registered, gave the plaintiff a decree.

Mr. Branson, Baboo Mohiny Mohun Roy, and Baboo Ishur Chunder Chuckerbutty for the Appellant.

Mr. H. Bell, Baboo Chunder Madhub Ghose and Baboo Bycunto Nath Dass for the Respondent.

Mr. Branson, for the Appellant.—The purchase of June 1842 purports to have been made by the defendant Sreemutty Chow-[547]drani

* Appeal from Original Decree, No. 168 of 1880, against the decree of Baboo Nobin Chunder Ghose, Subordinate Judge of Mymensing, dated the 9th April 1880.

with her own money, and the conveyance was taken in her name. The Subordinate Judge should have required clear evidence of the fact that it was benami, and no such evidence has been given. He has throughout put the burden of proof on the defendant, and has taken away her property, because there are, in his opinion, suspicious circumstances in the case. Such a mode of proceeding is entirely opposed to the case of *Sreeman Chunder Dey v. Gopal Chunder Chuckerbutty* (11 Moore's I. A., 28), where the Privy Council laid down that the decisions of the Court must rest not upon suspicions, but upon legal grounds established by legal testimony. In the case of *Rajah Chundra Nath Roy v. Ramjai Mazumdar* (6 B. L. R., 303), the Privy Council say, that the plaintiff, in a suit challenging a purchase as benami, is bound to prove his case, and if he does not, it is immaterial whether the defendant prove his or not. In *Lyakut Ali v. The Court of Wards* (10 W. R., 423), the same rule was followed; and in *Mussamut Meher Banoo v. Keramat Ali* (22 W. R., 402), COUCH, C.J., says, that circumstances of suspicion are not strong enough, and that the Judge must come to a clear finding that the purchase was benami. Even if the onus was properly on the defendant, the evidence is amply sufficient to prove the defendant's case. [The learned counsel then urged the plea of limitation, but did not go into the question of the sale-certificate, as the point was under the consideration of a Full Bench of the Court.]

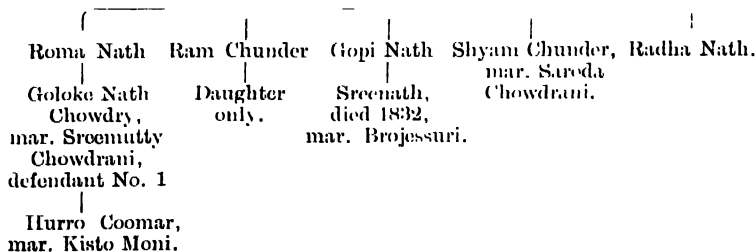
Mr. Bell, for the Respondent.—In this case it is clear from the evidence, that Sreemutty Chowdrani lived with Goloke Nath Chowdry, her husband, at the time of, and for years after, the purchase of 1842; and in such a case that purchase, though made in her name, will be presumed to be a purchase made for the benefit of the family, or rather for the benefit of the only person in the family from whom the money could come,—namely, Goloke Nath Chowdry—*Chunder Nath Mottoo v. Kristo Komul Singh* (15 W. R., 357). It is laid down in Field on Evidence, 3rd edition, p. 493, that the presumption of English law,—namely, that the [548] property belongs to the member of the family in whose name the conveyance was taken,—does not arise under Hindu law, “and when immoveable property is purchased by a Hindu in the name of his son, the presumption is, that it is a benami purchase merely, and that the property belongs to the father. If the person in whose name it was purchased alleged that he is solely entitled to the legal and beneficial interest in such property, the burden of proving this will lie upon him.” In *Bindoo Bashinee Debee v. Pearcee Mohun Bose* (6 W. R., 312) the Court held, that the wife in whose name the property stood was bound to show whence the money had come. [FIELD, J.—I think that case has been overruled. That case was decided by TREVOR, J. He afterwards decided *Sreeman Chunder Dey v. Gopal Chunder Chuckerbutty* on the same principle, and that case was reversed by the Privy Council (11 Moore's I. A., 28). McDONELL, J.—I suppose you will admit that, since the Privy Council's decision in *Sreeman Chunder Dey v. Gopal Chunder Chuckerbutty* (11 Moore's I. A., 28) the Courts in India have veered round a good deal?] There is no evidence on the record which is in any way inconsistent with the fact of the purchase being benami, and the defendant must show a genuine title—*Bebee Zahrah v. Bhugwan Doss* (16 W. R., 211).

Mr. Branson in reply.—The assertion that a transaction is not really what it purports to be, is one that will be regarded by the Courts with great suspicion, and must be strictly made out by evidence—Mayne's Hindu Law, s. 367 (2nd edition, p. 375), and the authorities there cited. Money advanced by a wife for the purchase of property in her husband's lifetime will not be considered as advanced for his benefit, nor will the property be presumed to be his—*Gobind*

Chunder Mozoomdar v. Dubneer Khan (23 W. R., 125), and *Moonshee Buzloor Ruheem v. Shumsoonissa Begum* (11 Moore's I. A., 551). The burden of proof lies on the person who maintains that the apparent state of things is not the real state of things, and the apparent purchase must be regarded as the real purchase until the contrary is proved—*Deo Nath v. Peer Khan* (3 Agra H. C., Rep., 16): [549] and in the judgment of PONTIFEX and FIELD, JJ., in *Kocjo Kaminy Debee v. Beedhu Soondur Gossamee*, Reg. App., No. 266 of 1879 (unreported), their Lordships say:—"A good deal has been said about the presumption that property acquired in the name of a wife must be presumed to have been purchased with her husband's money. If it were necessary to decide this case upon that presumption, we should have considerable hesitation in according our assent to the proposition contended for by the learned counsel for the appellant. There can, of course, be no doubt upon the authorities, that when property is acquired in the name of either a Hindu or a Mahomedan wife, and when there is evidence that the money with which such property has been acquired was the money of the husband, such property, of which the conveyance has so been taken in the name of the wife, will, notwithstanding the fact of the conveyance being in the wife's name, be considered to be the property of the husband. But we think it extremely doubtful if the naked proposition contended for by the learned counsel is supported by the authorities to which he has referred us, the proposition, *viz.*, that, in the absence of evidence as to who supplied the consideration-money, the mere fact of the property being acquired in the name of the wife is to be taken as presumptive evidence to show that the consideration-money was advanced by the husband, and therefore the property was the property of the husband."

The **Judgment** of the Court (McDONELL and FIELD, JJ.) was delivered by **Field, J.**—The plaintiff in this case purchased, on the 6th September 1871, the right, title, and interest of one Goloke Nath Chowdry in a twelve ganda share of an estate. Subsequent to his purchase, he applied under the provisions of Beng. Act VII of 1876 to be registered on the Collectorate as proprietor of this twelve-ganda share. He was opposed by the defendant in the present suit, Sreemutty Chowdrani, and the result of the registration proceedings was, that the plaintiff's name was registered for nine gandas only, and the [550] defendant's name was registered for the remaining three gandas. In consequence of this order of the registration authorities, the present suit has been instituted, and the plaintiff asks in his plaint to have his title declared to the three gandas, for which the defendant's name has been registered, and to have the Collectorate register amended accordingly.

In order to understand the merits of the controversy between the parties, it will be necessary to go back for more than forty years, and refer to the original members of the family to which Goloke Nath and Sreemutty Chowdrani both belonged. The following is a genealogical tree, which will enable the facts of the case to be readily understood :



It appears that one-anna ten gandas of Parganah Sherepore, formerly belonged to five brothers,—Roma Nath, Ram Chunder, Gopi Nath, Shyam Chunder and Radha Nath,—the interest of each of these brothers being six gandas. Rama Nath died and was succeeded by his son Goloke Nath Chowdry, who married Sreemutty Chowdrani, the defendant in the present case. Goloke Nath Chowdry, as the heir of his father Roma Nath, became entitled to his six gandas. Ram Chunder died subsequently, and the six ganda share belonging to him was also inherited by Goloke Nath Chowdry. There was at one time a contention that one moiety of Ram Chunder's six gandas went to Gopi Nath, and that the other moiety, or three gandas went to Goloke Nath, and that Goloke Nath, upon this, became entitled to nine gandas only; but this has been found against the plaintiff, and there is no appeal upon this point. It follows that Goloke Nath was entitled to twelve gandas of the property after the death of Ram Chunder and his daughter. While Goloke Nath was so entitled to the twelve gandas, he became surety for [551] one Jogul Kishore Sen, who was employed on the Mymensing Collectorate; and as surety for this Jogul Kishore Sen, he pledged one-fourth of his share in the property. Jogul Kishore Sen defaulted, and the Collector, under the law at the time in force, proceeded to sell the one-fourth share of Goloke Nath Chowdry's interest. This one-fourth share was three gandas, inasmuch as Goloke Nath Chowdry was, in the manner just stated, at that time entitled to an interest represented by twelve gandas. The three ganda share thus sold on the 9th June 1842 was purchased in the name of Sreemutty Chowdrani, the defendant, and this is the title to this three-ganda share upon which she relies. Subsequent to this Gopi Nath died, and was succeeded by his son Sreenath, who died in 1832; and it appears that the six gandas, which originally belonged to Gopi Nath, were also inherited by Goloke Nath. It then appears that Goloke Nath sold a twelve-ganda share to one Sib Dyal Tewari, and upon the same date, he and his wife, Sreemutty Chowdrani, executed, in favour of the same Sib Dyal Tewari, an izara or usufructuary mortgage, of a further six ganda share, for the period of twenty-six years. The date of this instrument was the 2nd Pous 1266, or 16th December 1859. Afterwards the share belonging to Shyam Chunder was also inherited by Goloke Nath, upon the death of Shyam Chunder's wife, Saroda Chowdrani. It would thus appear that Goloke Nath, at various times, and as the result of these successive inheritances, became entitled to twenty-four gandas. With respect to the six gandas which belonged to the fifth brother Radha Nath, we have nothing to do, and no question has been raised in this case.

The execution-sale under which the plaintiff purchased took place on the 6th September 1871, and the plaintiff's contention is, that the right, title, and interest of Goloke Nath Chowdry purchased by him at that sale is really an absolute title to twelve gandas of the estate,—that is, the twenty-four gandas to which Goloke Nath became entitled in the manner just described, less the twelve gandas sold by him on the 16th December 1859 to Sib Dyal Tewari. There is one further transaction which it is necessary to notice, and that is this. It appears [552] that the six gandas which formed the subject of the izara or usufructuary mortgage of the 2nd Pous 1266, or 16th December 1859, was granted in izara to three persons, of whom one, *viz.*, Bisso Nath, owned seven-sixteenths, Sib Dyal owned five-sixteenths, and the third, Judoo Nath, owned four-sixteenths. Bisso Nath's interest, that is seven-sixteenths, was sold in execution of a decree against him, and was purchased by Goloke Nath in the name of Kisto Moni, his son's wife.

The essential question with which we have to deal in this case is, whether the three gandas purchased on the 9th June 1842, in the name of defendant

No. 1, Sreemutty Chowdrani, were purchased by her as her absolute property, or were really purchased by her husband, but benami in her name. The first question which it will be convenient to consider in dealing with this matter is, the burden of proof. The Subordinate Judge evidently considered that the burden of proof was upon the plaintiff, for it appears that the plaintiff was called upon to begin, and that his witnesses were first examined. In this Court it has been contended that the burden of proof ought to have been laid upon the defendant Sreemutty Chowdrani. It is said that a Hindu wife is a member of a joint Hindu family, and that the general presumption that all property acquired by a member of such a family is acquired from the joint funds, is just as applicable in the case of property standing in the name of a Hindu wife as in the case of property standing in the name of any other member and alleged to have been acquired from separate funds. In support of this contention, the case of *Bindoo Bashinee Debee v. Pearee Mohun Bose* (6 W. R., 312), has been relied upon. In that case Bindoo Bashinee, wife of Modhoosoodun, was the person in whose name the property was purchased, and Mr. Justice TREVOR, who delivered the judgment of the Court, said :—“The plaintiff is entitled to a clear finding as to whether she held it in trust for him (that is her husband) or in her own right. That point can only be determined by her showing the source whence the money came, and as in such a case the burden is on the defendant Bindoo Bashinee, we remit the case to the Judge [553] for the purpose of enquiring whether the three bighas and three cottahs purchased by her ostensibly from Jugomoyi Dabi and Anund Chunder Chuckerbutty in 1256 was purchased by her from her husband's money and held in trust for him.”

Now it would appear that the learned Judge of this Court who delivered that judgment was of opinion that, as a general rule, in cases of alleged benami, it lies upon the ostensible owner to prove that he is the real owner, if the person who impugns the ostensible title can succeed in throwing suspicion upon such title. This appears from the case of *Sreeman Chunder Dey v. Gopal Chunder Chuckerbutty* (11 Moore's L. A., 28). The judgment in that case in the High Court was the judgment of Mr. Justice TREVOR and Mr. Justice JACKSON, and in that judgment there is the following passage (p. 39 of the report) :—“In a case of this nature, if the plaintiff succeeds in showing just ground for suspecting the good faith and reality of the title, which is interposed between the creditor and the realization of his dues, the Court will require the ostensible owner to do that which he alone can do, and which he can easily do if he is a *bonâ fide* owner, *viz.*, to place beyond a doubt the reality of his ownership. In this case we think there is ample ground for putting the defendant Sreeman Chunder to such proof.” When that case came on appeal before the Privy Council, their Lordships said (pp. 43 and 44 of the report) :—“Undoubtedly, there are in the evidence circumstances which may create suspicion, and doubt may be entertained with regard to the truth of the case made by the appellant; but in matters of this description it is essential to take care that the decision of the Court rests, not upon suspicions, but upon legal grounds established by legal testimony”; and they were of opinion that it lay, not upon the defendant Sreeman Chunder to show that the property was purchased with his own money, but upon the plaintiff to show that the judgment-debtors on whose behalf the purchase was alleged to have been made were the persons who supplied the purchase-money. It therefore appears to us, that the general principle laid down by Mr. Justice TREVOR in [554] the case of *Bindoo Bashinee Debee v. Pearee Mohun Bose* (6 W. R., 312), and followed by him in the subsequent case to which we have just referred, has been overruled by the Privy Council. But it is said that

there is an essential difference between the case of *Sreeman Chunder Dey v. Gopal Chunder Chuckerbutty* (11 Moore's I. A., 28) and the present case, inasmuch as that was not the case of property purchased in the name of a Hindu wife. We are inclined to think that the judgment in the case of *Bindoo Bashinee Debee v. Pearce Mohun Bose* (6 W. R., 312) proceeded upon a general principle supposed to be applicable to all benami-holders, and not upon the peculiar position of a Hindu wife. The same question came before a Bench of this Court very recently in appeal from Original Decree, No. 266 of 1879—*Koonjo Kaminny Debee v. Beedhu Soondur Gossamee* (unreported); and we there expressed our unwillingness to accept the bare proposition that, in the absence of any evidence to show the source from which the purchase-money was derived, there is a presumption that property purchased in the name of a Hindu wife is the property of her husband, and has been acquired with his money. If we had now to decide this question, we are inclined to say that, in our opinion, there is no presumption one way or the other, and that the burden of proof in each particular case must depend upon the pleadings and the position of the parties as plaintiffs or defendants. But we think it will not be necessary to decide this point upon the present occasion, because whether the burden of proof be laid upon the plaintiff or upon the defendant, we think that the preponderance of evidence is in favour of the defendant Sreemutty Chowdrani. The plaintiff has examined eight witnesses. Of these Nos. 4, 5, and 6—*viz.*, Chunder Kishore Bhat, Raj Kishore Hore, and Ram Comul Dey—give an account of the manner in which Goloke Nath Chowdry supplied the money with which the purchase was made. Having heard the evidence of these witnesses, we are of opinion that the story told by them is not in itself a very credible one. On the other side, we have the testimony of seven witnesses, including the defendant Sreemutty Chowdrani herself, and we have further the evidence of **[555]** Sib Dyal Tewari, a witness called by both parties, and the impression which this evidence leaves upon our minds is, that Sreemutty Chowdrani had funds of her own, and that, with a portion of these funds, this share in the property was purchased. It may be observed that the price paid, *viz.*, Rs. 560, renders this view a reasonable one. There is nothing improbable in the wife of a man in Goloke Nath's position having this sum of money as her *stridhan*. Then there are other circumstances in the case which, in our opinion, when taken together, afford corroboration of this view. *First*, the sale-certificate was taken out in the name of Sreemutty Chowdrani. The Subordinate Judge observes, that there is no evidence that the Mukhtear Doorga Prosad was acting on her behalf, but the recital in the sale-certificate is strong evidence of this fact. Then the name of Sreemutty Chowdrani was registered in the Collectorate for the share purchased by her; and decrees for rent were obtained in her name. *Thirdly*, we have an admission in the *izar* lease of the 16th December 1859, an instrument executed by Goloke Nath Chowdry and Sreemutty Chowdrani jointly. The recital in that instrument that three gandas of the property belonged to Sreemutty Chowdrani was an admission against the interest of Goloke Nath Chowdry, and if any question as to the real ownership of this share had subsequently arisen between Goloke Nath or his heirs and his wife or her heirs, this admission would have been strong evidence against Goloke Nath and his representatives. It appears to us that an admission of this kind is not an admission which would have been readily made by Goloke Nath if it did not represent the real state of the facts. As to the question of possession, there is, we think, as good evidence on one side as on the other; but this evidence, so far as it relates to the period after 1859, cannot be worth very much, seeing that, since the execution of the *izar* or mortgage lease on the 16th December 1859, the *izaradars* have been in actual possession of the property:

and nothing by way of rent or otherwise was payable to the reversioners. Looking at the evidence on both sides and the circumstances to which we have referred taken together, for each of them singly may be fairly argued to carry less weight, it appears to us, that [556] the preponderance of evidence is in favour of the defendant; and we think, therefore, that the decree of the Subordinate Judge must be reversed, and this appeal decreed with costs.

Appeal allowed.

NOTES.

I. THE APPEAL TO THE PRIVY COUNCIL—

The Privy Council, on appeal to it, **reversed this case, on the facts**:—(1886) 13 Cal., 181; 13 I. A. 70.

II. PROPERTY OR TRANSACTION IN THE NAME OF A HINDU FEMALE—PRESUMPTION—

As regards this, see also (1884) 8 Mad. 211; (1899) 26 Cal. 871; 26 I. A. 227; (1897) 2 C. W. N. 367; (1907) 17 M. L. J. 339 (342); (1882) 10 Cal. 686 (687).]

[8 Cal. 556 : 12 C.L.R. 253]

ORIGINAL CIVIL.

The 16th February, 1882.

PRESENT :

MR. JUSTICE WILSON.

Kristocomul Mitter

versus

Suresh Chunder Deb.

Insolvency—After-acquired property—Purchaser from insolvent who had not obtained his discharge—Purchaser from Official Assignee—Rights of parties—Intervention of Official Assignee.

Subject to the right and claim of the Official Assignee, and so long as he does not interfere, an insolvent, who has not obtained his final discharge, has power with respect to after-acquired property to buy and sell and give discharges, and do all other acts which he could have done before his insolvency.

The possession of such property by an insolvent in such a position may be adverse to the Official Assignee so as to bar the title of the latter by lapse of time.

THE plaintiff was the son of one Hurrochunder Mitter, who died intestate in 1862, leaving three sons, Nilcomul, Ramcomul, the plaintiff Kristocomul, and a widow Bemola Money Dossee, all members of a joint family, and as such, in possession of a family dwelling-house in Musjeed Baree Street.

In the year 1860, Nilcomul had been adjudicated an insolvent, and all his property therefore, from such date, vested in the Official Assignee; and he, up to the time of the present suit, had failed to obtain his final discharge.

The three brothers and the widow, in the year 1876, instituted a suit for the partition of the family dwelling-house, and, in accordance with a decree passed in that suit, a commission of partition issued, under which Nilcomul was allotted a quarter share. The Official Assignee was not made a party to the partition proceedings, and Nilcomul remained in possession of his quarter share up to the 24th July 1880.

On the 1th December 1881, the plaintiff bought from the Official Assignee Nilcomul's quarter share in the dwelling-house [557] for 500 rupees, the actual deed of conveyance being dated the 21st December 1881.

The plaintiff, on endeavouring to take possession, was forcibly prevented from so doing by the defendant, Suresh Chunder Deb, who alleged that he had, on the 24th July 1880, purchased from Nilcomul himself his quarter share in the family dwelling-house for the price of rupees 1,300, and that such purchase was made *bonâ fide* and without any notice of the alleged insolvency. The plaintiff, therefore, brought the present suit to have his title and share in the house declared and possession given to him.

The defendant contended that the plaintiff was estopped from setting up the title of the Official Assignee, inasmuch as Nilcomul had all along remained in possession of the property from the time of the partition up to the 24th July 1880, and that his own purchase was a *bonâ fide* one, and that, since his purchase, he had expended 850 rupees on the house.

Mr. Montrion and Mr. W. C. Ghose for the Plaintiff.

Mr. Bonnerjee (with him Mr. Amir Ali) for the Defendant. It is hardly likely that the defendant would have bought a property of a speculative kind, if he knew of the insolvency. The Official Assignee's title is barred by lapse of time—art. 144, sched. ii of the Limitation Act. Nilcomul's possession became adverse upon the death of his father. If the insolvent is regarded as the agent of the Official Assignee, I would contend that he could pass a good title to the defendant; but I say, that that would refer to personal property only. Whatever may be the right of the Official Assignee, the plaintiff cannot take advantage of it; his conduct debars him from so doing: see s. 115* of the Evidence Act. The case of *Herbert v. Sayer* (5 Q. B., 965) lays down that an uncertificated bankrupt may acquire property and contract for the benefit of his assignees, and may sue in respect of such property, the bankruptcy constituting no defence unless the assignees have interfered. In *Ashley v. Kell* (2 Strange, 1207) it was held, that although the future effects of a bankrupt were liable to be seized for the benefit of his credit-[558]ors, yet the bankrupt had, in the meantime, such a property in them, as enabled him to transact and sell to a *bonâ fide* purchaser. In *Re London and Provincial Telegraph Co.* (L. R., 9 Eq., 653) it was held, that the title of a registered purchaser for value prevailed against the assignee in bankruptcy, who had taken no steps for five years to assert his right. In *Drayton v. Dale* (2 B. and C., 293) it was held, that the right and title to endorse a bill does not vest in the assignee; and that if the assignee in bankruptcy make no claim to the bankrupt property, the bankrupt has a right to it as against all others. The principle to be deduced from *Herbert v. Sayer* (5 Q. B., 965), seems to be, that a bankrupt has property in after-acquired property and is entitled to deal with it. As to acquiescence, the silence of the assignee for a long time is to be construed as allowing the bankrupt to deal with the property as he pleases: see *Pickering v. Lord Stanford* (2 Ves., Jun., 272), *Prendergast v. Turton* (1 Y. and C., Ch. Cas., 98), and *Fyson v. Chambers* (9 M. and W., 460). [WILSON, J.—In all these cases, the question has been between a third person and the bankrupt; is there any case as between a third person and the assignee?] Not that I am aware of.

*[Sec. 115:—When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself

Estoppel.
and such person or his representative to deny the truth of that thing.]

Wilson, J.—The facts in this case are as follows:—Nilcomul Mitter, a brother of the plaintiff, was adjudicated an insolvent in the year 1860, but never obtained his final discharge. In 1862, by the death of his father, he became entitled to certain joint family property as one of three sons, and continued in undisturbed possession; and the Official Assignee never intervened or made any claim so long as the property was undivided. In 1876, the plaintiff and the third brother brought a suit against the widow and second brother, asking for partition. On the 13th May 1877, a decree for partition was made and carried out, and Nilcomul remained in undisturbed possession of his divided share, the Official Assignee making no claim. In June 1880, Nilcomul sold his interest to the present defendant, who, I find, bought in good faith, without notice, and paid full value. On the 4th December 1880 six [559] months after, the plaintiff bought the same share from the Official Assignee for a small sum, and with full knowledge of the purchase made by the defendant. The plaintiff now sues for the possession of the property purchased by him from the Official Assignee, stating that the defendant had forcibly prevented him from taking possession, and alleging the insolvency of Nilcomul. Such are the facts and contentions on the plaintiff's behalf. The subject of after-acquired property as regards uncertificated bankrupts, has been considered in England, from time to time, and the result is this, that, subject to the right and claims of the Official Assignee, so long as the Official Assignee does not interfere, the uncertificated bankrupt has power to buy and sell and give discharges and do all other acts he could have done and had done before the intervention of the Official Assignee. The law is summed up in *Herbert v. Sayer* (5 Q. B., 965), which seems to me conveniently to sum up the decision in England on the various cases, and *Kerakoose v. Brooks* (8 Moore's I. A., 339), is clear authority that the Indian Act is to be construed on the same principle. The defendant acquired a good title and the plaintiff none. But even if I thought the defendant's title was not good on the above ground, it is good on another ground. Nilcomul's possession since 1862 was adverse possession against the Official Assignee. The suit must be dismissed with costs No. 2.

Suit dismissed.

Attorney for the Plaintiff: Mr. Zorab.

Attorney for the Defendant: Baboo Gonesh Chunder Chunder.

NOTES.

[INSOLVENT—AFTER-ACQUIRED PROPERTY—

As to when possession of, or dealings with, such property becomes adverse to the Official Assignee, see (1912) 12 M. L. T. 215; (1904) 28 Mad. 168 (171); (1893) 17 Mad. 21. (28); as to maintainability of suits, see (1892) 16 Bom. 152; as to validity of discharges of debts previous to insolvency, see (1897) 2 C. W. N. 372 (375).]

[- 10 C. L. R. 369]

[560] APPELLATE CRIMINAL.*The 20th February, 1882.*

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

In the matter of the Petition of Nobin Chundra Banikya.

The Empress

versus

Nobin Chundra Banikya.*

*Criminal Procedure Code (Act X of 1872), s. 349—Acquittal of prisoner -
 Withdrawal of pardon granted to approver after judgment of
 acquittal - Conviction on trial improperly originated,
 Power of High Court to set aside.*

At a sessions trial, the Judge, after acquitting the prisoner, passed an order withdrawing a pardon already granted to an approver (who had given his evidence as such approver before the Sessions Court), and ordered his commitment. The approver was charged, tried, and found guilty. *Held* by MITTER, J., that the order withdrawing the pardon and committing the approver was contrary to the provisions of s. 349† of the Criminal Procedure Code, the words, "before judgment has been passed" being words inserted in the section to put a limit to the time within which the power of withdrawal of the pardon conferred in the Court of Sessions may be actually exercised; and that therefore the trial of the approver was illegal.

The power of directing commitments conferred upon the Sessions Court by s. 349 of the Criminal Procedure Code can be exercised only before judgment has been passed.

Held by MACLEAN, J., that it is not necessary that the order should be made before judgment is passed, but that it must appear to the Judge before he passes judgment, that the conditions of the pardon have not been complied with; and that, in the present case, it was impossible to hold, that because the actual order of commitment of the accused was written (although in the judgment) after the acquittal, therefore it did not appear to the Judge before passing judgment that there were grounds for his order.

Per MACLEAN, J.—The High Court may, without reference to the Local Government, set aside a conviction made upon a trial improperly originated.

RAMKRISTO, Nobin Banikya, and others were charged with abetment of the murder of one Muddun Banikya. Before the **[561]** Deputy Magistrate, Nobin made a confession, and a pardon was tendered to him under s. 347 of the Criminal Procedure Code. At the trial before the Sessions Judge, Nobin gave his evidence as an approver, which was substantially

* Criminal Appeal, No. 20 of 1882, against the order of T. D. Beighton, Esq., Officiating Sessions Judge of Mynensingh, dated the 14th November 1881.

† [Sec. 349:—When a pardon has been tendered under section three hundred and forty-

seven or section three hundred and forty-eight, if it appears to the Magistrate before the trial, or to the Court of Session before judgment has been passed, or to the High Court as a Court of reference or revision, that any person, who has accepted such offer of pardon, has not conformed to the conditions under which the pardon was tendered, either by wilfully concealing anything

essential, or by giving false evidence, such Magistrate or Court may commit or direct the commitment of such person for trial for the offence in respect of which the pardon was so tendered.

The statement made by a person under pardon, which pardon has been withdrawn under this section, may be put in evidence against him.]

the same in effect as his evidence before the committing officer ; but the Judge, concurring with the assessors, acquitted the accused, and after the formal finding acquitting the prisoner (although in the judgment) added an order to the effect that the pardon granted to Nobin should be withdrawn, and he, Nobin, put upon his trial for the murder of Muddun, and stating therein that he was of opinion, that Nobin had wilfully concealed essential facts and had given false evidence against Ramkristo, who, the Judge held, was innocent.

Nobin was then tried for the abetment of the murder of Muddun, and at this trial his deposition in the former trial was used against him ; the Judge, differing from the assessors, found him to have been present when the murder was committed, and sentenced him to transportation for life.

Nobin appealed to the High Court.

Mr. *M. Ghose* (with him *Baboo Anando Gopal Paulit*) for the appellant, contended, (i) that the pardon could not be withdrawn by the Sessions Judge at the stage at which it was withdrawn ; (ii) that he had no jurisdiction to withdraw the pardon at all, and even had he the power, he was not justified in so doing under the circumstances of the case ; (iii) that, assuming the Judge had jurisdiction having regard to the last clause of s. 349 of the Criminal Procedure Code, the statement used against Nobin was inadmissible in evidence ; (iv) that it never was intended that the last clause in s. 349 of the Criminal Procedure Code should override the provisions of the Evidence Act ; and (v) that the last clause of s. 349 can be read consistently with s. 24 * of the Evidence Act. *1st.*—The Judge had no power to cancel the pardon after verdict ; the object of the limitation in s. 349 as to the time when this power is to be exercised, is to prevent Judges from being influenced by the result of the trial. An approver does not undertake to secure a conviction, nor is it a condition of his pardon that he is [562] to be believed. He is *prima facie* unreliable unless corroborated in material particulars. The power must be exercised before the Court has made up its mind one way or the other, otherwise an approver may be committed in every case in which he fails to secure a conviction. *2nd.*—Assuming the Judge had jurisdiction to revoke the pardon, he was not justified in doing so under the circumstances of the case ; the falsity of the deposition ought to appear on the face of it. I contend that the prisoner apparently told the truth, and that there was no reason for holding that he had given false evidence. [MITTER, J.—But you contend on the merits that we ought not to believe his statement if it is admissible in evidence against him, how can you then ask us to hold that he did not give false evidence ?] For the purposes of my present contention only I ask your Lordships to hold that the prisoner stated what was apparently true. If he told the truth his pardon was improperly cancelled, and if he did not, then he ought not to be convicted on the basis of his own deposition. [MACLEAN, J.—Have we any power to interfere if we hold that his pardon was improperly withdrawn ?] I submit this Court can then set aside the conviction and hold that the pardon had become final. [MACLEAN, J.—Are you aware of the case of the *Empress v. Srinobin Bhutia* (Cr. Ap., No. 811 of 1879), from Darjeeling, decided on the 17th March 1880, in which WHITE, J., and myself held, that the pardon ought not to have been withdrawn, and we

* [Sec. 24 :—A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to

have been caused by inducement, threat or promise irrelevant.

Confession caused by inducement, threat or promise irrelevant. from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.]

then recommended the Local Government to pardon the prisoner?] That case was undefended, and the question was not argued. Whatever may be the case in England, here the pardon is provided for by Statute, and your Lordships are competent without referring the matter to the Local Government to set aside the conviction. As regards the fourth contention, the learned Counsel cited *The Dean of Ely v. Bliss* (2 DeGex M. & G., 459), as showing that a later Act does not repeal by implication a previous Act; and that, therefore, s. 349 of the Criminal Procedure Code could not override the Evidence Act. The words of a general Code cannot, without express words of modification, override a particular Code: *Wilberforce's Statute Law*, p. 326. The general rule touching [563] the repeal of laws is "*leges posteriores priores contrarias abrogant*" but subsequent Acts in the affirmative giving new penalties and instituting new methods of proceeding do not repeal former penalties and methods of proceeding without negative words. In *Fitzgerald v. Champneys* (2 John. & Hem, 31; at p. 54), it was held, that a general Act of Parliament does not repeal a prior special Act without express word of reference. See also *Escott v. Mastin* (4 Moore's P. C., 104) and *Trans. v. Rees* (9 C.B. (N. S.), 391). The statement made by Nobin is not admissible under the Evidence Act, and this Act being a prior Act is not repealed by implication by s. 349 of the Criminal Procedure Code. [MITTER, J.—We reserve our opinion as to whether the statement can be read, and subject to this you can read it.]

Mr. *Branson* (with him *Baboo Kalichurn Banerjee*) for the Crown.—As regards the withdrawal of the pardon, the order was in accordance with the provisions of s. 349, because this section only requires that the Court of Session should come to the conclusion that the accused has not conformed to the conditions under which the pardon was tendered before the judgment has been passed, and if this condition be fulfilled, the actual order directing the commitment may be passed at any time.

Mr. *Ghose* in reply. —If it was simply intended that before judgment is passed it must appear to the Judge that the prisoner had not conformed to the conditions of his pardon, and that the Judge might revoke the pardon at any time, then in every case, after any length of time, a Judge might exercise the power by simply recording, that, during the trial, it had appeared to him that the approver had not conformed to the conditions of his pardon. If the construction contended for were correct, then a Magistrate might, after trial, and even after an approver's evidence had been acted upon by the Sessions Court, revoke a pardon on the ground that it had previously appeared to such Magistrate that the approver had not told the whole truth—a result which could never have been intended. On the merits I [564] contend that the deposition of the prisoner, on which the conviction mainly rests, was improperly obtained by the Police, and ought not to be believed even as against himself.

The following **Judgments** were delivered by the Court (MITTER and MACLEAN, JJ.):—

Mitter, J.—The appellant has been convicted of the offence of abetment of murder (ss. 114 and 302 of the Penal Code) of a person named Muddun Banikya, and sentenced to transportation for life. The assessors were for acquitting the appellant. That, on the night of Friday the 8th Joist last (20th May), Muddun was murdered in his hut while asleep, and on the following morning his corpse was discovered with a *ram-dao* lying near it, is proved beyond the possibility of a doubt. It appears that the appellant was suspected of having committed this murder, and was arrested by the Police on the 22nd May and challaned on the 30th May. On the 31st May the appellant made a statement to the Deputy Magistrate in charge of

the Subdivision within which the murder was committed, confessing his guilt and implicating one Ramkristo Banikya and four other Mussulmans of his village. On the 7th June the Deputy Magistrate, under s. 347 of the Criminal Procedure Code, tendered pardon to the appellant, who, having accepted the tender, was examined as a witness in the case, which was prosecuted against Ramkristo and the aforesaid four Mussulmans. The case was ultimately committed for trial in the Sessions Court. In the Sessions trial, which was held by Mr. Kirkwood, the appellant was examined as a witness on the 27th July. His evidence was substantially the same which was given by him before the committing officer. On the 28th July, after the first witness for the defence had been examined, the assessors intimated to the Judge that, in their opinion, the evidence adduced on behalf of the prosecution was not sufficient to warrant a conviction. The Judge, concurring in that opinion, stopped the trial; and on the following day delivered his written judgment, acquitting the persons then on their trial. At the end of the judgment he recorded an order, directing the Magistrate to commit the appellant to be tried for the murder of Muddun, as it appeared to him that the appellant, having been guilty of wilful concealment of essential facts and of giving false [563] evidence against Ramkristo, had not conformed to the conditions under which the pardon had been tendered to him. This order was passed under s. 349 of the Criminal Procedure Code. The appellant was ultimately committed and convicted as stated above. The present Sessions Judge, Mr. Beighton, in support of his conclusion, relies chiefly upon the appellant's statements made from time to time while under pardon, and thinks they are corroborated by the fact that the *ram-dáo*, which was found lying near the corpse of the murdered man, is proved to have been purchased by the appellant from a blacksmith, named Ram Gopaul, about fifteen or sixteen days before the occurrence.

The learned Counsel who appeared for the appellant before us contended, (i) that the order of Mr. Kirkwood under s. 349, Criminal Procedure Code, directing the appellant to be committed, having been made after the judgment was passed, was not warranted by the provisions of that section; (ii) that, notwithstanding the express provision of s. 349, Criminal Procedure Code, the statements of the appellant, while under pardon, should not have been allowed to be put in evidence, inasmuch as these statements, amounting to confession of guilt on the part of the appellant, are not relevant under s. 24 of the Evidence Act; (iii) that the finding of the Sessions Judge is against the weight of the evidence in the record.

It has been urged by the learned Counsel who appeared before us to support the conviction, that Mr. Kirkwood's order under s. 349, Criminal Procedure Code, is in accordance with the provisions of that section, because it is clear from his judgment that it appeared to him before it was passed that the appellant had not conformed to the conditions under which the pardon was tendered; that the section only requires that the Court of Sessions should come to this conclusion before the judgment has been passed; and that, if this condition be fulfilled, the actual order directing the commitment may be passed at any time without any limitation.

I am of opinion that the order of Mr. Kirkwood, withdrawing the pardon to the appellant, and directing him to be committed, was passed contrary to the provisions of s. 349 of the Criminal Procedure Code. It appears to me that the words "before [566] judgment has been passed" have been inserted in the section with a view to put a limitation in respect of the time within which the power of the withdrawal of the pardon conferred in the Court of Sessions may be actually exercised. This intention of the Legislature would not be attained if we put upon the section the construction for which the learned

counsel who appeared in support of the conviction contends. According to his contention a person, to whom a pardon has been tendered under the provisions of s. 347, may be ordered to be committed by the Court of Sessions after the lapse of any length of time, provided it would appear that, before the judgment was passed, it had come to the conclusion that he had not conformed to the conditions under which the pardon was tendered. It seems to me that this is not a reasonable construction. It frustrates the very object for which this limitation of time is laid down. In my opinion the power of directing commitment conferred by the section in question upon the Court of Session can be exercised only before the judgment has been passed. In this case, therefore, Mr. Kirkwood, after passing the judgment in the case in which the appellant was examined as a witness under the provisions of s. 347 of the Criminal Procedure Code, had no power to withdraw the pardon granted to him, and direct his commitment. The subsequent trial of the appellant is consequently illegal. The conviction cannot, therefore, stand. In this view which I take of this question of law, it is unnecessary for me to express any opinion upon the other objections urged before us against the validity of the conviction. I would, therefore reverse the conviction and direct his release.

Maclean, J.—The appellant, stated in the record to be twenty years of age, was placed before the Magistrate charged on his own confession with abetment of the murder of one Muddun Banikya. The Magistrate thought proper to tender to him a pardon under s. 347 of the Criminal Procedure Code with a view to procuring the conviction of four other persons also charged with the murder. The appellant accepted the pardon, and was examined before the Magistrate on the 7th June last. The other persons were committed for trial, and the appellant gave his deposition on the 27th July. On the [567] 28th July the assessors, at the close of the evidence of the first witness for the defence, intimated that they had made up their minds and did not wish to hear further evidence. The Judge expressed his concurrence, but no finding was recorded on that day. On the following day the assessors' opinions were recorded and judgment delivered, acquitting the persons under trial. At the close of his judgment the Judge recorded that the appellant had not conformed to the conditions under which the pardon was tendered (s. 349, Criminal Procedure Code), and he directed that the appellant should be committed for trial for the offence in respect of which the pardon was so tendered. The appellant was thereafter committed, and has been tried before a different Judge and assessors. The assessors would have acquitted him, but the Judge has convicted him of abetment of murder and sentenced him to transportation for life.

Before dealing with the merits of the case two matters have to be disposed of, which Counsel for the appellant have urged against the proceedings before and at the trial.

In the first place it was urged, that the order of the Judge, dated 29th July, directing the commitment of the appellant, was not made before judgment was passed, and is, therefore, illegal with reference to s. 349 of the Procedure Code. Counsel for the prosecution urged against this view of the case, that it is not necessary that the order should be made "before judgment is passed," as the section requires only that it shall have "appeared to the Court or Sessions before judgment is passed" that the conditions under which pardon was tendered have not been conformed to. I think the correct view of the section is, that it must appear to the Judge before he passes his judgment that the conditions of pardon have not been complied with, and reading the judgment in this case it is abundantly clear that it did so appear to him. It is impossible to hold that because the actual order for commitment of the accused was

written (although in the judgment) after the acquittal, therefore it did not appear to the Judge before passing judgment that there were grounds for his order. The judgment prior to signature must be taken as a whole, as [568] representing the view taken by the Judge of the whole case, and nothing would justify us in dealing with it paragraph by paragraph and founding any conclusion upon the order in which they come. I therefore reject this objection.

The next objection is, that the statement of the appellant under pardon, *viz.*, his deposition on 27th July, was improperly used in evidence against him, although the last clause of s. 349 (Criminal Procedure Code) directs that it may be put in evidence against him. The argument in support of this objection is, that, by s. 24 of the Evidence Act, a confession made by an accused person is irrelevant, if it appears to the Court to have been caused by inducement, threat or promise, etc., and that there is thus a conflict between the Evidence Act, s. 24, and the later Act, s. 349. The appellant's counsel asked us to read the last section as if it contained the words "provided it is otherwise admissible in evidence." I must say, that, in my opinion, Counsel asked us to reduce the last clause of s. 349, Criminal Procedure Code, to an absurdity. I can see no connection whatever between the two sections. The deposition or statement made by the appellant under pardon was not a confession made by an accused person. The appellant was not an accused person on the 27th July. He had ceased to be so on the 7th June, when pardon was tendered and accepted. Holding this opinion, I decline to waste any time in considering what are called canons of construction on supposed inconsistencies between an earlier and a later Act.

(The learned Judge, after stating the facts of the case, continued.)

In the present case the first point for consideration is, whether the same statement, condemned as false in part and in other respects untrustworthy by the Judge who tried the first case, and again condemned in many respects by the Judge who tried this case, can be accepted as justifying the appellant's conviction.

I entertain a very strong opinion that the story told by the appellant is in the main true, and that Muddun Banikya was murdered with the prisoner's *duo*, and with his knowledge and consent. I share the belief expressed by the two Judges who [569] considered the case, that, as regards Ramkristo Banikya, the statement is false. My impression is, that the *duo* having been found by the body of Muddun Banikya, the case was so strong against the appellant that he was induced to make such statements as would, while implicating himself in a minor degree, secure, it was thought, the conviction of Ramkristo. Appellant was evidently in the hands of the Police from the 22nd to 31st May; and considering his youth and the pressure to which he was evidently subjected both by the finding of the *duo* and by the steps taken against his family who were put under restraint, I can quite understand his yielding.

I confess, however, that I cannot justify his prosecution. The Judge who directed this committal did so on two grounds—*firstly*, that he had concealed something essential; *secondly*, that he had given false evidence. This last ground would have justified his trial for that offence, but nothing has transpired at his trial to show that his evidence was false as regards his own share in the crime. If it is false in that respect, he must be acquitted on the ground that he had nothing to do with the murder. It was not to be expected that he should prove his own perjury, and therefore his silence cannot be unfavourably construed. As for the concealment of essential particulars, I am unable to discover it. It rather seems that he has stated false particulars.

The result, therefore, of my consideration of the case is, that this trial has properly ended in a conviction, but it is a trial which ought not to have taken place.

But I have, on a previous occasion, held, that this Court had no authority to set aside a conviction in a trial properly held. In the case I refer to, there was much that resembles this case. The appellant had accepted a pardon. The Judge considered his statement false, and ordered his trial. The Bench of which I was a member held, that the appellant's statement was not false, and that the conditions of the pardon had really been complied with. The proper course we then thought to be to uphold the conviction and refer the case to the Local Government with a view to pardon, which was done, and the pardon was granted. On re-consideration, however, [570] I think this Court may itself set aside a conviction made upon a trial improperly originated, and on this ground, I would direct the release of the appellant.

Appeal allowed and conviction set aside.

NOTES.

[CRIMINAL PROCEDURE—PARDON, WITHDRAWAL OF—

The present Cr. P. C. (1898) places no time limit. As regards the plea of pardon in bar of trial of the approver, see, 32 Mad. 173; 25 Bom. 675; 30 Bom., 611; 27 Cal. 137; (1905) P. L. R., 176.]

[8 Cal. 570: 10 C. L. R. 409]

APPELLATE CIVIL.

The 27th February, 1882.

PRESENT:

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

In the matter of the Petition of Hurro Lall Shaha.

Kamona Soondury Dassee.....Defendant

versus

Hurro Lall Shaha.....Plaintiff.*

Application for revocation of probate—Jurisdiction—Interest of applicant in the estate—Special citation—Succession Act (X of 1865), ss. 235, 244, 250.

The test of jurisdiction made use of in applications for grant of probate, may be also applied to cases in which a revocation of probate is demanded—viz., whether or no the deceased, at the time of his death, had his fixed place of abode, or had some property, moveable, or immovable, situate within the jurisdiction of the particular District Judge to whom the application is made.

A presumptive reversioner to property with which a will deals, has a sufficient interest in the property to entitle him to maintain a suit in respect of such property; and on the authority of *Nobeen Chundra Sil v. Bhobo Soonduri Dabee* (I. L. R., 6 Cal., 460), he is entitled to maintain a case for the revocation of probate.

In every case in which probate of a Hindu's will is applied for, a special citation should be served upon those persons whose interests are directly affected by the will.

* Appeals from Original Decree, No. 337 of 1880, against the decree of C. D. C. Winter Esq., Judge of Pubna, dated the 18th of September 1880.

THIS was an application to revoke probate of a will alleged to have been executed by one Huri Mohun Shaha.

Huri Mohun Shaha died at Pubna on the 21st February 1873, leaving a widow, Kamona Soondury Dassee, and a sister's son, named Hurro Lall Shaha. In March 1877, Kamona Soondury Dassee applied to the District Judge of Rajshahye for [571] probate of a will, which she alleged to be the will of Huri Mohun Shaha; and, on the 22nd June 1877, she obtained an order granting probate. At that time Pubna was under the jurisdiction of the District Judge of Rajshahye; but, in 1878, Pubna was formed into a distinct district, having a separate District Judge. On the 27th March 1878, Kamona Soondury Dassee executed a kobala, conveying all the property left by Huri Mohun Shaha to one Lukhipria Dasia.

On the 22nd May 1880, Hurro Lall Shaha applied to the District Court at Pubna to have this probate set aside, alleging that the will was a forgery, and that he first became aware of the existence of the alleged will, on hearing of the conveyance made by Kamona Soondury Dassee in 1878.

The District Judge found that no citation had been served on Hurro Lall Shaha in 1877, and that the will was not genuine, and on these grounds revoked the probate.

Kamona Soondury Dassee appealed to the High Court.

Baboo *Troilockya Nath Mitter*, for the Appellant, contended, that the District Judge of Pubna had no jurisdiction to revoke the probate granted by the Judge of Rajshahye; see the case of *In the matter of the Petition of Kasi Chunder Mozoomdar* (I. L. R., 6 Cal., 440). The petitioner had not sufficient interest in the property of Huri Mohun to entitle him to maintain the suit.

Baboo *Mohiny Mohun Roy* and Baboo *Shooshee Bhooshun Dutt* for the Respondent.

The **Judgment** of the Court (McDONELL and FIELD, JJ.) was delivered by

Field, J.—In this case the plaintiff asks for the revocation of probate of a will alleged to have been executed by one Huri Mohun Shaha as far back as 27th Magh 1279 (8th February 1873). Huri Mohun Shaha, the alleged testator, died in the following month, that is Falgoun 1279. No application for probate of the alleged will was made until some four years [572] after the testator's death; and probate was granted on the 22nd June 1877. The present petition for revocation of this probate was presented to the Court of the District Judge of Pubna on the 22nd May 1880; and the petitioner explains his delay in applying for revocation by saying that he had no information as to probate of the alleged will having been granted until a few months before making this application, when for the first time he became aware of the grant. Now the District Judge has dealt with the materials put forward by the petitioner and with the evidence produced as to the execution of the will in a way that is, to our minds, not altogether satisfactory. There are certain observations in his judgment with which we are unable to concur. We may mention, as an example, his remarks as to the possession of certain ornaments by the alleged testator's widow, Kamona Soondury Dassee. We do not think that it is at all probable that a Hindu widow would have sold her ornaments, which are her own *stridhan*, and applied the proceeds towards the payment of her husband's debts. In consequence of not being able to accept the District Judge's reasons for the conclusion at which he has arrived, we have reconsidered the whole evidence and have arrived at an independent conclusion of our own.

Before dealing with the evidence as to the *factum* of the will, it is necessary to dispose of two points which have been raised by the pleader for the appellant. These points are: *first*, that the District Judge of Pubna had no jurisdiction to revoke the probate; and *secondly*, that the petitioner had not sufficient interest in the property of the alleged testator to entitle him to maintain this suit.

As to the first point, it is admitted on all sides that probate of the will was originally granted by the District Judge of Rajshahye, and that between June 1877, the date of the grant of probate, and May 1880, the date on which the petition for revocation was filed, the Pubna District was removed from the local limits of the jurisdiction of the Rajshahye Court, and was constituted into a separate District Judgeship. Now it is said, that because the probate was originally granted by the District Judge of Rajshahye, the application for revocation [573] ought to have been made to the same Judge in his Court at Rajshahye and not to the District Judge of Pubna; and, in support of this contention, the case of *In the matter of the Petition of Kasi Chunder Mozoomdar* (1. L. R., 6 Cal., 440) has been relied upon. We think that that case is not on all fours with the case with which we have now to deal. In that case the statement, alleged to be false, and in respect of which the Court was asked to sanction a criminal prosecution, was made in proceedings which had been commenced and completed in the district of Rajshahye. The application in the present case is not concerned merely with proceedings that have been commenced and concluded in the Rajshahye Court. No doubt, if this application be successful, the grant of administration made by the Rajshahye Court will be cancelled; but the present proceedings are distinct from the former proceedings,—the allegations are different, the evidence is different, there is a new party, and the trial is *inter partes* and not *ex parte*. Section 235 of the Indian Succession Act (which is applicable to Hindu wills) enacts, that “the District Judge shall have jurisdiction in granting and revoking probates and letters of administration in all cases within his district.” Now, in order to ascertain what is a case within his district, we must turn to s. 244, which directs that, in petitions for probate, the following, among other particulars, shall be inserted,—*viz.*, that the deceased at the time of his death had his fixed place of abode, or had some property, moveable or immoveable, situate within the jurisdiction of the Judge. Now, it is clear from these words, that, in order to determine the district within which a case for grant of probate is to be instituted, we must see whether the deceased, at the time of his death, had his fixed place of abode, or had some property, moveable or immoveable, situate within the jurisdiction of the particular District Judge to whom the application is made. There is no similar provision in express language applicable to a case of revocation of probate; but it appears to us that the reasonable construction is, that the same test of jurisdiction is to be applied. Were it otherwise, there is no test of jurisdiction to be found in the Succession Act, and it is admitted [574] that if we are to look for that test in the Code of Civil Procedure, the case has been properly instituted in the Court of the District Judge of Pubna. Now it is admitted, that the testator, at the time of his death, had his fixed place of abode and also had property within the jurisdiction of the Pubna Court. Section 18 of the Bengal Civil Courts Act provides, that the “Local Government shall fix, and may from time to time vary, the local limits of the jurisdiction of any Civil Court under this Act;” and under the provisions of s. 15 of the same Act, a District Judge is a Civil Court within the meaning of the Code of Civil Procedure. It is clear that the Local Government, in the exercise of the power hereby conferred, varied the local limits of the Rajshahye Court. It is also clear that, after the Pubna District had been constituted a

separate jurisdiction with a separate District Court, any petition for grant of probate of this will must have been presented to the Pubna Court, inasmuch as the deceased resided and had property within the local limits of that Court. It follows from what has been already said, that, if the Pubna Court had jurisdiction to grant probate, it had also jurisdiction to revoke. Then, is this latter jurisdiction affected by the fact of the grant having been made in the Rajshahye Court? We cannot see that it is, more especially as the judicial jurisdiction of the two Courts is exactly equal, and neither party suffers any disadvantage by the revocation-suit being tried at Pubna. On the contrary, there is a positive advantage to the parties and their witnesses, inasmuch as Pubna is nearer their houses than Rajshahye. There is nothing to show that, by having the revocation-suit tried at Rajshahye, it would come before the same Judge who originally made the grant, and indeed it has been admitted that this would not be so, while it may well be that the jurisdiction of the Rajshahye Court has been taken away by the removal of the Pubna District from the local limits of its jurisdiction. For all these reasons, we think that the petition for revocation was properly presented to the Pubna District Judge.

The second question is concerned with the right of the plaintiff to maintain this suit. It appears to us, that the plaintiff, who [573] is admittedly the next presumptive reversioner, had a sufficient interest in the property with which this will deals to entitle him to maintain a suit in respect of such property. In support of this view we may refer to the case of *Rance Anund Kunwar v. The Court of Wards* (I. L. R., 6 Cal., 764), decided by the Privy Council on the 19th November 1880. Then, inasmuch as the plaintiff had a sufficient interest in the property to maintain a suit in respect thereof, we think, upon the authority of the case of *Nobeen Chundra Sil v. Bhobo Soondury Dabee* (I.L.R. 6 Cal., 460), that he was entitled to maintain this case for the revocation of the probate. Having disposed of these two preliminary points, we now turn to the evidence as to the *factum* of the will.

(The learned Judge then went into the evidence as to the execution of the will, and found it was insufficient to enable the Court to come to the conclusion that the will had been executed by Huri Mohun Shaha, and continued :) In the first place, the application for probate of the will was not made until nearly four years after its execution. Now, the will contains a recital that it was executed in order to provide for the payment of certain debts that were due by the testator; and the fact that no probate of the will was applied for till nearly four years after the testator's death, which occurred soon after the execution of the will, is not very consistent with this recital. In the second place, no special citation was served upon the petitioner, who was the next presumptive reversioner. We think that, in every case in which probate of a Hindu will is asked, a special citation ought to be served upon those persons whose interests are directly affected by the will. In this case no such special citation was served. It is said that it is not the usual practice in the mofussil to serve anything more than a general citation. There may be some truth in this statement, and in dealing with the case now before us, we, in consequence, assign less weight to this consideration than we might give to it, if a more careful practice prevailed. We desire to observe, however, that the practice of a mere general citation in all cases is one which in this country may tend to encourage fraud, [576] and the fabrication and propounding of forged wills. Section 250 of the Succession Act vests the District Judge with full discretion, which should be exercised with proper care: and when a will is propounded which alters the devolution of property, a special citation should be directed to be served upon the person or persons who is or are immediately affected by

the will. The other grounds on which the learned Judge was of opinion that the will had not been executed by Huri Mohun are not material to this report. Taking all these facts into consideration, and further having regard to the positive evidence which has been produced to prove the execution of the will, it appears to us, although we do not agree in the judgment of the District Judge, or in the reasonings upon which he has arrived at his conclusion, that this conclusion is substantially correct, and that we ought not to interfere with the order for revoking probate of the will.

This appeal must, therefore, be dismissed with costs.

Appeal dismissed.

NOTES.

[REVOCAION OF PROBATE—

The reversioner has sufficient interest :—(1902) 6 C. W. N. 912 ; (1894) 21 Cal. 539 ; (1909) 10 C. L. J. 263 ; but not one who is merely a legatee or creditor :—(1894) 17 Mad. 373 ; nor one disputing the testator's title to the property :—(1889) 17 Cal., 48 ; (1904) 6 Bom., L. R. 966. The mere absence of *special* citation is not '*just cause*' :—(1890) 18 Cal., 45—otherwise, as to *general* citation, 12 Bom., 164.]

[8 Cal. 576]

APPELLATE CIVIL.

The 28th February, 1882.

PRESENT :

MR. JUSTICE CUNNINGHAM AND MR. JUSTICE FIELD.

Leelanund Singh.....Plaintiff

versus

Hamidooddin and others..... Defendants.

Construction of document—Compromise—Release—" All present and future liabilities."

General words used in a deed of compromise or in a release must be confined to matters of the same nature and forming part of the transaction which the parties had in view.

* Appeal from Appellate Decree, No. 1933 of 1880, against the decree of W. Verner, Esq., Officiating Judge of Bhagalpore, dated the 26th June 1880, reversing the decree of Baboo Koylash Chunder Mookerjee, Officiating Subordinate Judge of that district, dated the 27th September 1879.

Directors of the London and South-Western Railway Co. v. Blackmore (L. R., 4 H. L., 610) followed.

THIS was a suit for arrears of rent instituted in the Court of the First Subordinate Judge of Bhagalpore, on the 4th [577] of June 1879, to recover arrears of rent for the years 1283 (September 1875—August 1876), 1284 (September 1876—August 1877) and 1285 (September 1877—August 1878) Fuslee. One of the defendants was Bhoobun Chunder Roy, and the others were his co-sharers, the heirs of one Kamiruddin, who, in his lifetime, had been the co-sharer of Bhoobun Chunder Roy. The arrears sued for had all accrued in the lifetime of Kamiruddin. It appeared that Kamiruddin had formerly been the plaintiff's agent, and in the present suit his heirs put in a written statement, in which they asserted that the plaintiff had brought a previous suit against them in respect of the agency, and that, by a compromise entered into in that suit on the 16th of May 1879, the plaintiff had released them from "all present and future liabilities" including the liability in question in this suit. In respect of this defence, the Judge of the Court of First Instance said: "We come now to consider the most important issue, namely, whether the plaintiff absolved the defendants from all liability by his deed of compromise. The compromise is to be construed by reading it as an entire document, and not merely by reading some portions of it on which the defendants laid much stress. The compromise was effected between the plaintiff and the heirs of Kamiruddin in a case where he sued them for money and accounts in the hands of his deceased agent, and also for recovering certain moveable properties that were in his hands, which we find fully set forth in the beginning of the compromise. In one portion of the instrument it is mentioned, that the plaintiff would not ask for accounts from the defendants whether their claim was included in that suit or not. It was also mentioned that the plaintiff would be at liberty to contest the demands of third parties. In the seventh paragraph of the instrument it was mentioned, that the defendants would pay the plaintiff Rs. 10,000 and the plaintiff thereupon acquitted them from all present and future liabilities. The defendants contend that these terms are very wide and may include all sorts of liabilities; but I am of opinion that this is an unreasonable construction of that document, for it was merely a suit for recovering accounts, money, and other moveables in the hands of the plaintiff's deceased agent, [578] and the terms of the compromise should be confined regarding those items of the claim, or, in other words, regarding those moneys which were in his hands in the capacity of an agent. In the present case the claim is regarding arrears of rent, and in this case Bhoobun Chunder Roy is a coparcener of the defendants, they are both principals, not agents, and both of them are jointly liable to pay rent. It is true that they are sharers of one moiety of the disputed jote; but the plaintiff has sued them jointly, and their respective liability was undetermined before. In that state of things it is unreasonable to suppose that the plaintiff absolved the defendants from their liability to pay him even his due rent, which is quite unconnected with that case." The Subordinate Judge gave the plaintiff a decree against all the defendants, which was reversed on appeal, the District Judge holding, that the deed of compromise covered the claim in the present suit. The plaintiff appealed to the High Court.

Mr. *Twidale* and *Moonshi Mahomed Yusuf* for the Appellant, argued, that, by the terms of the solehnama, the claim involved in the suit in which it was filed, as well as claims of a similar nature—i.e., claims for accounts of moneys received by Kamiruddin in his capacity of manager, were alone settled; and that the District Judge had failed to take into consideration that this

was a suit for rent due not merely by Kamiruddin himself, but by him jointly with Bhoobun Chunder Roy.

Moonshi Serajul Islam for the Respondents.

The following **Judgments** were delivered by the Court. (CUNNINGHAM and FIELD, JJ.) :—

Cunningham, J.—This was a suit for rent. The only question is, whether the claim was comprised in the deed of compromise, which was executed previously with reference to a former suit between the parties. The language of this deed is, in several places, somewhat general, and extends to claims of every description. In construing it, the view taken by the original Court is, that it deals with a particular claim, namely, the [379] subject of the former suit, which was a certain account to be rendered as an agent, and certain sums of money to be recovered, for which the defendants, in the former suit, were responsible. I think the general expressions used in the deed of compromise must, according to the well-known rule of interpretation, be confined to matters of the same nature, and forming part of the transaction which the parties had in view. I, therefore, agree with the view taken with regard to the compromise by the original Court, and think that the appeal, so far as regards this part of the case, must be allowed.

The result is, that the decision of the lower Appellate Court must be set aside, and the case remanded for trial of the other points raised in the petition of appeal to this Court.

Field, J.—In this case the plaintiff sued two persons—namely, Bhoobun Chunder Roy and the heirs of Kamiruddin Mahomed, for rent of an ijara for 1283 to 1285. It appears that Kamiruddin Mahomed was in the employment of the plaintiff as *gomashta*; and, after his death, the plaintiff had brought a previous suit against the heirs of Kamiruddin in order to have an account of the moneys received and disbursed by Kamiruddin Mahomed during the period of his agency. That suit was terminated by a compromise dated the 16th of May 1879, and the question which we have to decide in this case is, whether that compromise was intended to embrace, not only the subjects which were then in dispute between the parties, but also the claim for rent which forms the subject of the present suit.

I concur with my learned colleague in thinking, that the proper construction to be put upon that compromise is, that it was not intended to embrace the claim which forms the subject of the present suit. It is a general rule of construction that general words in a release are to be limited to that thing or those things which was or were in the contemplation of the parties; see the judgment of Lord WESTBURY in the case of the *Directors of the London and South-Western Railway Company v. Blackmore* (L. R., 4 H. L., 610). In that case the words of the release were [380] quite as general as the words which are to be found in the *solohnama* in the present case. It was a release of "all claims and demands therein mentioned and for or on any other account or claim whatsoever."

I, therefore, concur in reversing the decision of the District Judge, and I also agree that the case must be remanded to him for a decision of the other questions raised in the petition of appeal to this Court.

The costs of this Court will abide the result.

Appeal allowed and case remanded.

NOTES.

[I. RECITALS—THEIR VALUE IN INTERPRETATION OF DEEDS—

The following rules taken from *Norton on Deeds* (1906) 2nd Edn. pp. 181—199 will be found very useful. The authorities on which they are based are there set out *in extenso* :—

i. If both the recitals and the operative part of a deed are clear and unambiguous, but they are inconsistent with each other, the operative part is to be preferred.

"If the recitals are ambiguous and the operative part is clear, the operative part must prevail:" per LORD ESHER, M.R. *ex parte Davies* (1886) 17 Q.B.D. 275 (286).

It follows that a specific description of property or a specific statement of what is intended to be done contained in the operative part will not be controlled by a general description, or a general or ambiguous statement, contained in the recitals.

ii. "If the recitals are clear and the operative part of a deed is ambiguous, the recitals must govern the construction", per LORD ESHER, M.R. *ex parte Davies* (1886) 17 Q. B. D. 275 at 286.

It follows that a specific description of property, or a specific statement of what is intended to be done, contained in the recitals, will not be *enlarged* by a general description, or a general or ambiguous statement, contained in the operative part.

iii. The most striking instance of the generality of the operative words being controlled by the recitals occurs in a release, (also, powers-of-attorney, etc.)

iv. A misrecital will not affect the deed, if it be sufficiently clear what is intended.

v. A misrecital may influence the construction.

vi. A misrecital may operate by way of estoppel.

vii. A recital in a deed may operate as a covenant, where it appears to have been the intention of the parties that it should so operate.

II. RECITALS IN RELEASE MAY RESTRICT GENERALITY OF OPERATIVE PART :—

"If a release is given on a particular consideration recited, notwithstanding that the release concludes with general words, yet the law, in order to prevent surprise, will construe it to relate to the particular matter recited which was under the contemplation of the parties, and intended to be released":— per LORD HARDWICKE in *Ramsden v. Hytten* (1751) 2 Ves. Sen. 305 (310).

"The general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given." :— *London and South Western Railway Co. v. Blackmore* (1870) L. R. 1 H. L. 610 (623) ; *Turner v. Turner* (1880) 14 Ch. D. 829 ; *In re Perkins* (1898) 2 Ch. 182 (190).

Thus, this maxim has been applied to restrict the general words in the operative part to those mentioned in the recitals, when they were specified debts (*Payler v. Homersham* (1815) 4 M. & S. 423) ; specified objections to title (*Lord Braybrooke v. Inskip* (1803) 8 Ves. 417) ; specified causes of action (*Simons v. Johnson* (1832) 3 B. & Ad. 175) ; specified assets in the release to the administrator (*Turner v. Turner* (1880) 14 Ch. D. 829).

Similar constructions have been placed on *powers of attorney* (*Darby v. Coutts & Co.*, 29 Ch. D. 500 ; *Watson v. Jemmenjoy Coondoo*, 10 Cal. 901 P.C.) ; *indemnity bonds* (*Boyes v. Bluck* (1853) 13 C. B. 652) ; *guarantees* (*Bain v. Cooper*, (1842) 9 M. & W. 701).

Norton on Deeds, (1906) p. 193, gives instances, where on this principle *even without mention in recitals*, general words were confined to what the parties had in contemplation : see *Turner v. Turner* (1880) 14 Ch. D. 827 ; *Liyall v. Edwards* (1861) 6 H. & N. 337 ; *Cholmondeley v. Clinton* (1817) 2 Mer. 171, 353. This case was cited in argument to support that a thing not in the contemplation of parties should be excluded from the document :— (1904) 14 M.L.J. 175, (right of survivorship in a partition between two daughters—upheld) ; (1903) 31 Cal., 111 at 125, (description in *ekramamah* as *maik*, proprietor ; contention from context, that only *trustee* was meant—not upheld).]

[8 Cal. 580 : 11 C.L.R. 414]
CRIMINAL REFERENCE

The 6th March, 1882.

PRESENT :

MR. JUSTICE CUNNINGHAM AND MR. JUSTICE TOTTENHAM.

Bradley

versus

Jameson.*

*Criminal Procedure Code (Act X of 1872), ss. 297, 518—Injunction—
Review of order—Revival of order which has been quashed—
High Court, superintendence of—Reference—Charter Act, 24 and
25 Vict., c. 104, s. 15.*

On the 7th of June 1881, the Assistant Commissioner of Hylakandi, in Sylhet, passed an order under s. 518 of the Criminal Procedure Code, that the manager of a certain tea garden should discontinue holding a market on Thursdays until further notice. On the 25th of August 1881, the Assistant Commissioner reviewed this order, and having come to the conclusion that he had no power to issue a permanent injunction, struck the case off the file, at the same time referring the matter to the Deputy Commissioner. The latter declined to interfere, informing the Assistant Commissioner that he saw no illegality in his order. Thereupon the Assistant Commissioner passed an order declaring that his order of the 7th of June 1881 remained in full force. On a reference to the High Court, made by the Officiating Sessions Judge of Sylhet under s. 297 of the Code of Criminal Procedure.—

Held, that the Magistrate having, on the 25th of August 1881, set aside his order of the 7th of June 1881, and struck the case off the file, he had no power to revive it without a fresh proceeding.

[581] *Held* also, that the Magistrate had no power to pass a perpetual injunction under s. 518 of the Code of Criminal Procedure.

Gopi Mohun Mullick v. Taramoni Chowdhurani (I. L. R. 5 Cal., 7) followed.

Held also, that orders made under s. 518 of the Code of Criminal Procedure not being orders made in a judicial proceeding, the High Court had no power to deal with them under s. 297 of the Code of Criminal Procedure; but the order of the 6th of September 1881 being illegal, the High Court would set it aside under s. 15 of the Charter Act, 24 and 25 Vict., c. 104.

In the matter of the Petition of Chunder Nath Sen (I. L. R. 2 Cal., 293) followed.

THIS was a reference under s. 297 of the Code of Criminal Procedure (Act X of 1872) by the Officiating Sessions Judge of Sylhet, the terms of which are as follows :—

“The facts of the case are, that the managers of Phencha Cheera and Katti Cheera Tea Estates have established two markets on the same day of the week close to each other. The Phencha Cheera market is the older of the two. The Sub-divisional Officer of Hylakandi, on the 7th of June 1881, has ordered that the Katti Cheera manager should discontinue holding his market on Thursdays until further notice. The reasons which he gives in his order for passing it are as follows :—‘All persons bringing articles for sale must pass through Phencha Cheera Bazar, and if they sell their wares there, instead of

* Criminal Reference, No. 241 of 1882, Letter No. 1116, from the order made by W. F. Meres, Esq., Officiating Sessions Judge of Sylhet, dated the 13th December 1881.

at Katti Cheera, it will be open for some ill-disposed person to raise a row between the coolies of each garden by alleging that the Setakandi coolies are stopping the supplies of the Katti Cheera coolies.' The Assistant Commissioner subsequently reviewed this order on the 25th August 1881, remarking that he had no power to pass a permanent injunction, and 'struck the case off the file' referring the matter to the Deputy Commissioner of Cachar. The Deputy Commissioner, however, declined to interfere, and informed the Hylakandi Magistrate that he saw no illegality in his order. The Assistant Commissioner, on receipt of this communication, passed the following order on the 6th of September 1881—'Inform Messrs. Bradley and Jameson that the Deputy Commissioner declines to interfere as Collector, and that, therefore, my order under s. 518, Criminal Procedure Code, remains in force.'

"The above order and the order directing the discontinuance of the Katti Cheera market on Thursdays appear to me to be bad in law: *firstly*, because the Assistant Commissioner had no power to pass an injunction without any limit as to time; and *secondly*, that he could not legally revive his order of the 6th September without further enquiry."

[582] The case was not argued.

The **Judgment** of the Court (CUNNINGHAM and TOTTENHAM, JJ.) was delivered by

Cunningham, J.—We think that the Magistrate, having, on the 25th August 1881, set aside his order of June 7th, 1881, and struck the case off the file, had no power to revive it (without a fresh proceeding) by his order of 6th September, and that he had no power, under s. 518 of the Criminal Procedure Code, to pass a perpetual injunction: see *Gopi Mohun Mullick v. Taramoni Chowdrani* (I. L. R., 5 Cal., 7). Orders under s. 518 not being judicial proceedings, we have no power to deal with the present case under s. 297; but we infer from the judgment in *In the matter of the Petition of Chunder Nath Sen* (I. L. R., 2 Cal., 293), that the order being, in our opinion, illegal, we can deal with it under the Charter. We, therefore, set it aside.

Orders set aside.

NOTES.

[I. CRIMINAL PROCEDURE—PERPETUAL INJUNCTION—

An order indefinite as to time is not bad:—34 Cal., 897; 11 C. W. N. 942; but one which contemplates duration, perpetual or beyond the statutory period is bad:—5 Cal., 7; 8 Cal. 580; 10 All., 115; 17 A. W. N. 50; 27 Cal., 918; 7 C. W. N. 140. Nor can the same end be secured by successive orders:—11 C. W. N. 79.

II. HIGH COURT'S INTERFERENCE UNDER THE CHARTER ACT—

See also (1891) 19 Cal. 127.]

[8 Cal. 582]

ORIGINAL CIVIL.

The 7th March, 1882.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE PONTIFEX.

Juggut Mohinee Dossee.....Defendant

versus

Dwarka Nath Bysack and others.....Plaintiffs.

*Suits between Hindu inhabitants of Calcutta—21 Geo. III,
c. 70, s. 17—Difference in law applicable in Calcutta and the mofussil—
Equity and good conscience—Buildings on land—
Ownership in land and buildings.*

At a Sheriff's sale, one Templeton bought a Hindu widow's interest in certain land in Calcutta; after passing through several hands, the land was purchased by the defendant. Between the possession of Templeton and the defendant, an intermediate holder built a house upon the land. The plaintiff, a reversionary heir to the estate after the widow's death, sued the defendant to recover possession, of the house and land. The defendant admitted the plaintiff's claim to possession, but contended that he was entitled to be paid a fair price for the buildings, or to remove the materials.

Held, that he was neither entitled to compensation, nor to remove the materials, and that the question raised in the suit could not be said to be a [583] question of either succession or inheritance so as to admit of the Hindu law being applied as directed by Geo. III, c. 70, s. 17, but that the law applicable to the case was the law of equity and good conscience as administered by the Courts of Equity in England.

The case of *Thakoor Chunder Paramanick* (B.L.R. Sup. Vol., 595) discussed.

APPEAL from the decision of WILSON, J.

One Dwarka Nath Bysack, the original plaintiff in this case, was one of the grandsons of Russick Loll Bysack, who died in 1821, leaving him surviving a widow and three sons—*viz.*, Rajnarain, Rajkisto, and Joykisto, who, being the members of a joint family of the Bengal school, succeeded to the property of Russick Loll.

In 1826, Rajkisto died intestate, leaving him surviving his widow, Opoorba Chandra, his sole heiress. In 1829, Opoorba Chandra brought a suit for partition of the family property, in which suit one Templeton was attorney for all parties, and in this suit she obtained a decree declaring her entitled to an undivided one-third share in the family property and directing a partition; and in 1832, the Commission of Partition affirmed this allotment. Possession of her one-third share was formally given to her by the Sheriff on the 14th January 1833. Templeton, on the 25th July 1833, in order to recover the costs entailed in this suit, seized and put up for sale the right, title, and interest of Opoorba Chandra's share in the family property, and at the Sheriff's sale himself became the purchaser. The property at this date consisted of a piece of untenanted land in Shibtollah Street, containing about 14 cottahs.

On the 22nd August 1834, Templeton conveyed the property to Gooro Dass Dutt and Shamal Dass Dutt.

In 1843, Gooro Dass and Shamal came to a partition, when the part of the property, the subject of this suit, fell to Shamal Dass.

In 1849, Rajnarain Bysack died, leaving two sons, who, however, died prior to this suit.

In 1853, Shamal Dass Dutt died, leaving a son Rajendro Chunder, who, in 1855, built upon the land, and in 1860 conveyed the land and buildings to one Raipearry Dossee, his aunt.

[584] In 1865, Joykisto Bysack died, leaving him surviving two sons, Gopaul Loll and Dwarka Nath Bysack (the original plaintiff in this suit).

On the 26th October 1869, Opoorba Chandra, the widow of Rajkisto Bysack, died; and on her death Gopaul Loll and Dwarka Nath, the only nephews of Rajkisto then alive, became entitled to the one-third share allotted to Opoorba on partition.

In 1870, Gopaul Loll died intestate, leaving four sons (who were made defendants in the present suit).

Early in 1878, Raipearry divided the land conveyed to her into two parcels, such parcels being known as No. 40 and No. 41, Shibtollah Street; and on the 26th July 1878, she conveyed No. 40, Shibtollah Street, to the defendant Juggut Mohinee Dossee.

Early in 1881, about eleven and-a-half years after the death of Opoorba Chandra, Dwarka Nath Bysack brought this suit against Juggut Mohinee Dossee (making the sons of Gopaul Loll and a daughter of one of the sons of Rajnarain, who were the other reversionary heirs, defendants, as they refused to join with him in bringing the suit) to recover possession of the property, and asking for mesne profits from the 26th July 1878.

The defendant Juggut Mohinee, in her written statement, denied the identity of the land in suit with the land sold by the Sheriff to Templeton, and stated that Raipearry had been in possession of the land for forty-five years adversely to the plaintiffs and the other reversionary heirs, and submitted that, assuming it to be identical with the land bought by Templeton, she was entitled to compensation at the rate of 4,000 rupees for the value of the buildings erected on the land by her predecessors in title with the acquiescence of the plaintiffs and the persons through whom she claimed, and that she was entitled to a further sum of Rs. 1,000 for repairs which she had executed.

Mr. Bonnerjee and Mr. T. A. Apear for the Plaintiffs.

Mr. Palit and Mr. C. Dutt for the Defendant.

At the hearing in the Court below, the defendant Juggut Mohinee admitted the facts stated in the plaint, and the identity of the [585] land, but claimed to be entitled to remove the buildings, or to compensation for them. An objection was also taken that the reversionary heirs not being plaintiffs, the suit could not proceed, being a suit for possession of the whole property. It was also admitted by the defendant Juggut Mohinee at the hearing, that the buildings were erected prior to the passing of Act XI of 1855. The question was also raised whether the case was governed by Hindu law as being a question of succession or contract within the meaning of s. 17, Geo. III, c. 70.

The reversioners were present in Court and consented to be joined as plaintiffs.

WILSON, J., held, that the case was not governed by Hindu law, not being a question of inheritance or contract; and that the defendant Juggut

Mohinee was not entitled to remove the buildings, or to compensation; that s. 34 of the Code of Civil Procedure had no application to the case; and that the reversioners might be added as plaintiffs, and granted an adjournment for that purpose.

Subsequently, a decree was given for the plaintiffs, declaring them entitled to the house jointly as heirs of their ancestor Rajkisto Bysack; the original plaintiff getting half, and the rest of the plaintiffs half between them; the lady taking a mother's share, and the decree to be one for possession and account of mesne profits from 26th July 1878: the defendant Juggut Mohinee to have credit for taxes, repairs, and all legitimate outgoings; and to pay the costs of suit up to decree, costs of account being reserved; the parties to have liberty to apply.

From this decision the defendant appealed.

Mr. *Palit* and Mr. *C. Dutt* for the Appellant.

Mr. *Bonnerjee*, Mr. *T. A. Apear*, and Mr. *O'Kinealy* for the Respondents.

Mr. *Palit* contended that the case was governed by Hindu law, and that the plaintiffs ought not to have been allowed to recover possession of the buildings: but if they did so, the appellant was entitled to have the value thereof paid him, and that the lower Court was wrong in giving the plaintiffs a decree [586] with costs, but should have given them only a partial decree without costs. The whole case is a question of succession. The question is, under what law does it fall? I say it is under Hindu law, and that, therefore, on the authority of the case of *In the matter of Thakoor Chunder Paramanick* (B. L. R., Sup. Vol., 595), I am entitled to the buildings. [PONTIFEX, J.—That case does not apply to a person who knowingly builds on lands belonging to another.] The case of *Russick Lall Muddock v. Lokenath Karmokar* (I. L. R., 5 Cal., 688), shows that the Hindu law applies between Hindus in Calcutta. [GARTH, C.J.—With reference to *Thakoor Chunder Paramanick's case* (B. L. R., Sup. Vol., 595), it is difficult to say how the usage is to be applied, for if a Hindu gets into possession of land improperly though *bonâ fide*, and builds on it, he gets the buildings; but if an Englishman did the same thing, he would not get the buildings.] Under the Regulation of the 17th April 1780, s. 27, all suits regarding inheritance, marriage, and caste, and other religious usages or institutions, the law of the Koran with respect to Mahomedans, and those of the shastras with regard to Gentoos, should be used; and in the following year this section was re-enacted with the addition of the word 'succession.' In the Statute-law relating to India, 21 Geo. III, c. 70, s. 17, enacted, that, between the native inhabitants of Calcutta, their inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party should be determined, in the case of Mahomedans, by the law and usages of Mahomedans, and in the case of Gentoos, by the law and usages of the Gentoos; and where one only of the parties shall be a Mahomedan or Gentoos, by the law and usages of the defendant. See Morley's Administration of Justice in India, p. 174. This is a case of succession between Hindus, and is therefore to be governed by Hindu law. See *Sarkies v. Prosonomoyee Dossee* (I. L. R., 6 Cal., 794, at p. 808), in the judgment of PONTIFEX, J. [GARTH, C.J.—The question is, what is meant by 'succession'? Does it mean the way in which property devolves? Is a question whether a house built on land forms part of the land [587] a question of succession?] Act VI of 1871 and Act XI of 1855, s. 2, show that the English rule does not apply. The case of *Russick Lall Muddock v. Lokenath*

Karmokar (I. L. R., 5 Cal., 688), is a case governed by Hindu law. No question of fact was there gone into as the case came on for settlement of issues; it was decided on the general principles of Hindu law. [GARTH, C.J.—The Court cannot take judicial notice of what the Hindu law is with regard to Hindu custom; that must always be proved.] Yes, but there the question was put on the general principles of Hindu law; and was decided on the point as to whether the mere fact of *A* being proved to be the tenant of *B*, did not give to *B* as such tenant a right to remove the buildings. There is nothing to distinguish *Paramanick's case* (B. L. R., Sup. Vol., 595) from the present one, and Mr. Justice WILSON's decision is in direct opposition to *Paramanick's case* (B. L. R., Sup. Vol., 595). In the case of *Narayan Raghoji v. Bholaagir Gurnu Manjir* (6 Bom. II. C. Rep., A. C., 80), the question of *bona fides* was distinctly said not to arise. In *Mookta Soondurce Chowdram v. Muthooranath Ghose* (22 W. R., 209), a house was sold to one person and the land on which the house stood to another, and there was no question either of succession or inheritance; but I quote it to show that buildings and lands in the mofussil are treated separately. There is no ruling to show whether English law applies to Hindus in questions of real property in Calcutta, but remarks have been made in different cases, *viz.*, in the *Mayor of Lyons v. The East India Company* (1 Moore's I. A., 175), which points out that the English law of inheritance was applicable in Calcutta only so far as it was applicable to the state of things in India. As to how far English law is to be applied, and what is to govern the case where it is inapplicable to the habits and customs of the people, see *Ram Coomar Coondoo v. Chunder Canto Mookerjee* (1 L. R., 2 Cal., 233). In *Shibdas Bandapadya v. Bamondas Mukhapadya* (8 B. L. R., 237), it was held, that a house built upon land did not pass when the tenure was sold; and in *Kinoo Singh Roy v. Nusseerooddeen Mahomed Chowdhry* (17 W. R., 97), a tenant was allowed to remove a house he built [588] on land which was leased to him. As amongst Hindus and Mahomedans, English law has not been extended. The building having been erected with our money, we are entitled to have something allowed us, on the principle of *Rani Asmut Koor v. Maharani Indurjeet Koor* (B. L. R., Sup. Vol., 1003).

Mr. O'Kinealy for the respondents.—It has been decided that, subject to s. 17 of the English Statute, the law prevailing here is English law. *Savage v. Bancharam Tagore* (Morton's Dec. by Montrieu, 105). The same thing is laid down in *The Advocate-General of Bengal v. Rance Surnomoyee Dossie* (9 Moore's I. A., 387). I say it is no question of succession, but one of accession, and English law applies. The question is, whether or no the land is the property of Rajnarain: you cannot separate the house from the land. The case of *Thakoor Chunder Paramanick* (B. L. R., Sup. Vol., 595) is not a rule of Hindu law. Regulation IV of 1793 enacts that the Zilla Courts are to decide these questions according to equity and good conscience. I shall show that the ruling in *Paramanick's case* (B. L. R., Sup. Vol., 595) is not a rule of Hindu law, but is simply a usage which was found to act satisfactorily in the mofussil, and was decided according to equity and good conscience. The rules of equity and good conscience are not extended to Calcutta. Under the Hindu text the plaintiff is not entitled to take away the buildings, this being a case of contract. See Narada's Institutes by Dr. Jolly, sec. 21, chap. vi. The case of *Shibdas Bandapadhyaya v. Bamondas Mukhapadhyaya* (8 B. L. R., 237) is clearly evolved from rules of equity and good conscience, and will not therefore apply. The case of *Parbutty Bewah v. Woomatara Dabee* (14 B. L. R., 201) was a special case stated to the Court by both parties, and does not bear on the present case as there was a usage admitted.

The following **Judgments** were delivered by the Court (GARTH, C.J., and PONTIFEX, J.) :—

Garth, C.J.—The plaintiff in this case sues as reversionary heir of one Rajkisto Bysack to recover possession of a house [589] and land in the town of Calcutta, to which he claims to have become entitled on the death of the widow and heir of Rajkisto Bysack.

The widow's estate in this property was sold under an execution against her so long ago as the year 1833, and purchased by a gentleman named Templeton; and from Templeton it passed into the hands of several persons in succession, the last of whom is the present defendant. One of those persons, many years ago, built a house upon this land, which is known by the name of 40, Shibtollah Street, and the only question in this appeal is, whether the plaintiff, who is admittedly entitled to the land, is entitled to the house also.

The defendant contends that the house is hers; and that she is entitled, at the option of the plaintiff, either to be paid by him a fair price for the house, or to be allowed a reasonable time, after the plaintiff has declared his option, for removing the materials of it, and restoring the land to the condition in which it was before the house was built.

The defendant has proved no usage or custom of Hindu law in support of this contention, but she relies mainly upon the Full Bench judgment in the case of *Thakoor Chunder Paramanick* (B. L. R., Sup. Vol., 595) as laying down a general rule of Hindu law to that effect. Of course, if I took that view, I should feel bound to follow the Full Bench Ruling; and I observe that, in the case of *Russick Lall Muddock v. Loknath Kormokar* (1 L. R., 5 Cal., 688), a suit between landlord and tenant in Calcutta, that rule was followed by the learned Judge who tried this cause in the Court below. He seems, however, to have considered that it was a rule of Hindu law, and that, in a suit between Hindus, he was bound in a matter of contract to abide by it.

In this case the same learned Judge thought that the rule did not apply, because the question here was, not one of succession or inheritance or contract, within the meaning of the 21 Geo. III, c. 70, s. 17.

I confess that, after giving a good deal of attention to the Full Bench judgment, and to the authorities there referred to, I think that the law laid down is not intended specially as a [590] rule of Hindu law. The learned Chief Justice, it is true, quotes certain Hindu authorities relating to the law of landlord and tenant and joint proprietorship, but he also in support of his conclusions relies upon the Mahomedan law and the civil law, as well as upon Act XI of 1855 of the Indian Legislature.

It seems to me, therefore, that the Full Bench rather intended to deduce from these various authorities a rule of equity and good conscience to be generally observed in the mofussil; and in the mofussil probably, even in the present day, such a rule would work equitably. The sort of houses that are generally found there are, for the most part, readily removeable; and cutcha or semi-cutcha buildings, such as are erected by the poorer native population, have always been considered as in the nature of moveable property.

But in Calcutta the case is very different. The Full Bench Ruling, if generally applied there, would be productive of great inconvenience; and, moreover, we are bound in Calcutta according to the express language of the Charter, not by the law of equity and good conscience which prevails in the mofussil, but by the law of equity and good conscience which was administered by the Supreme Court (see ss. 19, 20, and 21 of the Charter of 1865). That law, I

consider, is, generally speaking, the self-same law of equity which is administered in our Courts in England. We are bound of course, in suits between Hindus, to pay all due regard to any Hindu law or usage which can be shown to prevail in Calcutta; but in this particular case, as I before observed, no attempt has been made to establish any such law or custom, nor has a single authority been cited before us, which, in my opinion, justifies in any degree the appellant's contention. We have no proof whatever as to where, or by whom, the house in question was built; but the builder must have claimed under Templeton, and must be taken to have known perfectly well the limited nature of Templeton's estate. Had Templeton himself built the house, it is clear that, upon the widow's death, he would have had no right to remove it; and it is difficult to see how any one claiming under Templeton could have had a larger right than he had.

[591] I confess that I see no equity, but on the contrary a vast deal of injustice, in allowing a tenant for life to build upon a property in such sort as to ruin a reversioner if he were compelled to purchase the buildings, or, as an alternative, to deprive him of the use of his land during the many months which might be occupied by the representatives of the tenant-for-life in pulling down the buildings and removing the materials. What might be a very just law in the mofussil, would operate in large towns as a monstrous evil; and I believe that if the Appellant's contention were well founded, the consequences in Calcutta would be most disastrous.

I think, therefore, that the Court below was right, and that the appeal should be dismissed with costs on scale 2.

Pontifex, J.—The plaintiff is entitled to have this case decided on the footing that Templeton, the purchaser at the Sheriff's sale, was aware he was buying only the qualified interest of a Hindu widow. And that being so, the fact that Templeton, or any one claiming through him, built on the land would not, in my opinion, apart from any question of Hindu law, give him or them an equity entitling him or them as against the reversioner to remove the materials.

It has been argued that this is a question of 'succession,' and must, under 21 Geo. III, c. 70, s. 17, be governed by Hindu law.

It appears to me, however, that it is not a question of succession or inheritance.

The defendant in fact admits that the plaintiff is entitled to succeed to the house, subject only to a right in the defendant to be compensated, which right does not accrue to the defendant until after the moment of succession. The right to compensation, or the alternative right to take away the materials, if such rights existed, would not to my mind be rights of succession or inheritance. And it has not been shown that such rights exist in Hindu law except in the case of contracts for tenancies where rent is paid.

The statement of Narada referred to in the Full Bench case of *Thakoor Chunder Paramanick* (B. L. R., Sup. Vol., 595) is confined to that state [592] of circumstances. Nor does that Full Bench case deal with the equity as a provision of Hindu law, but, as it appears to me, decides it as a rule of equity and good conscience applicable to the particular case, the property being in the mofussil and the rule of equity and good conscience being the rule applicable.

Nor would it necessarily follow that what might be a rule of equity and good conscience applicable to the country, would be equally applicable to

Calcutta or a town. It would indeed be difficult to apply a rule like this to a town, and as the rule in *Narada* does not include the present case, I think it would be improper to extend it to that which the defendant only claims to be an analogous case.

We must, therefore, deal with the question according to the usual equities applicable to cases in Calcutta,—namely, equities administered by an English Court of Equity. And especially in this case the defendant, claiming as he does through Templeton, a European, can, I think, claim no greater or other equity than Templeton himself would have been entitled to claim.

I, therefore, think the plaintiff is entitled to recover free from any claim of the defendant to the materials of the house.

Appeal dismissed.

Attorneys for the Appellant: Messrs. *Mookerjee and Deb.*

Attorney for the Respondents: *Bahoo M. D. Sen.*

NOTES.

[RIGHT TO REMOVE BUILDINGS ERECTED BY ONE ON THE LAND OF ANOTHER—

This case was decided on the express ground that, *arising in Calcutta and not being a matter of contract*, etc. (as in the case of landlord and tenant—5 Cal., 688), the law to be applied was the English Law, according to which (with certain exceptions) whatever is fixed to the soil becomes part of, and goes with, the soil.

The Indian law on the subject was discussed exhaustively by Sir V. BHASHYAM AYYANGAR, J., in (1903) 27 Mad., 211; 14 M.L.J. 25, which declares the tenant's right, **before** the determination of the tenancy, to demand compensation of the landlord or to remove fixtures; **after** that period, he cannot do so: (1911) 21 M.L.J. 891 (SANKARAN NAIR, J., *dissenting*).

The rights created by estoppel stand on a different footing. As to this, see 18 Bom. 66; 17 Bom., 736; 21 All. 496 P. C.

The case of (1895) 22 Cal. 820 (824) was under the Land Acquisition Act the tenant being in possession when the Act was applied, he was held to be the person entitled under it.]

[10 C.L.R. 359]

[593] FULL BENCH.

The 11th March, 1882.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE PONTIFEX,
MR. JUSTICE MORRIS, MR. JUSTICE MITTER, AND MR. JUSTICE PRINSEP.

Kishori Lal Roy.....Plaintiff

versus

Sharut Chunder Mozumdar..... Defendant.

Court-fees Act (VII of 1870), s. 17 Suit for possession and mesne profits—Stamp-fee payable on appeal.

For the purposes of determining the stamp-fee payable on an appeal to the High Court, in a suit for possession and for mesne profits, the claim for possession and mesne profits is to be taken as one entire claim.

Chedi Lal v. Kirath Chand (I. L. R., 2 All., 682) dissented from.

THIS was a reference to a Full Bench by GARTH, C. J., as to the proper amount of stamp-fee payable on an appeal to the High Court.

* Reference under s. 5 of Act VII of 1870.

The plaintiff, the appellant, brought a suit in the mofussil for possession of certain immoveable property, and also for mesne profits. The entire claim was valued at Rs. 1,24,997, of which sum Rs. 64,997 represented the value of the land, and Rs. 60,000 the amount of mesne profits.

In the lower Court the plaintiff recovered only a portion of the land which he claimed, the value of which was Rs. 3,395.

On appeal to the High Court, he valued his claim at Rs. 1,18,600, and proposed to pay stamp-duty upon that entire sum. The Registrar considered that this sum consisted of two distinct claims within the meaning of s. 17 of the Court-Fees Act,—that is to say, Rs. 61,602, being the difference between the value of the property claimed in the Court below, and the Rs. 3,395, the value of land recovered, and Rs. 56,998 for mesne profits,—and was of opinion that the appellant was bound to pay a stamp-fee not upon the Rs. 1,18,600 as a whole, but upon the two separate sums of Rs. 61,602 and Rs. 56,998. The appellant objected to pay the double stamp-fee, and the Registrar referred the matter to the Chief Justice. The Chief Justice was of opinion that a claim for possession and for mesne profits [594] should be considered as one claim; but inasmuch as the matter had been decided differently in *Chedi Lal v. Kirath Chand* (I. L. R., 2 All., 682), he referred the following question to a Full Bench,—i.e., whether, for the purpose of determining the stamp-fee payable on an appeal to the High Court, the claim for possession and mesne profits should be considered as distinct and separate claims within the meaning of s. 17 of Act VII of 1870.

Baboo Srinath Doss, Baboo Mohini Mohun Roy, and Baboo Tarucknath Sen for the Appellant.

The **Opinion** of the Full Bench was given by

Garth, C. J.—I think that the question referred should be answered in the negative. Having regard both to the practice of the Courts and to the language of the Legislature, it seems to me, that, in this country, the policy of the law has always been to allow a plaintiff to enforce a claim for possession of land and for mesne profits, either in one suit or two, as he may think proper; but at the same time to induce him, if there is no reason to the contrary, to dispose of his whole claim in one suit only.

And there seems much good sense in this policy; because in the generality of such cases, the plaintiff's right to mesne profits follows his right to possession, in the same way that in a money claim, a right to interest follows the right to the principal sum. The Court which decides the question of possession has generally all the materials before it to decide at the same time the question of mesne profits; and it would be only entailing both upon the Court and the parties unnecessary expense and trouble, to try the claim in two different suits.

A rule of the old Sadr Court, dated the 15th of June 1849, was as follows:—

“The Court are pleased, upon re-consideration, to cancel prospectively the rule laid down in the last sentence of paragraph 6 of Circular Order No. 29, dated 11th June 1839, which requires that, in actions for real property, the mesne profits, unless relinquished, shall be included in the amount at [595] which the suit is laid, and to intimate that they may be made the subject of a subsequent suit, anything in rule 3, paragraph 4 of Circular Order No. 28, dated 30th September 1874, notwithstanding.”

It would appear from this rule, that previously to the 15th of June 1849, a petitioner was bound to sue for possession and mesne profits in one suit; but that, after that date, he might, if he pleased, bring a separate suit for the mesne profits.

In accordance with this practice, the Legislature, in passing the Civil Procedure Code of 1859, seem to have contemplated the joinder, under ordinary circumstances, of claims for possession and mesne profits in one suit. Sections 8, 9, and 10 of that Code, which were so much discussed during the argument, appear to me to favour that view.

Section 8 allows several causes of action to be joined in one suit, provided they are by and against the same parties, and their total value does not exceed the jurisdiction of the Court.

Section 9 provides, that if two or more causes of action are joined in one suit, the Court may order separate trials, if it considers that such causes of action cannot conveniently be tried together.

And then s. 10 enacts, that, for the purposes of ss. 8 and 9, a claim for possession and for mesne profits shall be deemed to be distinct causes of action. This, I think, implies that a claim for possession and mesne profits, when joined in one suit, would, but for this last section, be considered as one cause of action; but that, for purposes of jurisdiction, and of allowing the Court to order separate trials, if necessary, such a claim was to be considered as embracing distinct causes of action.

It must be borne in mind that, in both the old and new Codes, the Courts were at liberty, in a suit for possession of land, to give mesne profits as well as possession, although the mesne profits were not claimed in the plaint; and s. 8, as I take it, was intended to restrain the Courts from giving mesne profits, where the value of the land recovered, *plus* the mesne profits awarded, would have exceeded the jurisdiction of the Court. See s. 196 of the old Code, and s. 211 of the new Code.

These same sections, which I have just quoted (196 and 211) afford also, I think, another strong argument in favour of my view.

[596] It is admitted, that when, under the power thus given to the Courts, mesne profits are decreed as from the date of suit, the value of the land, *plus* the amount of the mesne profits awarded, is for the purposes of stamp-fee to be considered as one claim only. The plaintiff in such a case has only to pay an additional fee in proportion to the amount of the mesne profits.

Then let us suppose a case, where the plaintiff claims not only possession, but also mesne profits from the date of suit. Is he to pay a larger amount of stamp-fee than he would have paid if he had sued for possession only, and the Court had awarded the mesne profits without his asking for them? Why should he be charged upon a different principle in the two suits, when his claim is virtually the same in each? It seems to me that this would be an absurdity.

Then let us proceed a little further. Let us suppose that the plaintiff claims both possession and mesne profits, not from the date of the suit, but from a period antecedent to the date of the suit. Is he to pay stamp-fee in that suit as upon two distinct claims, when, if he had claimed mesne profits only from the date of suit, he could only be charged stamp-fee for the one claim? That again would be most unreasonable.

The Court could only give him the mesne profits from the time when he was entitled to possession, and whether he was so entitled as from the date of suit, or from a time antecedent to the date of the suit, the nature of his claim must be the same. For the purposes of the Court-Fees Act, the claim can hardly consist of several and distinct causes of action in the one case, and not in the other.

And then lastly, another strong argument in favour of my opinion consists in this. The Court-Fees Act of 1870 has now been the law of the land for nearly twelve years. It is admitted, that, until quite lately, claims for possession and mesne profits have always, for the purposes of stamp-fee, been treated as one claim only. This appears to have been the universal practice, both in the Mofussil Courts and in the High Court; and it can hardly be, that, for all these years, the Courts and the Government should have been under a mistake.

These suits for possession and mesne profits are matters in [397] this country of constant occurrence. The Government must have been well aware of the construction which had been put by the Courts upon s. 17 of the Court-Fees Act; and if, being aware of it, they have desisted all this time from any legislative action to change the practice, that seems a strong reason for believing, that they considered the practice to be in accordance with the intentions of the Legislature.

There is a very wholesome maxim of law "*optimus legis interpret consuetudo*"; and Mr. Broome in his work on Legal Maxims, 2nd edition, page 534, says this:—"Where a Statute uses language of doubtful import, the acting under it for a long term of years may well give an interpretation to that obscure meaning, and reduce that uncertainty to a fixed rule."

And I take it, that this principle is especially applicable, where the subject of interpretation is a matter of every-day occurrence. And when we find that, for a series of eight or ten years, a law which imposes a heavy tax upon litigation has received a particular interpretation in favour of the suitor, and a course of practice has prevailed for years, throughout the whole country, in accordance with that interpretation, I think that any Court of Justice ought to be very slow in changing that interpretation or course of practice to the prejudice of the suitor, unless it sees clear and weighty reasons for so doing.

Having regard to the nature of this reference, of course there will be no order as to costs.

NOTES.

[I. SUIT FOR POSSESSION AND MESNE PROFITS—

For the purposes of the Court Fees Act, such suits were deemed to relate to one subject only:—(1882) 8 Cal. 593; 17 Cal. 968; 19 Cal. 615; 16 All. 401 *contra* 1 All. 552; 2 All. 682; 12 Bom. 98. As regards appeal the entire claim has to be regarded:—(1909) 13 C.W. N. 815.

For the purpose of the rule as to splitting causes of action, they have been held to be distinct causes of action:—(1908) 31 Mad. 405 approving of (1887) 11 Mad. 210 and not following (1887) 11 Mad. 151. See also (1891) 19 Cal. 615; (1890) 17 Cal. 968; 14 Bom. 286; (1889) P.R. 129 F. B.; (1908) 32 Mad. 330 (rent). It is immaterial which of the two causes of action has been first sued on:—(1887) 11 Mad. 210; (1891) 19 Cal. 615. See, however, 17 All. 533; on appeal (1900) 23 All. 227 at 232; 21 All. 425; (1908) 30 All. 225; 5 A.L.J. 192; (1908) A.W.N. 96 (mortgage suit).

For the purpose of ascertaining the proper Appellate Court, see 34 Cal. 954 F. B.; 6 C.L.J. 255; 11 C.W.N. 1133.

II. INTERPRETATION OF STATUTES—USAGE—

The rule amounts to no more than this, that if the Act be susceptible of the interpretation which has been put upon it by long usage, the Courts will not disturb that construction—*Fermoy Peerage case* (1856) 5 H. L. C. 716." *Pochin v. Duncombe* (1857) 1 H. & N. 842 (856, 857), per Pollock, C. B. "Contemporaneous and continuous usage is of the greatest efficacy in law for determining the true construction of obscurely framed documents"—*Hebbert v. Purchas* (1871) L. R. 3 P. C. 605 (650).

When there are ambiguous expressions in an Act passed one or two centuries ago, it may be legitimate to refer to the construction put upon these expressions throughout a long course of years, by the unanimous consent of all parties interested, as evidencing what must presumably have been the intention of the legislature at that remote period :—*Trustees of Clyde Navigation v. Laird* (1883) 8 A. C. 658 (673), per Lord Watson. Construction long acquiesced in will not be departed from even if it appear to be incorrect, and a different construction would be arrived at, were the matter *res integra* :—Where a series of decisions have put a (particular) construction on an Act of Parliament, and have thus made a law which men follow in their daily dealing, it has been held, even by the House of Lords that it is better to adhere to the course of decisions than to reverse them because of the mischief, which would result from such a proceeding"—per Jessel, M. R., in *Ex parte Willey* (1883) 23 Ch. D. 118, 127. See also *Mignault v. Malo* (1872) L. R., 4 P. C. 123 ; *Evantural v. Evantural* (1869) L. R. 2 P. C. 462 ; *London County Council v. Erith Overseers* (1893) A. C. 562 (598).

See also (1880) 5 Bom. 188 (193) ; (1907) 6 C. L. J. 651 ; 12 C. W. N. 37 ; (1907) 94 Cal. 954 ; 11 C. W. N., 1133 ; 6 C. L. J. 255 ; 10 Cal. 274.

III. LIMITATIONS ON THE APPLICATION OF THE RULE—INTERPRETATION BY USAGE—

1. The interpretation must have been established uniformly and for a long period :—8 years held to be insufficient in *Danford v. McAnulty* (1882) 8 A. C. 456 (463). As regards uniformity, see *Reid v. Reid* (1886) 31 Ch. D. 402 (410).

2. If the meaning is plain and the statute admits of only one plain interpretation, it is immaterial that a wrong meaning has for many years been ascribed to it :—"As to usage, I am clearly of opinion that it ought not to be attended to in considering an Act of Parliament; where the words of the Act are doubtful, usage may be called in to explain them :—*R v. Hogg* (1787) 1 T.R. 728, per Grose, J.

Where a statute speaking on some points is silent as to others, usage may well supply the defect ; for where the statute uses language of doubtful import, the acting under it for a long course of years may well give an interpretation to that obscure meaning and reduce that uncertainty to a fixed rule * * * but it is quite plain that against a plain statutory law no usage is of any avail :—Magistrates of Dunbar v. Duchess of Roxburgh (1895) 3 Cl. & F. 325. Usage and practice for 80 years was discarded in *Northan Bridge Co. v. R.* (1886) 55 L. T. 759. See also 12 All. 129 (135) ; 27 Cal. 508 ; (1909) 13 C.W.N. 815.

3. For the maxim to apply, the statute should have been universally construed in a particular way.

"We understand that in acting upon the statute in Ireland a practice has been prevalent, though not universal, which is at variance with our opinion as to its proper construction. We conceive that the meaning of the Act is so clear that we ought not to give any weight to the practice"—*Bank of Ireland v. Eran's Charity* (1855) 5 H. L. C. 405.

We are interpreting a universal law, which cannot receive different constructions in different towns. It is the general law that this kind of property should be rated, and we cannot explain the law differently by the usage of this or that particular place :—*R v. Hogg* (1787) 1 T. R. 728.

IV. INTERPRETATION OF FISCAL ACTS :—

See also (1890) 12 All. 129 at 135.]

[8 Cal. 597=10 C.L.R. 241]

FULL BENCH.

The 11th March, 1882.

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE PONTIFEX,
MR. JUSTICE MORRIS, MR. JUSTICE MITTER, AND MR. JUSTICE PRINSEP.

Narain Chunder Chuckerbutty.....Defendant

versus

Dataram Roy.....Plaintiff.*

*Registration Act (III of 1877), s. 50—Registered and unregistered
documents—Priority—Possession—Transfer of Property*

Act (IV of 1882), s. 54.

A vendor sold the same property twice over to different people—once by an unregistered conveyance (the purchase-money being under Rs. 100), giving [598] to his vendee possession, and a second time to another person by a registered conveyance at a time when the first vendee was out of possession.

Held by the Court (PRINSEP, J., *dissenting*), in a suit by the first vendee to recover possession, that the fact of a vendor having given possession to the first and unregistered purchaser, even if such possession continued to the date of the second conveyance, did not necessarily prevent the operation of that part of s. 50 of the Registration Act which enacts that "a registered document shall take effect as regards the property therein comprised against every unregistered document relating to the same property."

The only case in which the title of the prior unregistered purchaser can prevail against the subsequent registered purchaser for value, is when the latter takes with notice of the title of the former.

Per PRINSEP, J.—A purchaser under a registered conveyance subsequently executed cannot succeed in a suit to eject one who holds possession under a prior but unregistered conveyance, registration of which is optional.

Per CURIAM.—Delivery of possession is not under the Hindu law essential to complete the title of a purchaser for value.

Per GARTH, C.J.—Section 54 of the Transfer of Property Act virtually abolishes optional registration.

THE plaintiff purchased from Dino Nath Roy a four-anna share of one-half bigha of land, and took a conveyance, dated the 26th Choitro 1278 (7th April 1872). He also purchased from Jodu Nath Roy an eight-anna share of the same land, and took a conveyance in the name of his wife, dated the 29th Aughran 1279 (13th December 1872). The purchase-money in each case being under Rs. 100, registration was optional. The deeds were not registered, but the plaintiff obtained possession of the twelve annas so purchased, and remained in possession down to the 13th Jeit 1284 (25th May 1877), when he was dispossessed, according to the Munsif's finding, by defendant No. 2, Putit Maji, at the instigation of defendant No. 1, Khotter Mohun Chuckerbutty.

While the plaintiff was out of possession, Jodu Nath Roy purported to convey his original eight-anna share to the defendant Narain Chuckerbutty by deed, dated the 27th Bhadro 1284 (11th September 1872), for a consideration of Rs. 100. This deed was duly registered.

The plaintiff sued to recover the property. The defendant Putit Maji alleged that he held possession as tenant of Dino Nath Roy and Narain Chuckerbutty.

* Reference to Full Bench made by Mr. Justice Cunningham, Mr. Justice Prinsep, and Mr. Justice Wilson, in Appeal from Appellate Decree, No. 2603 of 1879.

[599] Both the lower Courts held that the plaintiff was entitled to recover.

The Munsif so held on the following grounds :—1st, that Narain Chuckerbutty “did not obtain legal possession of the land,” and that “delivery of possession is under the Hindu law essential to complete the title”; and 2ndly, that “registered documents will not prevail against unregistered written agreements accompanied by possession.”

The Subordinate Judge affirmed the Munsif's decree, on the ground that “it is a settled point of law that an unregistered kobala, supported by possession, shall prevail over a registered kobala without possession.”

The defendant Narain Chunder Chuckerbutty appealed to the High Court, and the case came before CUNNINGHAM and PRINSEP, JJ., who differed in opinion. The case was thereupon reheard before those two learned Judges and WILSON, J., by whom it was referred to a Full Bench.

Baboo *Umakali Mookerjee* for the Appellant.

Baboo *Umbica Churn Bannerjee* for the Respondent.

The following **Judgments**, in which the circumstances under which the case was referred and the opinions of the learned Judges who referred it are fully stated, were delivered by the Full Bench :

Prinsep, J.—In the case before us, the plaintiff, after being for some years in possession of lands conveyed to him under an unregistered deed, the registration of which, owing to the small value of the lands, was optional, has been ejected. About three months afterwards his vendor has sold again to a third person under a registered deed of sale, and in suing to recover possession, plaintiff finds himself opposed by this second purchaser, who maintains that under his registered conveyance, his title is preferable to that of plaintiff under an unregistered deed of sale. The Subordinate Judge in appeal held that “it was a settled point of law that an unregistered kobala supported by possession shall prevail over a registered kobala without possession.”

[600] The second appeal was heard originally by a Division Bench consisting of CUNNINGHAM J., and myself, and in consequence of a difference of opinion was re-heard by us sitting with WILSON, J. We had determined to remand the case for retrial on the issues stated in the judgment now about to be delivered when the attention of CUNNINGHAM and WILSON, JJ., was drawn to a judgment delivered by FIELD, J., sitting with me in second appeal, and in accordance with their request, I agreed to have this case referred to a Full Bench. The facts of the present case, which I have already briefly stated, were, however, different from those of the case heard by FIELD, J., and myself. In the latter case the plaintiff, a second purchaser under a registered deed, sought to obtain possession of land already conveyed by his vendor to the defendant, who was in possession under an unregistered instrument, registration being optional, and I there held, following the precedent in Second Appeal No. 1122 of 1876, decided by MARKBY, J., and myself on August 20th, 1877, that defendant being in possession under a valid instrument, could not be ejected by plaintiff, the subsequent purchaser, under a registered deed. I would also explain that although I agreed in remanding the case now before us for retrial on certain issues, I had not agreed in the terms of the judgment to be delivered. As I had merely signified my general dissent and the grounds of the judgment had not been settled in consultation with reference to my opinion, the opinions of my learned colleagues cannot, I apprehend, be properly quoted or at most be regarded otherwise than their opinions subject to re-consideration for the settlement of judgment.

In this respect I would only refer to the remarks of Sir B. PEACOCK, C.J., in the Full Bench case of *Mahomed Akil v. Asadunnissa Beebee* (B. L. R., Sup. Vol., 774, see pp. 817, 818; s.c., 9 W. R., 1, see pp. 29, 30).

I regret extremely that the opinions I entertain regarding the interpretation to be put on s. 50 of the Registration Act of 1877 are not in accordance with those of my learned colleagues. I have reconsidered the matter very carefully with the advantage of seeing the judgment that they propose to deliver, but I still find myself unable to agree.

[601] In all the successive enactments relating to registration of deeds since 1793 to the present day, the general rule has been that preference is to be given to a registered over an unregistered deed relating to immoveable property. Regulation XXXVI of 1793 and the Acts of 1843 declared that a registered deed should 'invalidate' an unregistered and previously executed deed; Act XVI of 1864, that it should have 'priority'; and Act XX of 1866 and the more recent Acts have enacted that any such instrument shall "take effect as regards the property comprised therein against every unregistered instrument." To use the words of Lord Chancellor Cairns in the case of *Agra Bank v. Barry* (L. R., 7 H. L., 135; at pp. 147, 148), any person reading over that Act of Parliament would perhaps "in the first instance conclude that it was an Act absolutely decisive of priority under all circumstances, and enacting that, under every circumstance that could be supposed, the deed first registered was to take precedence of a deed which, although it might be executed before, was not registered till afterwards. But by decisions, which have now, as it seems to me, well established the law, and which it would not be, I think, expedient in any way now to call in question, it has been settled that, notwithstanding the apparent stringency of the words contained in this Act of Parliament, still, if a person in Ireland registers a deed, and if, at the time he registers the deed, either he himself, or an agent whose knowledge is the knowledge of his principal, has notice of an earlier deed, which, though executed, is not registered, the registration which he actually effects will not give him priority over that earlier deed." Our Courts have consequently considered in each case whether the person in whose favour the second deed was executed had notice or knowledge of the previous transaction, and have been influenced by such considerations in applying the law.

The point I propose to consider is, whether having sold his right, title, and interest, and having put his vendee in possession of certain land under an unregistered but valid deed, a man can sell the same property over again to a third party, so as to give him a good title by reason of the conveyance being [602] registered. If the transaction were not reduced to writing, the law since 1871 has made it clear, that an oral agreement or declaration accompanied or followed by possession, confers a title which cannot be disturbed by subsequent recourse to the registration office, and so far an honest purchaser is protected against the fraudulent conduct of his vendor; but if the strict construction of the law which I understand my colleagues desire to adopt be maintained, one who to avoid the "uncertain testimony of a slippery memory" has the agreement committed to writing, but takes advantage of the law enacted expressly for the convenience of the poorer classes, and does not register his conveyance, remains at the mercy of his vendor until his possession has fructified into a perfect title by the lapse of twelve years. To me it appeared that the Legislature could not have contemplated such consequences, and I thus expressed myself:—

"I am unable to learn any valid reason for any difference between an unregistered and an oral agreement, both followed by delivery of possession, or

why, where registration is optional, such a deed should be placed at a disadvantage; in other words, why because such an agreement has been reduced to writing, it should not be at least as good as the previous state of the same transaction before the terms agreed on were fixed and made certain by a permanent record. 'Such a construction of the law,' to quote a recent judgment of the Privy Council on the same Act, 'would cause great difficulty and injustice which it cannot be supposed the Legislature contemplated, and would be inconsistent with the language and tenor of the rest of the Act'—*Mahomed Fwaz v. Bij Lal*, 13th June 1877 (L. R., 4 I. A., 166 ; at p. 172). If the term were interpreted strictly, a person in the position of the respondent Fulmoni would have a title, not only uncertain, but dependent on the conduct of her vendor until she had perfected that title by a possession of twelve years, so as to enable her successfully to plead limitation. I find it impossible to conceive that the Legislature intended to countenance such a state of things, and therefore it appears to me that the rule laid down in the case of *Salim Sheik* must be followed, and that we must hold [603] that, notwithstanding the enactment of s. 48 of the Act of 1871, the full force of that rule is unaffected."

A contrary opinion has, however, been expressed in the case of *Fazluddeen Khan v. Fakir Mahomed Khan* (I. L. R., 5 Cal., 336 ; see p. 350). In that case it was held, that "the defendant can put his case no higher than that he and the plaintiff are two innocent purchasers; and if that is so, the fact that the plaintiff did register, while the defendant did not, is sufficient under s. 50 to compel us to hold that the plaintiff's registered deed must prevail against the defendant's unregistered deed." The effect of such a rule would be to declare that although the Legislature has said that, under certain circumstances, an unregistered instrument shall be received as evidence of the absolute title it confers, and although this title be confirmed by possession obtained under it, an instrument conveying the same title to a third party, executed subsequently by the same person but registered, shall nullify the previous title long enjoyed without any question: so that, although the proprietor of certain land sells it fairly and honestly under a valid instrument, he shall have the power to convey what no longer remains with him to a third party, and unless it can be shown by the prior purchaser that the later purchase was made with notice or knowledge of his title, he will find that he has lost what he has long enjoyed in security. I cannot believe that the Legislature could deliberately have devised such a trap for the ruin of the poorer and more ignorant classes of the community, that it should on the one hand have benevolently declared its intention to spare them the expenses of registration wholly disproportionate to the value of such small transactions, but that at the same time it should have obscurely enacted, that a long possession held under such a valid title might be at once annulled by the dishonesty of the vendor. I can quite understand the great importance of a perfect system of registration, and of the security so afforded to persons inclined to invest money in land; but in smaller transactions,—that is to say, where the value of the property is less than Rs. 100, and registration is consequently optional, such investors should be put on their [604] guard, and should be especially cautious in making full enquiry regarding possession of the particular property.

Where the particular instrument confers anything short of an absolute title, and is in the nature of a mortgage on the land, and is unregistered, I can see no objection to preference being given to a subsequently executed but registered deed. In such a case the rights of the executant of the instrument would still remain to some extent so as to enable him to deal with another

party, and in the competition between two such instruments 'priority' may be given to the registered deed, or the registered deed may 'take effect' before the unregistered one. But where the executant has already divested himself by a valid instrument and by delivery of possession, he cannot, in my opinion, convey to another what no longer remains with him. The second purchaser is, in my opinion, in no better position than one who buys from a man who never had any title at all.

In the case of *Raja Sahib Perhlad Sen v. Baboo Budhu Singh* (12 Moore's I. A., 301, at pp. 306, 307; s.c., 2 B. L. R., P. C., 111, at p. 117), their Lordships of the Privy Council thus expressed themselves:—"They (that is, the Judges of the lower Court) seem to have ruled that the effect of the execution of a bill of sale by a Hindu vendor is, to use the phraseology of English law, to pass an estate irrespective of the actual delivery of possession, giving to the instrument the effect of a conveyance operating by the Statute of Uses. Whether such a conclusion would be warranted in any case is, in their Lordships' opinion, very questionable. It is certainly not supported by the two cases cited in the judgment under review, in both of which actual possession seems to have passed from the vendor to the purchaser. To support it, the execution of the bill of sale must be treated as a constructive transfer of possession, but how can there be any such transfer, actual or constructive, upon a contract under which the vendor sells that of which he has not possession, and to which he may never establish a title? The bill of sale in such a case can only be evidence of a contract to be performed *in futuro*, and upon the happening of a contingency of which the purchaser may claim a specific performance, if he comes into Court, [605] showing that he has himself done all that he was bound to do."

Section 27 of the Specific Relief Act (I of 1877) declares, that "except as otherwise provided by this chapter, specific performance of a contract may be enforced against

(a) either party thereto :

(b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value, who has paid in money in good faith and without notice of the original contract."

The following illustration is given of this latter clause:—*A* contracts to sell certain land to *B* for Rs. 5,000. *B* takes possession of the land. Afterwards *A* sells it to *C* for Rs. 6,000. *C* makes no enquiry of *B* relating to his interest in the land. *B*'s possession is sufficient to affect *C* with notice of his interest, and he may enforce specific performance of the contract against *C*.

Our Courts have refused to hold, that, in order to perfect a title, possession must have been given, but they have never held that a title followed by possession is not a perfect title, so far as its former proprietor is concerned, and if it is good as against him, it must, in my opinion, be good against any one deriving a subsequent title from him. If a vendee in possession under an unregistered conveyance (registration of which is optional) be ejected by a third party, he is competent to sue to recover possession on his title, and if he can alone do so, his vendor can have nothing to convey to any one else.

Some observation has been made regarding the manner of obtaining possession of land in some instances, generally known as symbolical possession,—that is, by sticking up a bamboo in some prominent place accompanied by beat of drum or some sort of proclamation, and it has been stated that such a practice would convey insufficient notice of any change of possession. If such a proclamation be properly made, I have no doubt that it would convey notice to the ryots who would consequently be in a position to communicate the

information to any person making enquiries regarding possession, but this is not the only way of getting possession of land, and whatever argument might be derived from it, would not apply to cases such as we [606] have now before us, in which registration is optional. In transactions regarding immoveable property of less value than Rs. 100, the property would generally be ryoti lands—not extensive zamindaries—lands probably not comprising an entire mouza.

On such considerations as these, I have, in the two cases already mentioned, held, that a purchaser under a registered conveyance subsequently executed cannot succeed in a suit to eject one who holds possession under a prior but unregistered conveyance, registration of which is optional. The unanimity of my learned colleagues has made me have much hesitation in adhering to those decisions, but after long and careful consideration I find myself unable to concur in their opinions. The point under discussion is one of very considerable importance, and it is therefore to be hoped that an early opportunity will be taken by the Legislature of clearly expounding the law in this respect.

In the present case, where the second sale was made while the unregistered and prior purchaser was out of possession, I am not unwilling that a retrial should be held on the issues stated in the judgment of my learned colleagues, but I am bound to say that further consideration has made me inclined to agree with the opinion expressed by Mr. Justice FIELD, that having once sold, the vendor has no title to convey to any one else.

Pontifex, J. (after setting out the facts, continued).—Two of the learned Judges who referred this case were of opinion, that none of the grounds relied upon by the lower Courts were correct statements of the law.

They were of opinion that the ruling in the case of *Fuzluldeen Khan v. Fakir Mahomed Khan* (I. L. R., 5 Cal., 336) was correct,—namely, that the fact of a first purchaser under an unregistered conveyance having obtained possession, even if such possession continued at the date of a second registered conveyance, did not necessarily prevent the operation of s. 50 of the present Registration Act, which enacts broadly, that a registered document “shall take effect as regards the property therein comprised against every unregistered document relating to the same property.”

They were further of opinion upon the authorities, that the only case in which the title of an unregistered purchaser for a [607] less consideration than Rs. 100 can prevail against a subsequent purchaser for value, who registers, is when the latter takes with notice of the title of the former; because a vendor who sells property for less value than Rs. 100, by an unregistered kobala, gives a title perfectly good as against himself. If such vendor afterwards sells to another, so as to defeat that title, he commits a fraud on the first purchaser, and if the second purchaser takes with notice of the first purchaser's title, he has notice of, and is party to, the fraud; and his title therefore will not be allowed to prevail against that of the first purchaser.

Being of opinion that neither the Munsif nor the Subordinate Judge had directed their minds to what was the actual point in the case, *viz.*, whether the appellant took with notice of the previous sale to the plaintiff, two of the learned Judges who have referred this case were of opinion that it should be remanded to the Munsif, in order that the question of notice might be properly tried, with an instruction that, in determining it, the long continued possession of the plaintiff would be an important circumstance for consideration, though it would not be conclusive; more especially, as the plaintiff was

not in actual possession at the date of the appellant's alleged purchase. The facts and circumstances attending his dispossession might, however, be material if known to the appellant.

But before their intended order of remand was in fact made, a Division Bench, consisting of PRINSEP and FIELD, JJ. (and therefore containing one of the Judges before whom the present case came) had delivered judgments in the case of *Dinonath Ghose v. Anluck Ami Dabee* (I. L. R., 7 Cal., 753), which was of a similar character to the present, with this difference, that the first unregistered purchaser obtained possession, and continued in possession up to the date of the registered conveyance to the second purchaser.

In dealing with that case, Mr. Justice PRINSEP decided in favour of the first unregistered purchaser, on the ground that the second and registered purchaser "presumably had notice of title of the first purchaser in the fact of possession having been given,"—that is, from the fact of the first purchaser being in possession at the time of the second purchase.

[608] This possibly might on the facts of that case have been a sufficient ground for the correct decision of it; though if it was intended to lay down that possession alone was in all cases sufficient notice, we think the proposition would be stated too broadly; because, in many conceivable cases, of which the case of *Fuzluddeen Khan v. Fakir Mahomed Khan* (I. L. R., 5 Cal., 336) furnishes an example, such possession might reasonably be accounted for without necessarily affecting the second purchaser with notice of the first purchaser's title, and so making him a participator in the fraud of the common vendor.

Mr. Justice FIELD, however, in his judgment appears to have agreed with the dictum of the Subordinate Judge in the present case, that "it is a settled point of law that an unregistered kobala supported by possession shall prevail over a registered kobala without possession." Indeed he would seem to have gone further, and to have been of opinion that a purchaser under an unregistered deed, who obtains possession for a single day, must be preferred to a subsequent purchaser under a registered deed, though the first purchaser may be out of possession at the date of such second registered conveyance. For though in one part of his judgment he states the case before him to be "a case of possession" (meaning continuing possession) "and a prior unregistered conveyance, registration of which was optional, *versus* a subsequent registered conveyance and nothing more," he does in fact deal with the question as follows:—"If A sells property to C on the 1st of January 1880 by an instrument which the law does not require to be registered, and which therefore although unregistered is admissible in evidence to prove the transfer and the title of the transferee; and if this legal conveyance made in legal form is further followed immediately by delivery of the possession of the property to C, upon what principle can it be reasonably contended that A has on the 1st of February of the same year any right which he can convey to X?"

But this is merely stating in other words the proposition in the report of the case of *Fuzluddeen Khan v. Fakir Mahomed Khan* (I. L. R., 5 Cal., 336 see p. 338)—*viz.*, "when a man sells property of less value than [609] Rs. 100 by an unregistered deed, that deed will give a valid title, and the title of the vendor will cease from the date of its execution. Therefore he will have no power to reconvey the same property three months later to another person"—a proposition which was directly overruled by considered judgments in that case; and which represents the conditions occurring in almost every case under the English Registration Acts.

It is true that Mr. Justice FIELD refers to the fact of possession having been given to the first purchaser; but possession had also been given to and maintained by the first purchaser in the case of *Fuzluddeen Khan v. Fakir Mahomed Khan* (I. L. R., 5 Cal., 336). So that the latter case was in that respect on all fours with the case before Mr. Justice FIELD; and the *continued* possession of the first purchaser carried his case further than the alphabetical case put by Mr. Justice FIELD. It seems doubtful whether that learned Judge construes the words "accompanied or followed by possession" as meaning a continued possession down to the date of the second conveyance. In the alphabetical case put by him, it would seem that he did not consider continued possession necessary; as there he bases his argument on the vendor having parted with his estate, and having nothing further to convey; but in the latter part of his judgment he deals with the case of continued possession; for he says:—"In giving effect to the prior unregistered conveyance and possession, there is no real hardship done to the later registered purchaser, who, if he had used ordinary precaution, would have been able to discover that his vendor had no possession to give him."

Mr. Justice FIELD also seems to have been inclined to support the dictum of the Munsif in the present case, "that delivery of possession is under the Hindu law essential to complete the title" of a purchaser for value. The observations of Mr. Justice FIELD on this point, though apparently considered by him to be extra-judicial, do in fact seem to influence his entire judgment and his construction of the Registration Act.

It was only in consequence of the judgments delivered in *Dinonath Ghose v. Auluck Moni Dabee* (I. L. R., 7 Cal., 753), that two of the three learned Judges, before whom the present case originally came, [610] considered it advisable to refer it to a Full Bench. But we understand that those two learned Judges themselves dissented from the statements of law contained in the judgment of Mr. Justice FIELD.

After giving due consideration to the judgment of Mr. Justice FIELD in *Dinonath Ghose v. Auluck Moni Dabee* (I. L. R., 7 Cal., 753), we agree with Justices CUNNINGHAM and WILSON, two of the referring Judges, that none of the grounds relied upon by the lower Courts in the present case were correct statements of the law.

We are of opinion that the fact of the vendor having given possession to the first and unregistered purchaser, even if such possession continued to the date of the second conveyance, does not necessarily prevent the operation of that part of s. 50 of the Registration Act which enacts broadly that a registered document shall "take effect as regards the property therein comprised against every unregistered document relating to the same property;" and that the only case in which the title of the prior unregistered purchaser can prevail against the subsequent registered purchaser for value is when the latter takes with notice of the title of the former. We think that the observations of Lord CAIRNS in the (lately reported) case of the *Agra Bank Limited v. Barry* (I. L. R., 7 H. L., 135, at pp. 157, 158), are applicable to cases under s. 50 of the Indian Registration Act. We are further of opinion, that delivery of possession is not, under the Hindu law, essential to complete the title of a purchaser for value.

The universal practice in this province has for years been to consider that a proper deed of conveyance for valuable consideration by itself passes the vendor's title. It is a matter of every-day practice that mofussil properties are conveyed by deed executed in Calcutta. The Registration Acts themselves are founded on the sufficiency of the execution of a duly registered deed to convey

the vendor's interest ; and indeed it would seem to be a necessary implication from the language of s. 48 of the present Act, that even an oral transfer without delivery of possession would effectually pass the property as against the vendor and all persons claiming under him otherwise than by a duly registered conveyance. Legislation has for [611] years, as in the matter of sales in execution, proceeded on the same foundation.

We feel bound emphatically to negative the proposition that delivery of possession is necessary to give full validity and effect to a transfer for valuable consideration. Indeed in this country the actual possession of the land seldom accompanies its transfer by deed. In the great majority of cases actual possession is with, and continues with the ryot. It is difficult to understand how 'possession' can be given in cases where the ryot is not a party to the conveyance. The Procedure Code in such cases directs that symbolical possession shall be given ; but this of course only applies to execution cases. It seems to us that to hold that "delivery of possession of the property sold is essential to complete the title of the vendor" as suggested by Mr. Justice FIELD, would be to hold that the greater part of the transfers of property by deed in this country are ineffectual to convey the land.

We agree with the learned Judges who have referred this case that it must be remanded to the Court of the Munsif for re-trial, with liberty to the parties to adduce fresh evidence, if so advised, in order that the following questions may be determined :—

First.—Was the appellant a *bona fide* purchaser for value ? and

Second. If the appellant was a *bona fide* purchaser for value, was he affected by notice of the plaintiff's title ?

If the appellant was a *bona fide* purchaser for value, and was unaffected by notice of the plaintiff's title, the plaintiff's suit should be dismissed. Otherwise the plaintiff is entitled to recover against the appellant.

The costs of this appeal and reference will abide the result of such trial.

Garth, C.J. I would only add with reference to the judgment which has been delivered by my learned brother PRINSEP, that I entirely agree with him as to the injustice which has frequently been done by the system of what is called 'optional registration.' With the professed object of relieving poor people from a burthen, the law of optional registration has made them in numbers of cases the victims of fraud and litigation-[612]. I have already expressed my opinion very strongly to the Government upon that subject.

And as to the suggestion of my learned brother, that the Legislature should interfere to prevent this unhappy state of things, it has already, as I understand, been carried out.

As I read the Transfer of Property Act, which was passed the other day, s. 54 does virtually abolish optional registration. No transfer can now be made, after that Act comes into operation, by any instrument in writing, unless it is registered.

It is true that, in the case of possessory interests, the value of which is less than Rs. 100, an oral transfer coupled with possession will pass the property ; but there will be no such thing as a *transfer in writing*, unless it is registered.

And by that same section, as I take it, the point which has been raised by my brother FIELD, and which we have decided to-day, has also been set at rest.

A registered transfer *without delivery of possession* will pass any interest in land, whether in possession or otherwise; and when the value of the interest amounts to Rs. 100, there is no other means of transferring it.

It was mainly for these reasons that I considered the recent Transfer of Property Act would prove so beneficial to this country.

Case remanded.

NOTES.

[I. LATER REGISTERED AND PRIOR UNREGISTERED DOCUMENTS—PRIORITY UNDER SEC. 50, WHETHER AFFECTED BY NOTICE—

It is now settled that notice prevents the priority under sec. 50:

Madras:—16 Mad. 118 P. B. (overruling 5 Mad. 73; 139; 6 Mad. 88) 25 Mad. 1; 17 M. L. J. 1, 319; 20 Mad. 250; 24 M. L. J. 661.

Calcutta: 10 Cal. 1073; 421; 11 Cal. 667; 13 Cal. 70; 16 Cal. 414; 19 Cal. 623 overruling 16 Cal. 622.

Bombay:—27 Bom. 152; 108; 10 Bom. 105; 9 Bom. 127; 18 Bom. 449.

Allahabad:—8 All. 510; 19 All. 115; 20 All. 252; 25 All. 366; 30 All. 238; 130; 28 All. 315; 10 A. L. J. 111.

Punjab:—1900 P. R. 56 overruling 1890 P. R. 115; 1883 P. R. 102; 159.

Oudh:—(1898) 2 O. C. 71.

Except as affected by priority, the earlier deed remains valid:—11 A. L. J. 291.

II. POSSESSION AFFECTS THE QUESTION OF PRIORITY, AS GIVING NOTICE, ACTUAL OR CONSTRUCTIVE TO THE SUBSEQUENT PURCHASER.

8 Cal. 597; 10 Cal. 1075; (1896) A. C. 587; 25 All. 366; 8 All 540; 27 Bom. 408.

III. DELIVERY OF POSSESSION IN HINDU LAW

See also (1901) P. L. R. 21; 6 Mad. 404.]

[8 Cal. 612 10 C.L.R. 499]

APPELLATE CIVIL.

The 8th March, 1882.

PRESENT:

MR. JUSTICE CUNNINGHAM AND MR. JUSTICE TOTTENHAM.

Golam Ali Mundul.....Defendant

versus

Golap Soondery Dossee.....Plaintiff.*

Landlord and tenant Right of occupancy—Ejectment—Abandonment of holding—Failure to pay rent—Beng. Act VIII of 1869, ss. 6 and 22.

When a tenant, having a right of occupancy, abandons his holding and ceases to pay rent for five years it is not a right construction of s. 22 of Beng. [613] Act VIII of 1869, to say, that the landlord may not put another tenant into possession without the formality of a suit.

Section 6 of Beng. Act VIII of 1869 expressly limits the duration of occupancy right by the words "so long as he pays the rent payable on account of the same," and distinct abandonment and cessation to pay rent disentitle the tenant from enforcing the rights which he may have previously enjoyed.

THIS was a suit for possession of land by declaration of plaintiff's right thereto. The facts of the case are set forth in the judgment of the lower Appellate Court, the material portion of which was as follows:—

"The dispute is with respect to a holding which admittedly belonged to Bhugwan Ghose, the husband of the plaintiff. It is an admitted fact that Bhugwan Ghose died in or about the month of Aughran 1285 (November-December 1879). The plaintiff's witnesses say he died in Aughran 1285. The defendant Golam Ali, in the ninth paragraph of his written statement,

* Appeal from Appellate Decree, No. 1906 of 1880, against the decree of Baboo Brojendro Coomar Seal, Additional Judge of East Burdwan, dated the 9th August 1880, reversing the decree of Baboo Khetter Prosad Mookerjee, Munsif of Kulna, dated the 24th February 1880.

says, that Bhugwan died in Pous 1285 (Decomber-January 1879). The holding comprises seventeen bighas of land, and it bore a rent of Rs. 4-4. It was settled with Golam Ali at a rent of Rs. 7-6 on the 3rd of March 1879. The plaintiff stated that she was dispossessed on the 7th of June 1879. On the 23rd of June 1879, she, through her relation, Moti Lal Ghose, appears to have lodged a complaint in the Criminal Court; but as no relief was obtained, she instituted the suit, out of which this appeal has arisen, on the 24th of July 1879. Her suit has been dismissed. The finding of the first Court about the nature of Bhugwan's right is not clear. It was disposed to find that Bhugwan had a right of occupancy, but has not found it in so many terms. At one part of its judgment it says:—'The plaintiff's husband could only acquire a right of occupancy under s. 6.' At another place the first Court observes, 'although the plaintiff's husband might have once acquired a right of occupancy in the land, he failed to retain the acquisition by neglecting to pay rent to the maliks for five years.' There can be no doubt on the evidence that Bhugwan had a right of occupancy. The witnesses examined on the side of the plaintiff prove that Bhugwan was in possession for twenty or thirty years, and before him his father was in possession. The first Court does not disbelieve those witnesses, and I do not find their evidence untrustworthy. I find that Bhugwan had acquired a right of occupancy in the holding.

[614] "The plaintiff states in her plaint that her husband had a *karni* tenant's right. The term *karni* is used to distinguish it from a *licca* tenant's right. There being no question about the nature of Bhugwan's right, the only question is whether his conduct was such as to lead to the inference that he had given up his jote. It is not pretended that he had directly given it up, but the Court finds that (i) there was no evidence on the side of the plaintiff that any rent was paid for the last five years; and (ii) that the land remained uncultivated for a period of five years. If these findings are correct, there can be very little doubt that, keeping in view the ruling of the High Court noticed by the learned Munsif—*Hemnath Dutt v. Ashgur Sirdar* (I.L.R., 4 Cal., 891)—the conclusion arrived at is right. The evidence on the side of the plaintiff is, that so long as Bhugwan was alive, he cultivated the major portion of the lands, and even after his death his widow got it cultivated; but the defendant forcibly dispossessed her in June 1879. The first Court does not say that the evidence of the plaintiff's witnesses is not reliable. The Court below observes—'that the plaintiff's witnesses admit, that about half the area in suit had lain uncultivated for the last four or five years. The maliks say that the whole land in suit had remained in that condition.' It is not 'about half the area.' The only witnesses on the plaintiff's side who speak of the land remaining fallow are witnesses Nos. 3 and 8. No. 3 says, that four bighas and odd cottahs of land were fallow in 1285 and 1286, and witness No. 8 says, that it is only about two or three bighas which remained in an uncultivated state in 1285. Then the maliks have not given their evidence; what they stated in their written statement is no evidence. There is no clear finding that Bhugwan was not in possession of the land up to the time of his death, or that, after his death, the plaintiff was not in possession. There is a clear finding that no rent was paid for five years."

[The learned Judge then went through the evidence on this point and came to the conclusion that "the evidence to prove the payment of rent is certainly very meagre."]

"When Bhugwan, and after his death his widow, continued to remain in possession, non-payment of rent would not justify the landlord to re-enter without in any way determining the tenancy. Section 22 of the Rent Law

(Beng. Act VIII of 1869) distinctly rules that no ryot having a right of occupancy shall be ejected otherwise than **[615]** in execution of a decree or order under the provisions of the Rent Act. That being so, in my opinion the plaintiff is entitled to possession. In reversal of the judgment of the first Court, the suit of the plaintiff is decreed with costs of both Courts. The plaintiff will get possession of the land claimed."

From this decision the defendant appealed to the High Court.

Baboo *Lall Mohun Dass* and Baboo *Rashbehary Ghose* for the appellant argued, that the facts, as found by the Judge of the lower Appellate Court, showed that the plaintiff had no title to the land; she could not, therefore, recover possession unless in a suit brought under s. 9^{*} of the Specific Relief Act (I of 1877) see *Jonarudan Acharjee v. Haradhun Acharjee* (B. L. R., Sup. Vol., 1020; s.c., 9 W. R., 513). Even if there was an illegal ejection within the meaning of the Rent Act, the present suit is improperly framed. Beng. Act VIII of 1869, s. 6 is clear to show that non-payment of rent determines the right of occupancy.

Baboo *Nil Madhub Bose* and Baboo *Mokond Nath Roy* for the Respondent.

The **Judgment** of the Court (CUNNINGHAM and TOTTENHAM, JJ.) was delivered by

Cunningham, J. In this case the plaintiff states that her husband had a permanent tenancy of seventeen bighas at a rent of Rs. 4-4; that, in 1286, the principal defendant (who is a tenant under the *pro forma* defendants) dispossessed her, and she prays for possession of the property by declaration of her right.

The first Court found (i) that there was no evidence as to any grant commencing the plaintiff's husband's tenancy, and that the plaintiff could claim occupancy rights only under s. 6 of the Rent Act; (ii) that no rent was paid to the owners from 1281 to 1285; (iii) and that, consequently, the plaintiff's husband had forfeited his occupancy rights.

The lower Appellate Court found that the plaintiff's husband had a right of occupancy and acquiesced, apparently, in the finding that no rent was paid for five years. But the Judge considers that, as the plaintiff's husband, and after his death, the **[616]** plaintiff, were in possession of the property, the mere non-payment of rent for five years did not justify re-entry on the part of the landlord, inasmuch as s. 22 of the Act provides that no tenant having a right of occupancy shall be ejected otherwise than in execution of a decree or order. This part of s. 22 is, however, only applicable to cases in which the tenant has a subsisting right under s. 6, and upon the facts found we consider that the plaintiff is not entitled to a decree according to her prayer giving her possession on declaration of her rights as an occupancy tenant. Whatever rights s. 22 may confer on occupancy tenants, we do not think that the intention can have been that where a tenant abandons his holding and ceases to pay rent for five years, his landlord should not be able to put another tenant in possession without

* [Sec. 9. - If any person is dispossessed without his consent of immoveable property otherwise than in due course of law, he or any person claiming through him may, by suit instituted within six months from the date of the dispossession, recover possession thereof, notwithstanding any other title that may be set up in such suit.

Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof.

No suit under this section shall be brought against the Government.

No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed.]

recourse to the formality of a suit. Section 6 of the Act expressly limits the duration of occupancy rights by the words "so long as he pays the rent payable on account of the same," and we think that distinct abandonment and cessation to pay rent disentitle the tenant from enforcing the rights which he may formerly have enjoyed. We, therefore, admit the appeal, and restore the finding of the original Court with costs.

Appeal allowed.

NOTES.

[This case was explained in (1887) 14 Cal. 751 as having proceeded on abandonment by the tenant.]

[8 Cal. 616]

APPELLATE CRIMINAL.

The 15th March, 1882.

PRESENT:

MR. JUSTICE CUNNINGHAM AND MR. JUSTICE TOTTENHAM.

In the matter of the Petition of Munshi Sheikh and others.

The Empress

versus

Munshi Sheikh and others.

Confession of an accused person - Examination of the accused - Question and answer - Recording examination - Statement of accused - Criminal Procedure Code (Act X of 1872), s. 316.

The confession of an accused person was recorded in a simple narrative form instead of in the shape of question and answer as required by the Code [617] of Criminal Procedure, s. 346. There was nothing in the character of the confession, or in the circumstances of the case, to lead to the inference that the accused had been prejudiced by the error.

Held, that the error did not affect the admissibility of the statement in evidence.

IN this case the appellants were, with others, convicted of voluntarily causing grievous hurt, and were sentenced to six years' rigorous imprisonment by the Sessions Judge of the 24-Parganas. The appellants had previously confessed the crime when examined by the Magistrate, but these confessions were not recorded in the form of question and answer, but were written out in a narrative form. The learned Judge directed the jury that if they considered those confessions to have been voluntary, genuine and credible, they might convict the appellants on those confessions alone. The jury found the prisoners guilty. The latter appealed to the High Court.

Baboo Boido Nath Dutt and Baboo Tara Prosonno Sen for the Appellants.

The **Judgment** of the Court (CUNNINGHAM and TOTTENHAM, JJ.) was delivered by

* Criminal Appeal, No. 94 of 1882, against the order of H. Beverley, Esq., Additional Sessions Judge of the 24-Parganas, dated the 14th December 1881.

Cunningham, J.—We are of opinion that there has been no misdirection in this case. The main ground urged before us in appeal is, that the confessions of two of the accused were recorded in a simple narrative form instead of in the shape of questions and answers. If we could infer from the character of the confessions or from the circumstances of the case, that this mode of recording the confessions had resulted in any prejudice to the prisoners, we should of course deem it necessary to direct a new trial. But there is nothing from which we can draw this inference; and we, therefore, think that, having regard to the concluding paragraph of s. 346,* we are not at liberty to hold that there has been a misdirection, merely because the Judge allowed these confessions to go to the jury.

With regard to the accused Munshi Sheikh, the question does not arise, because the Judge told the jury that, as far as he was concerned, they must, before convicting him, satisfy themselves [618] that there was sufficient evidence to justify his conviction independent of the confession.

We think, therefore, that, as far as the matter of the irregularity of the mode of recording the confessions goes, the conviction must be upheld.

Conviction upheld.

NOTE.—A similar point was decided by a Full Bench of the High Court, consisting of GARTH, C. J., and KEMP, JACKSON, MACPHERSON, and AINSLIE, JJ., on the 26th of March 1877, in Criminal Appeal, No. 67 of 1877, the case of *Pilu Maya v. The Queen*.

The decision was given on a reference to the Full Bench made by MACPHERSON and BIRCH, JJ., the terms of which are as follows:—

“In this case the prisoner has been convicted of murder, the offence having been committed on the 10th of September last. He was committed by Mr. Luttinan Johnson, the Magistrate of Cachar, for trial before the Sessions Court. In the course of the enquiry preliminary to commitment, the prisoner was twice examined by the Magistrate. If the statements made by him on the occasions of these examinations are admissible in evidence, the conviction can be supported. But if those statements are not admissible, then there clearly is no evidence to warrant conviction. The question is, whether the statements made by the prisoner on those two examinations are, under the circumstances, admissible.

“The first examination of the accused was on the 21st of September. The Magistrate, in his own hand, recorded fully in English each question and answer, and at the end he signed the memorandum and added, ‘Note—The police connected with the case were

* [Sec. 346:—Whenever an accused person is examined, the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full, and shall be shown or read to him, and he shall be at liberty to explain or add to his answers.

When the whole is made conformable to what he declares is the truth, the examination shall be attested by the signature of the Magistrate or Sessions Judge, who shall certify under his own hand that it was taken in his presence and in his hearing, and contains accurately the whole of the statement made by the accused person.

In cases in which the examination of the accused person is not recorded by the Magistrate or Sessions Judge himself, he shall be bound, as the examination proceeds, to make a memorandum thereof in the vernacular of the district, or in English, if he is sufficiently acquainted with that language; and such memorandum shall be written and signed by the Magistrate or Sessions Judge with his own hand, and shall be annexed to the record. If the Magistrate or Sessions Judge is precluded from making a memorandum as above required, he shall record the reason of his inability to do so.

The accused person shall sign or attest by his mark such record.

If the examination be taken in the course of a preliminary inquiry, and the Court of Session find that the provisions of this section have not been fully complied with, it shall take evidence that the prisoner duly made the statement recorded: Provided that if the error does not prejudice the prisoner, it shall not be deemed to affect the admissibility of the statement so recorded.]

carefully excluded from the Court, and the accused was given every opportunity of correcting any of his statements. His manner was that of a person speaking the entire truth.' And this note is initialed by the Magistrate and dated the same 21st of September. Simultaneously a Mohurir, in the presence of the Magistrate, recorded in the vernacular all the answers given by the prisoner, but the questions put are not recorded in the vernacular. At the end of this vernacular record, the Magistrate certifies, 'taken in my presence and hearing, and contains accurately the whole of the statement made by the accused person,'—and this certificate is signed and dated by the Magistrate. To this the Magistrate appends a Note—'the clerk has unfortunately omitted questions. They are, however, entered fully in my memorandum,'—and this he signs. After that, a few words seem to have been added on the same day by the prisoner. They are recorded by the Magistrate in his own hand in his memorandum, and simply signed by him: and they are recorded by the clerk in the vernacular and initialed by the Magistrate.

"On the 12th of October, the prisoner was further examined by the Magistrate. The questions and answers are fully recorded both in the English memorandum and in the vernacular, and the record is duly attested by the Magistrate. But neither [619] the record of the examination of the 12th October, nor the previous record of the examination of 21st September, were signed by the accused person, as required by s. 346. Nor is there anything to show that the record of the examination, every question and every answer, was shown or read to the accused, as directed by the first clause of s. 346.

"In this particular case, we have no doubt that the examination of the accused was in fact carefully conducted by the Magistrate, and that all the questions and answers are accurately recorded, as regards the first examination, in the Magistrate's English memorandum, and as regards the second examination, in both the vernacular and English. The error is one which, in our opinion, does not prejudice the prisoner, unless we are bound to hold as matter of law that the mere omission to comply with the provisions of s. 346 does prejudice him. The Bombay High Court apparently considers that such an error necessarily does prejudice the prisoner, and is incurable, and that the statement of the accused, unless recorded strictly as directed by s. 346, is inadmissible—see *Reg. v. Bai Ratan* (10 Bom. H. C. Rep., 166); but the last clause of s. 346 seems to contemplate the admissibility of such records although not strictly in form, provided the error does not prejudice the prisoner. The following cases bearing on the subject are reported:—*Queen v. Nussuruddin* (21 W. R., Cr., 5), *Queen v. Kala Chand Pal* (24 W. R., Cr., 29), *Queen v. Chunder Bhattacharjee* (24 W. R., Cr., 42), *Queen v. Wazir Mundul* (25 W. R., Cr., 25), *Reg. v. Daya Anand* (11 Bom. H. C. Rep., 44), *Reg. v. Deva Dayal* (11 Bom. H. C. Rep., 237), *Reg. v. Shirja* (I. L. R., 1 Bom., 219). As the question is of great importance, and opinion seems divided, we think the matter should be referred for the decision of a Full Bench.

"The questions referred for the opinion of the Full Bench are:—*First*,—Whether the omission to obtain the signature or attestation of the accused person as directed by s. 346 necessarily prejudices the prisoner within the meaning of the last clause of that section and renders the record inadmissible? *Secondly*,—Whether the omission to obtain the signature, &c., of the accused person, as required by s. 346, or the omission to record in the vernacular the questions put to the accused person, or both these omissions taken together, necessarily render the record inadmissible, even although it appears from the Magistrate's certificate that, taking the English memorandum together with the vernacular, the whole of the questions and answers are fully recorded? *Thirdly*,—Whether the defect can be cured by taking further evidence now, supposing that it can be proved that in fact the record was duly read to the accused person?

Baboo Joy Gobind Shome for the Prisoner.

Baboo Juggodamund Mookerjee for the Crown.

The Opinion of the Full Bench was delivered by

GARTH, C.J.—As regards the first point stated for our opinion, it now appears that the statement made by the prisoner does purport to bear his signature, and in the absence of any

[620] evidence to the contrary, and there being no defect in the certificate endorsed by the Magistrate in compliance with the directions of s. 346, we must take it that the signature is that of the accused person. Then secondly, as to the omission on the part of the Magistrate to record in the vernacular the questions put to the prisoner, it is clear that in this instance the prisoner is not, and cannot have been, prejudiced in any way by the omission. The questions were of such a nature that it is perfectly immaterial to the sense and meaning of the prisoner's statement whether they were recorded or not.

The case will go back to the Bench which referred it for disposal.

NOTES.

[IRREGULARITIES IN RECORDING CONFESSION—

See also 14 Cal. 539; 5 All. 253, at 256; 4 Bom. L. R. 785 (787); 2 C.W.N. 702; 8 C.W.N. 22; 9 C.L.J. 55.

[8 Cal. 620 : 11 C.L.R. 288]

APPELLATE CIVIL.

The 27th March, 1882.

PRESENT :

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

Dhunput Singh.....Plaintiff

versus

Shoobhudra Kumari and another.....Defendants.*

*Ward of Court—How far incapacitated from contracting—Reg. X of 1793—
Court of Wards Act (Beng. Act IX of 1879)—Contract Act (IX of
1872), s. 11.*

On a reasonable construction of the whole of Reg. X of 1793, a ward of Court, duly constituted as such, is not thereby absolutely incapacitated from contracting, but the power of the ward to contract is taken away so far as regards all property which, under the provisions of the law, comes under the charge and control of the Court of Wards.

The view taken by the Courts of the Regulation and Acts concerned with the Court of Wards in Bengal is, that although the possession of a revenue-paying property is a condition precedent to the jurisdiction of the Court of Wards attaching, yet when once that jurisdiction has attached, all the property of the ward comes under the control and management of the Court.

Mahomed Zahoor Ali Khan v. Thakooranee Rutta Koer (11 Moore's I. A., 468) considered.

IN the year 1865, one Shoobhudra Kumari, the widow of one Kunwar Udoy Chunder, and Jomuna Kumari, the widow of a brother of Kunwar Udoy Chunder, applied to the Court of Wards to take over the management of their estates. The Collector reported on the matter, and advised that the widows

* Appeal from Original Decree, No. 66 of 1881, against the decree of A. J. R. Bainbridge Esq., Judge of Moorshedabad, dated the 25th January 1881.

[621] might be taken to be disqualified proprietors, under s. 2 of Reg. X of 1793; and on this report, and on the approval of the Government, the Court of Wards, on the 18th June 1866, took over the management of the widow's estates.

In 1876, Shoobhudra petitioned the Court of Wards to release her share of the estate. The other widow did not join in the application. The Court of Wards, finding that the estate was still in debt, refused the application.

Shoobhudra, being in want of funds for puja ceremonies and to pay off the law expenses occasioned in 1876, borrowed from one Dhunput Singh, on the 3rd February 1876, Rs. 6,000, and executed in his favour a bond agreeing to repay the advance in the month of June 1877, with interest at one per cent. per mensem, and at the same time, as further security, mortgaged certain properties to Dhunput Singh.

Dhunput Singh, on the 22nd June 1880, brought this suit on the bond to recover Rs. 6,000 as principal and Rs. 3,100 as interest, making the managar on behalf of the Court of Wards and the widow defendants.

The manager put in a defence denying the bond, and contended that the entire estate was vested in the Court of Wards by virtue of the Regulation, the effect of which was to render Shoobhudra disqualified from contracting debts and incapable of being sued. The widow put in no appearance.

The District Judge held, that the estate was not liable, but finding that the bond had been executed by the widow, he found that the widow was personally liable, inasmuch as the Regulation did not declare that she should be disqualified from contracting: and he, therefore, gave the plaintiff a personal decree against the widow for Rs. 9,100, allowing the Court of Wards to recover their costs from him.

The plaintiff appealed to the High Court, and the Court of Wards put in a cross-appeal, contending that the Court was not right in giving a personal decree against the widow.

Mr. Branson (with him Baboo Sreenath Das and Baboo Gurudas Banerjee) for Dhunput Singh.—The widow was never [622] properly constituted a ward of Court, the procedure provided not having been followed. The case is similar to that of *Mahomed Zahoor Ali Khan v. Thakooranee Rutta Koer* (11 Moore's I. A., 468); that case was decided on Reg. LII of 1803, and the Reg. X of 1793 is nearly verbatim the same. The widow, if she was a ward of Court, was not incapacitated from contracting, and there is no express provision to that effect in the Regulation of 1793, or in any of the Acts amending the Regulation. And the fact that the Court of Wards Act (Beng. Act IX of 1879) does provide for this, shows that the former Regulations and Acts did not intend that she should be incapacitated; she was only incapacitated from contracting with properties directly in the hand of the Court of Wards—*Musst. Kustoora Koomaree v. Monohur Deo* (W. R., January to July, 1864, p. 39). Section 11 of the Contract Act points out the persons who are incapacitated from contracting, and the widow does not come within that section.

Mr. Kilby and Baboo Anoda Pershad Bannerjee for the Court of Wards.—The requirements of s. 4 of Reg. X of 1793 have been complied with, and the estates, therefore came properly into the hands of the Court of Wards. The case of *Mohomed Zahoor Ali Khan v. Thakooranee Rutta Koer* (11 Moore's I. A., 468) did not go into the question as to whether the widow was incapacitated from contracting; it was decided on the ground that the relation of ward and guardian had not been completely constituted. Under the Board of Revenue's Circular Orders, rule 2, at p. 340 of Mr. Chapman's edition, the Court of

Wards has jurisdiction over all the property of a ward. As regards our cross-appeal, s. 51 of Beng. Act IX of 1879 shows that all suits should be brought against the manager, and not against the ward, the personal decree against the widow is wrong.

The **Judgment** of the Court (McDONELL and FIELD, JJ.) was delivered by

Field, J.—In this case the plaintiff, Rai Dhunput Singh Bahadoor, sues Rani Shoobhudra Kumari, a lady whose estate is under the management of the Court of Wards, and he seeks to [623] recover Rs. 9,100, being Rs. 6,000 principal and Rs. 3,100 interest, due upon a bond dated 3rd February 1876, which is found to have been executed by the Rani. He also seeks to have certain property (which is specified in the schedule annexed to the plaint) declared liable to be sold in execution for the realization of the amount claimed by him. Three questions arise for our decision in the case. The first is—Was Rani Shoobhudra Kumari duly constituted a ward of Court under the law relating to the Court of Wards at that time in force? The second is—If she was duly constituted a ward of Court, was she thereby incapacitated from contracting on any account whatever? The third question, which must be decided in order to dispose of this case, is—Whether Rani Shoobhudra Kumari, if duly constituted a ward of Court, but not thereby absolutely incapacitated from contracting, was yet incapable of contracting to this limited extent that she could not bind her property, or any portion of that property which came under the management of the Court of Wards?

As to the first of these points, it has been contended before us, upon the authority of the case of *Mahomed Zuhoor Ali Khan v. Musst. Thakooranee Rutta Koer* (11 Moore's I. A., 168), that the Rani was never properly constituted a ward of Court; and reliance has been placed upon the following passage to be found at p. 477 of the report:—"The provisions of such a law should be strictly pursued, in order to effect the disqualification of any particular person." Now, in that case it appears that the property in question had previously belonged to a lady named Maha Koer. She was declared a disqualified female under the provisions of Reg. LII of 1803—a Regulation applicable to the ceded and conquered provinces, and which is almost verbatim the same as Reg. X of 1793, applicable to the Lower Provinces of Bengal. Maha Koer died in 1853, and she was succeeded in the ownership of the property by Rutta Koer, her sister. The property was alleged to have remained in charge of the Court of Wards, although there were in the case circumstances which went a long way to rebut this allegation; but beyond doubt, no proceedings were taken under the Regulation to have Rutta [624] Koer declared a disqualified proprietor: and upon the ground that the course of proceeding provided by the Regulation for having a disqualified proprietor made a ward of Court had not been followed, the Privy Council came to the conclusion that the mere fact of the property remaining under the charge of the Court of Wards, without the necessary steps being taken to have the disqualified proprietor declared a ward of Court, was not sufficient to make the provisions of the Regulation applicable to the lady, or, in other words, to render Maha Koer a ward of Court. In the present case, we think that the circumstances are widely different. Section 4 of Reg. X of 1793 provides, that the "Collectors of the revenue are to ascertain and report to the Board of Revenue, both now and hereafter, what proprietors in their respective zillas may come within the description of disqualified landholders specified in s. 2." Now it appears from the document to be found at p. 29 of the Paper-book, —viz., a letter from the Collector of Moorshedabad to the Commissioner of Rajshahye, dated 11th May 1865, that Mr. C. Mackenzie,

the Collector of Moorshedabad, did in fact make to the Board of Revenue, through the Commissioner, the report required by s. 4 of the Regulation. We have then a document at page 30 of the Paper-book, which is a copy of a letter from the Under-Secretary to the Government of Bengal, in which the Under-Secretary is directed to acknowledge the receipt of a letter from the Secretary to the Board of Revenue, and in reply to state that the Lieutenant-Governor approves of the estates in the district of Moorshedabad, acquired under a deed of gift by the widows of Baboo Kirtu Chunder and Uday Chunder, and which they are represented as incapable of managing, being taken under the management of the Court of Wards. From the substance of this letter and also from the copies of the several memoranda by which a copy of this Government letter was forwarded to the Collector of Moorshedabad, it appears that this letter of Government relates to the same matter as the copy of the letter of the Collector of Moorshedabad to be found at page 29 of the Paper-book. Now, under cl. 1 of s. 5 of the Regulation, "if a proprietor of land shall be reported disqualified solely from being a female, the [625] Board of Revenue, in their capacity of a Court of Wards, shall immediately proceed to take the estate under their care, reporting the circumstance to the Governor-General in Council, who reserves to himself the power of declaring any female proprietor, whom he may deem competent to the management of her own estate, exempt from the operation of this Regulation." It is clear from this provision that the Board of Revenue, upon the report of the Collector, is required to take under its care the estate of a disqualified female proprietor; and that the report there required to be made to the Governor-General is merely for the purpose of enabling the Governor-General to exercise the discretion vested in him by the Regulation— a discretion that is to declare any female proprietor to be competent to manage her own estates. That discretion, we may observe, was subsequently transferred to the Court of Wards by s. 3 of Reg. X of 1793. But it is clear that the sanction of the Government is not a condition precedent to the action of the Board, and it is evident from the other proceedings in this case that the Board of Revenue did, as a matter of fact, take over the property of the two widows, whose names are mentioned in the Collector's letter already referred to. Under these circumstances, the Board of Revenue, as a Court of Wards, having taken charge of the lady's estate, and the matter having been reported so as to give Government an opportunity of exercising its discretion, if it saw fit, to declare the lady competent to manage her estate, we are of opinion that the requirements of the Regulation were substantially complied with, and that, in consequence, the Rani was duly constituted a ward of Court. It is to be observed that the Rani became a ward of Court while Reg. X of 1793 was in force, and that: so far as this case is concerned, the provisions of the subsequent Acts of the Bengal Council, IV of 1870 and IX of 1879, have no application.

We now come to the second point, viz., whether a person who has been duly constituted a ward of Court is thereby absolutely incapacitated from contracting or incurring debts of any kind. It is to be observed that no express provision is to be found upon this point either in Reg. X of 1793 or Reg. LII of [626] 1793, or in any of the Acts by which those Regulations were amended, nor yet in the consolidated Beng. Act IV of 1870. The last Court of Wards Act (Beng. Act IX of 1879) does contain in s. 60 the following express provision:—"No ward shall be competent to create, without the sanction of the Court, any charge upon, or interest in, his property or any part thereof." It is to be observed that if the proper construction to be placed upon the old Regulations or the Act of 1870 were this, that a ward of Court is absolutely incapable of contracting, the provision contained in s. 60 of Beng. Act IX of 1879 would have been unnecessary. Considerable reliance has been placed upon the

case of *Mahomed Zahoor Ali Khan v. Thakooranee Rutta Koer* (11 Moore's I. A., 468), which has already been referred to. It is true that in that case the bond was a simple money-bond (see page 472 of the report), and it is also true that one of the questions presented for decision to their Lordships of the Privy Council was the wide question—Had the defendant the power to contract debts? and, as their Lordships point out in their judgment at page 475 of the report, not the more limited question—Whether she had power by contract to charge her land with debts? Having stated the questions which were in dispute in that particular litigation, their Lordships proceed to say: "Under these circumstances, the principal questions to be considered on this appeal are, whether the estate and property of Rutta Koer were in fact under the charge of the Court of Wards when the bond is alleged to have been executed; and if so, whether such custody or charge was of a character which made her what is called, under the Regulation to be presently referred to, a disqualified female, and incapacitated her to contract debt in any way." Their Lordships found that the estate and property of Rutta Koer were in fact under the charge of the Court of Wards when the bond was alleged to have been executed. They further found that this custody or charge was not of a character which made her a ward of the Court; but they did not proceed to decide, and under the circumstances of that case it was not necessary to decide, whether, if the provisions of the Regulation had been properly applied to Rutta Koer so as to [627] make her a ward of the Court, this would have incapacitated her to contract debt in any way, or would merely have incapacitated her to contract debt so as to bind the property which came under the management of the Court of Wards. Their Lordships say in one part of their judgment: "There is no pretence for saying that, but for the application of this Regulation to her, Rutta Koer was incapable of contracting the debt in question. The Regulation itself does not in terms declare the incapacity, or define the circumstances in which it is to arise. The provisions of such a law should be strictly pursued in order to effect the disqualification of any particular person; and no one should lose her natural liberty of contracting debts unless the relation of ward and guardian between her and the Court of Wards be regularly and completely constituted." The Privy Council decided that the relation of ward and guardian had not been regularly and completely constituted; and this being so, it was immaterial and unnecessary to say what would have been the effect as regards the simple bond-debt, which was the subject of that suit, if that relation had been regularly and completely constituted. Under these circumstances, we do not feel that the decision of the Lords of the Privy Council has affected the question which we have to decide.

Section 11 of the Indian Contract Act provides, that "every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject" Now the mortgage-bond, which forms the subject of the present suit, was executed after the Contract Act came into force; and the Rani was without question of the age of majority at the time. We have already observed that there is no express provision to be found in any of the Regulations or Acts prior to 1879 which disqualifies a Ward of Court from contracting; and this being so, we think that if capacity to contract existed apart from the provisions of the Regulations and Acts applicable to the Court of Wards, such capacity cannot be presumed to be taken away by anything contained in any of the Regulations or Acts prior to 1879, unless we can find that this result follows by necessary implication from a reasonable construction [628] of these enactments. Turning now to Reg. X of 1793, s. 2 enacts that "the superintendence of the Court of Wards extends

to the persons and estates of all proprietors disqualified, under the rules prescribed for the Decennial Settlement, for the management of their own lands " Section 15 provides, that "the manager is to have the entire care of the estate, real and personal. He will, therefore, have the exclusive charge of all lands, malguzari or lakheraj, as well as all houses, tenements, goods, money and moveables of whatever nature, belonging to the proprietor whose estate may be committed to his charge, excepting only the house wherein such proprietor may reside, the moveables wanted for his or her use, and the money allowed for the support of the proprietor, and his or her family entitled to a provision, which are to be left to the care of the guardian, where distinct guardians may be appointed." Now, it is clear from this language that the house and the money allowed for the support of the proprietor (and we may notice that a female proprietor may, under s. 22, herself receive and disburse the allowance fixed for their maintenance) are in the disposing power of the ward; and that so far as regards those portions of the estate, it is clear that the ward must retain the power of contracting. Then, under s. 32, minors and other disqualified landholders having guardians, as described in s. 22, shall not be sued but under the protection and joint name of their guardians. It will appear, on a reference to s. 22, that a female proprietor who is not disqualified by minority, idiotism, lunacy, or other natural defect or infirmity rendering her incapable of attending to the care of her own person and maintenance, would not necessarily require a guardian; and this being so, a female proprietor could be sued without a guardian. This, we may observe, has been altered by the Act of 1879. So far as regards that portion of the estate which, under the provision of s. 15, came under the charge of the manager, who is by that section declared to have the entire care of the estate, real and personal, it is obvious that this provision of the law would have been practically nugatory if the ward could contract so as to affect those portions of the estate. We think, therefore, that the reasonable construction to be placed upon the whole of the [629] Regulation read together is, that, so far as regards the property which by the Regulation came under the charge of the manager and the control of the Court of Wards, the ward became incapable of contracting. This is a view which we think to be consonant with the whole of the provisions of the Regulations read together, and which is further supported by some authority (see the case of *Musst. Kustoora Koomaree v. Monohur Deo* (W. R., January to July, 1864, p. 39). Section 60 of the present Court of Wards Act (Beng. Act IX of 1879) therefore, merely states in express language what, in our opinion, is the result of a reasonable construction of the old Regulations.

Upon this second point then, the conclusion at which we arrive is, that a ward of Court, duly constituted as such, is not thereby absolutely incapacitated from contracting. But with reference to the third point, which must be decided in order to dispose of this case, we are of opinion, that the power of the ward to contract is taken away so far as regards all property which, under the provisions of the law, comes under the charge and control of the Court of Wards.

Then it has been contended, that so far as regards one of the three properties which form the subject of the mortgage-bond, *viz.*, Patni Mehal Kohinagar, this property did not come under the management and control of the Court of Wards. It is said that this was the *stridhan* of the Rani; that it did not come to her by the deed of gift, dated the 26th February 1865; nor did it descend to her from her husband by right of inheritance; and that, therefore, so far as regards this property, the Court of Wards could have no jurisdiction.

We are not able to concur in this argument. The view which, according to our experience, has been taken of the Regulations and Acts concerned with the Court of Wards in these provinces is, that although the possession of a revenue-paying property is a condition precedent to the jurisdiction of the Court of Wards attaching, yet once that jurisdiction has attached all the property of the ward comes under the control and management of the Court. Section 15 of Reg. X of 1793 is in support of this view, and the provisions of the later Acts are still more precise upon this [630] point. We may further refer to a Circular Order of the Board of Revenue, which is to be found at page 340 of Mr. Chapman's Edition of the Board's Circular Orders. Rule 2 says:—"Whenever a disqualified proprietor comes under the superintendence of the Court of Wards, the jurisdiction of the Court extends over all his property, including lands held without payment of revenue, and shares in revenue-paying lands held in common tenancy with other not disqualified proprietors. The Court of Wards is, therefore, to take charge of such property." It may be quite possible that if the Court of Wards had not taken charge of the Patni Mehal Kohinagar, the plaintiff in the present case might be entitled to enforce his lien against that property; but we think, having regard to the express provisions of the Regulations, that the presumption is that the Court of Wards did take charge of this property, and as this presumption has not been rebutted, we think that the plaintiff is not entitled to have any decree affecting this property. The result will be that this appeal must be dismissed on all the grounds which have been argued before us.

There is then a cross-appeal by the Court of Wards on behalf of the Rani to the effect that the lower Court ought to have dismissed the entire claim of the plaintiff, and not to have passed a decree personally against Rani Soobhudra Kumari. Now, we think that if Soobhudra Kumari was competent to contract in respect of matters or property other than that which came under the control and management of the Court of Wards, it must follow, as a necessary consequence, that she can be made liable upon her contracts according to the usual procedure in force in this country. Reliance has been placed upon s. 51 of the present Court of Wards Act (Beng. Act IX of 1879), which came into operation before the present suit was instituted. This section, laying down a different provision from that contained in s. 32 of the old Regulation, provides, that "in every suit brought by or against any ward, he shall be therein described as a ward of Court; and the manager of such ward's property, or if there is no manager, the Collector of the district in which the greater part of such property is situated, or any other Collector whom the Court [631] of Wards may appoint in that behalf, shall be named as next friend or guardian for the suit, and shall in such suit represent such ward, and no other person shall be ordered to sue or be sued as next friend or be named as guardian for the suit by any Civil Court in which such suit may be pending." This is, however, a provision of procedure. We think it was not intended to affect, and cannot affect, any liability which may be incurred by a ward in so far as he (and under the Bengal General Clauses Act, V of 1867, the masculine includes the feminine) is concerned. In the Courts of England there are many instances in which a minor or a female can only be sued by a next friend or guardian; but, so far as we are aware, this practice does not operate to remove or destroy the personal liability of such minor or female under the law in force in that country. We think, therefore, that the decree of the lower Court declaring the Rani to be personally liable is one with which we ought not to interfere. We may remark, in conclusion, that no argument has been raised before us that because the bond in this case was a mortgage-bond, a personal liability could not be enforced thereupon.

The appeal will be dismissed with costs. The cross-appeal will be also dismissed ; but we think it unnecessary to make any order as to costs.

Appeal and cross-appeal dismissed.

NOTES.

[DISABILITIES OF A WARD OF THE COURT OF WARDS -

See also 5 All. 142; 9 I. A. 182; (1883) 5 All. 487.]

[8 Cal. 631 · 11 C. L. R. 22]

APPELLATE CIVIL.

The 3rd March, 1882.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE BOSE.

Chunder Coomar Mitter.....Plaintiff

versus

Sib Sundari Dasse.....Defendant.*

Res judicata—Appeal—Point decided by lower Court, but not dealt with on appeal.

In a suit for enhancement of rent, the Munsif found that the service of notice was sufficient, but that the rent could not be enhanced. On appeal, the District Judge found that the service was insufficient, and dismissed the [632] suit, expressly declining to consider the question whether the rent was enhanceable. In a subsequent suit for enhancement, by the same plaintiff against the same defendant, the Munsif found that no sufficient ground for enhancement had been made out, and dismissed the suit. On appeal, the District Judge agreed with the Munsif on this point, and held also, that the decision of the Munsif in the first suit, that the rent could not be enhanced, was *res judicata*.

Held, that where the decision of a lower Court is appealed to a superior tribunal, which for any reason does not think fit to decide the matter, the question is left open, and is not *res judicata*.

THIS was a suit for arrears of rent at an enhanced rate after notice. The grounds of enhancement were increase in quantity of holding discovered on measurement, and too low rates of rent as compared with rates of similar neighbouring tenants for corresponding lands.

The defendant pleaded non-service of notice and insufficiency of notice ; that the land was not subject to enhancement ; and that there were no grounds for enhancement. It appeared that, in 1875, the plaintiff had brought a suit against the defendant for enhancement of rent. In that suit issues as to the service of notice, and as to the liability of the tenure to enhancement were raised, and it was found that the notice had been served, but that the tenure was not liable to enhancement.

There was an appeal and a cross-appeal against that decision, the defendant appealing on the point of service of notice. The cross-appeal was decided in favour of the cross-appellant, and the plaintiff's suit was dismissed on the ground that the notice had not been served, the Appellate Court expressly declining to enter on the question as to the enhanceability of the tenure.

* Appeal from Appellate Decree, No. 842 of 1880, against the decree of J. R. Hallett, Esq., Acting Judge of Rungpore, dated the 14th February 1880, affirming the decree of Baboo Denobundhu Roy, Second Munsif of Kurigram, dated the 4th June 1879.

In the present suit, the lower Court held that there was no sufficient ground for enhancing the rent, and gave the defendant a decree. On appeal, the District Judge agreed with the lower Court and dismissed the appeal, holding further, that the decision of the Munsif in the suit of 1875 operated as *res judicata*.

The plaintiff appealed to the High Court.

Baboo Nil Madhub Bose for the Appellant.

[633] Baboo Kali Churn Banerji for the Respondent.

The **Judgment*** of the Court (GARTH, C.J., and BOSE, J.) was delivered by

Garth, C.J.—This is a suit for enhancement, and three questions have been raised by the defendant: *first*, that no notice of enhancement was served; *secondly*, that the rent was not enhanceable; and *thirdly*, that there were no grounds for enhancing it.

The Munsif found that notice had been served; but as to the other points,—namely, whether the rent was enhanceable, and whether there were any grounds for enhancing it,—he found them against the plaintiff. For the purpose of proving that the rent was not enhanceable, the defendant relied upon a decree which was passed in a suit for enhancement brought by the same plaintiff against the same defendant in 1875. In that suit there were two issues: *first*, whether there was a proper notice of enhancement; and *secondly*, whether the rent was enhanceable. The Munsif found that the service of notice was sufficient, but he also found that the rent could not be enhanced. Upon these findings, there were two appeals to the Subordinate Judge—one by the plaintiff, upon the ground that the second issue had been improperly found against him, and the other by the defendant, upon the ground that the notice was not sufficient. The last point was the only one which the Subordinate Judge thought it necessary to try. He found that the service of notice was not sufficient, and consequently that the suit was properly dismissed. He, therefore, thought it unnecessary to go into the other question; and although he dismissed the appeal of the plaintiff, he did not decide the question which it involved. He expressly says so. In this suit the Munsif does not say whether the decision in the former suit was a *res judicata* or not; but upon appeal to the District Judge, he considered that, as the decision of the Munsif in the former suit was not expressly overruled by the Appellate Court, it was *res judicata* in this suit, and prevented the plaintiff from contending here that the rent was enhanceable. But in this he was wrong. When the decision of a lower [634] Court is appealed to a superior tribunal, and that tribunal for any reason does not think fit to decide the matter, it is left an open question. We have held so here over and over again; and it is not because in point of form the appeal in the first suit was dismissed, that the decision of the Munsif can be considered as confirmed.

The judgment of the District Judge in this point was erroneous. But then there is another issue which the District Judge has decided in favour of the defendant, which in this suit is fatal to the plaintiff. That issue was, whether there were any sufficient grounds in this suit for enhancing the rent? The Munsif found that issue against the plaintiff, and the lower Appellate Court agrees with him, so that even supposing the tenure to be enhanceable, the suit must stand dismissed; and it would be useless to send it back for retrial. It may be doubtful how far the District Judge means to decide upon other grounds, whether the rent was enhanceable. That is a matter with respect to

which we say nothing, because we do not wish to prejudice the rights of either party in the future.

The appeal will be dismissed with costs.

Appeal dismissed.

NOTES.

[' RES JUDICATA '—POINT NOT DEALT WITH BY APPELLATE COURT—

See (1907) 5 C. L. J. 653.]

[8 Cal. 634 10 C. L. R. 466]

APPELLATE CRIMINAL.

The 31st March, 1882.

PRESENT :

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

In the matter of the Petition of Uttom Koondoo and another.

The Empress

versus

Uttom Koondoo and another.

*Penal Code (Act XLV of 1860), ss. 411, 413—Offences of different kinds—
Criminal Procedure Code (Act X of 1872), ss. 283, 453—Defect in procedure—
Reduction of punishment—Course to be followed at trial.*

A prisoner cannot be tried at the same trial for receiving or retaining (s. 411, Penal Code), and habitually receiving or dealing in (s. 413), stolen property. The proper course is to try the accused first for the offences under [636] s. 411, and if he is convicted, to try him under s. 413, putting in evidence the previous convictions under s. 411, and proving the finding of the rest of the property in respect of which no separate charge, under s. 411, could be made or tried by reason of the provisions of s. 453 of the Criminal Procedure Code.

UTTOM KOONDOO and Krishno Moni Telani were committed on seven separate charges of dishonestly retaining stolen property (s. 411), and of habitually dealing in stolen property (s. 413 of the Penal Code).

The Sessions Judge tried these seven charges together, and recorded the following finding:—"Concurring with the assessors, the Court finds that Uttom Koondoo and Krishno Moni Telani are guilty of the offences specified in the first seven headings of the charge, *viz.*, that they dishonestly retained stolen property belonging to Nobin Ghose, Mudun Shaha, Meer Jhan, Sonatun Ghose, Naba Kumar Chatterjee, Tamizudden, and Porashoola, knowing or having reason to believe the same to be stolen, and thereby committed an offence punishable under s. 411 of the Penal Code; and the Court directs that the said Uttom Koondoo be sentenced to rigorous imprisonment for five years, and Krishno Moni Telani to rigorous imprisonment for three years. Further, that Uttom Koondoo pay a fine of Rs. 100, and in default suffer rigorous imprisonment for one year."

* Criminal Appeal, No. 143 of 1882, against the order of T. Peterson, Esq., Sessions Judge of Jessore, dated the 1st January 1882.

The prisoners appealed against this order to the High Court.

No one appeared on either side at the hearing.

The **Judgment** of the Court (McDONELL and FIELD, JJ.) was delivered by

Field, J. (who, after setting out the facts, continued) :—There is no finding or sentence under s. 413 of the Penal Code. The Sessions Judge erroneously speaks of the "seven headings of the charge." There were seven distinct charges, not seven headings of one charge. Upon conviction on a single charge under s. 411, three years is the maximum term of imprisonment that could have been directed. Regard being had to the provisions of s. 453 of the Code of Criminal Procedure, the prisoner could not have been charged and tried at the same [636] time for more than three offences of the same kind. The Sessions Judge was, therefore, wrong in trying the seven charges together. The appellants do not, however, complain of this irregularity in procedure; and it does not appear that the irregularity has occasioned a failure of justice either by affecting the due conduct of the prosecution or by prejudicing the prisoners in their defence (s. 283, Code of Criminal Procedure). We, therefore, think it unnecessary to set aside the proceedings of the Sessions Judge and direct a new trial; but the conviction and sentence must be set aside, and the prisoners will be convicted upon the three charges concerned with the property of (i) Nobin Ghose, (ii) Meeajan, and (iii) Porashoola. For the first and second offences the prisoners will be sentenced each to one year's rigorous imprisonment in respect of each charge. For the third offence Uttom Koondoo will be sentenced to three years' rigorous imprisonment, and Krishno Moni Telani to one year's rigorous imprisonment. We think a sentence of fine unnecessary.

We may observe that the prisoners could not be tried at the same trial for receiving or retaining (s. 411) and habitually receiving or dealing in (s. 413) stolen property, these two offences not being offences of the same kind (s. 453, Code of Criminal Procedure). The proper course would have been to try the accused first for the offences under s. 411, and then, if he were convicted, to try him for the offence under s. 413, putting in as evidence the previous convictions under s. 411, and proving the finding of the rest of the property in respect of which no separate charge, under s. 411, could be made or tried by reason of the provisions of s. 453, Code of Criminal Procedure. As, however, the punishment awarded under s. 411 is, in our opinion, sufficient, it is unnecessary to proceed further under s. 413. The appeal will be dismissed, the conviction and sentence being altered as above directed.

Sentence altered.

NOTES.

[DISTINCT OFFENCES—

See also 8 Cal. 450; 1 C.W.N. 35; 6 C.W.N. 550; 30 Cal. 822.

The irregularity of misjoinder is *not* curable :—25 Mad. 61; 4 Bom. L.R. 440; 30 Cal. 822; (1900) P.R. Cr. 5; 30 Mad. 328.]

[— 10 C.L.R. 459: 6 Ind. Jur. 576]

[637] ORIGINAL CIVIL.

The 4th May, 1882.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE WHITE.

Alangamonjori Dabee.....Plaintiff

versus

Sonamoni Dabee.....Defendant.

Hindu Wills Act (XXI of 1870), ss. 2, 3, and 6—Succession Act (X of 1865), ss. 98, 99 and 101—Gift to unborn persons—Statutes, Construction of.

A gift by will to persons unborn at the time of the death of the testator, whether made prior or subsequently to the passing of the Hindu Wills Act, is void.

The words “to create an interest,” in the fifth proviso to s. 3 of the Hindu Wills Act, apply both to the quantity and quality of the interest created, and in their natural and ordinary meaning include the capacity of a donee to take.

In construing an Act of the Government of India passed in the form peculiar to the Hindu Wills Act, the sound rule of construction is to give their full and natural meaning to the provisos, and only to give effect to the enactments contained in the applied sections and chapters so far as the latter do not contravene the full and natural meaning of the provisos.

APPEAL from the decision of WILSON, J., dated 21st August 1881.

In March 1873, one Chandranath Chowdhry died, leaving him surviving a widow, Alangamonjori Dabee (the plaintiff in the present suit), his mother Sonamoni Dabee (the defendant in the present suit), three unmarried daughters, Rajranee Dabee, Hurridasi, and Siddessori (of whom Hurridasi died intestate and unmarried, and Rajranee is at present alive and married, and Siddessori, since the institution of the present suit, has also been given in marriage), and three sisters. The testator, by his will, left certain property to his sons, or failing sons to his daughter's sons, giving a monthly allowance to any daughter who should be childless or become a widow, and to his mother and sister maintenance as soon as the daughter's sons should succeed to the property. Sonamoni took out probate and took possession of the whole estate. The testator's widow then brought this present suit, charging misappropriation, and praying for a construction of the will, and contending that she, as heiress-at-law, was [638] entitled to the estate during her life, and asking for an account. The defendant denied the charges of misappropriation.

The case came on for settlement of issues, when the principal controversy was as to the validity of the gift to the daughter's sons and of other gifts dependent on the principal gift.

Mr. T. A. Apcar and Mr. Mitra for the Plaintiff.

Mr. Bonnerjee and Mr. Allen for the Defendant.

WILSON J., gave a judgment (which will be found reported in I. L. R., 8 Cal., 159) holding, that the will being governed by the Hindu Wills Act, the bequest to the daughters' sons was valid; but that the plaintiff had a sufficient interest under the will to entitle her to an account.

The plaintiff appealed.

Mr. Evans and Mr. Palit for the Appellant.

No one appeared for the Respondent.

The following **Judgments** were delivered by the Court (GARTH, C.J., and WHITE, J.) :—

White, J.—The law is clear that, prior to the passing of the Hindu Wills Act (XXI of 1870), a gift by will to a person unborn at the time when the testator died was void, with a few exceptions which we need not consider now, as they have no application to the present suit.

The law was so declared in 1873 by PEACOCK, C.J., and NORMAN, J., overruling PHEAR, J., and also by the Judicial Committee of the Privy Council in 1872, affirming on this point the decision of the first-named Judges, in the case of *Jatendra Mohun Tagore v. Ganendra Mohun Tagore* (4 B. L. R., O. C., 103; s.c., on appeal to P. C., 9 B. L. R., 377; L. R., I. A., Sup. Vol., 47.)

I believe that the decision in the *Tagore case* (4 B. L. R., O. C., 103; s.c., on appeal to P. C., 9 B. L. R., 377; L. R., I. A., Sup. Vol., 47), so far as it declared the invalidity of a bequest to persons unborn at the testator's death, came with surprise upon some members of the Profession, if not upon the Profession generally; and that, until that decision, it had at least been taken very much for granted that such bequests were valid.

[639] When the Hindu Wills Act, however, was passed, and came into force, the law had been settled in the way I have mentioned by the highest authority known in our Courts.

The question to be determined here is, whether the Legislature have changed the law in this respect, and whether such a gift is now valid by virtue of the Hindu Wills Act, s. 2, which, amongst other sections of the Indian Succession Act, 1865, extends to the wills of Hindus made on or after the 1st of September 1870, the 99th, 100th, and 101st sections of the Indian Succession Act.

I may observe in the first place, that the preamble of the Hindu Wills Act does not disclose any intention in the Legislature to extend the testamentary power of Hindus; the sole objects of the Act being, as there stated, to "provide rules for the execution, attestation, revocation, revival, interpretation, and probate of the Wills of Hindus."

The sections of the Indian Succession Act above referred to occur in that chapter of the Act which relates to Void Bequests. Section 99, after laying down the rule that a bequest is void, "when made to a person by a particular description, and no such person exists at the testator's death," permits an exception when such person stands "in a particular degree of kindred to a specified individual, but his possession is deferred by reason of a prior bequest." Section 100 provides in effect that the deferred bequest must comprise the whole of the remaining interest of the testator in the thing bequeathed; and s. 101 contains a rule against perpetuities, which necessarily recognizes the exception contained in s. 99.

Did the Legislature, in passing the Hindu Wills Act, intend that the exception mentioned in the 99th section should extend to the case of Hindu wills executed after the 1st of September 1870; and, by thus conferring upon Hindu testators the power of bequeathing their property to unborn persons answering a certain description, change the law as laid down in the authority which I have cited?

This question might perhaps have admitted of an affirmative answer but for the fifth proviso in s. 3 of the Hindu Wills Act, which enacts, that "nothing in the Act contained shall authorize [640] any Hindu to create in property an interest which he could not have created before the 1st of September 1870."

The words "to create in property an interest" apply both to the quantity and quality of the interest created, and in their natural and ordinary meaning include the capacity of a donee to take. A deceased Hindu testator may be said to create an interest in property which he could not have previously

created as well when he makes a gift of his estate in-tail-male as when he makes a gift to a person unborn at the date of his death.

The proviso in question was, in my opinion, introduced into the Hindu Wills Act, for the very purpose of preventing the application to Hindu testators of the specific sections mentioned in s. 2 of the Act from being construed into an enlargement of their testamentary power.

But it has been contended, and successfully contended, in the Court below, that a narrower construction should be put upon the language of the proviso, and that its operation should be confined to the capacity to take on the part of the donee.

The consequence of giving the wider meaning to the phrase is stated in the judgment of the lower Court to be, that "the whole of s. 99, except the first clause, is inoperative; s. 100 is entirely so; and s. 101 is inoperative, because it falls short of the restrictions existing without it." The learned Judge considered himself bound to avoid this consequence, and therefore read the phrase in the narrower sense, which allowed of full effect being given to the sections referred to. I may add that the argument of the learned Judge may be reinforced by a reference to the second clause of the 6th section of the Hindu Wills Act, which provides, that, in applying ss. 99, 100, and 101, 'son,' 'sons,' 'child,' 'children,' shall be deemed to include an adopted son, &c.

In arriving at this decision the learned Judge has applied a canon of construction, which has long been applied in construing English Acts of Parliament, and which is thus stated in the case cited by him—*Reg. v. Bishop of Oxford* (L. R., 4 Q. B. D., 245). "A Statute ought to be so construed, that, if it can be prevented, no clause, sentence or word shall be superfluous, void, or insignificant."

I do not for a moment deny that that canon is the correct [641] one to apply to many of the Acts of the Government of India, or that if it is the appropriate rule to apply here, the decision of the Court below is correct.

But the Hindu Wills Act is not drawn in the ordinary form of a Statute, or indeed of an Act of the Government of India. It does not enact a series of provisions relating to Hindu wills, but, in point of form, it applies to certain Hindu wills certain portions only of the Indian Succession Act, and it does this by mentioning only the numbers of particular sections and the numbers of particular parts or chapters or portions of parts or chapters of the principal Act.

The sections and parts and portions of parts so specified are applied bodily and *in globo* as it were, without any limitation and without any adaptation of the sections to the peculiar law or custom or circumstances of Hindus.

Hindus were expressly excluded from the operation of the Indian Succession Act when it was passed, and although it is not improbable that the Legislature, even at that time, contemplated that, at some future day, the Act might be extended to Hindus, the Legislature must have considered in 1865 that the Act, as it then stood, was not in all respects suited for Hindus, otherwise Hindus would have been included.

It is obvious, that an unqualified extension to Hindus of a large number of sections and parts of an Act, in its origin passed for persons other than Hindus, would be attended with some most unexpected and undesired results, unless the operation of the applied sections were controlled.

The 3rd section, accordingly, enacts five provisos, the object of which, as it appears to me, is to prevent, so far as Hindus are concerned, the wholesale application, as it were, of the sections and chapters mentioned in s. 2 from directly or indirectly altering or affecting the Hindu law in those matters to which the provisos relate, and from thus introducing changes not contemplated by the Legislature.

Hence, in construing an Act of the Government of India passed in the form peculiar to the Hindu Wills Act, I think the sound rule of construction is to give their full and natural meaning to the provisos, and only to give effect to the enactments [642] contained in the applied sections and chapters, so far as the latter do not contravene the full and natural meaning of the provisos; and that this is the sound rule of construction, although the result of carrying it out may be, and in the present case is, that some of the applied sections are rendered nugatory.

This also appears to me to be the only safe rule in dealing with an Act like the one now before us. To construe such an Act by the canon laid down in the case cited would be to introduce changes into the Hindu law by a side wind, as it were, and also when there is no clear expression on the part of the Legislature of an intention to alter that law.

I therefore reverse the decree of the Court below so far as it declares the validity of the bequest to the daughters' sons who were unborn at the death of the testator, and the validity of the other gifts in the will dependent on that bequest.

There will be a declaration that that bequest and the gifts dependent upon it are void, and that the plaintiff is entitled, as heiress of her deceased husband, to succeed to a widow's estate in the residue of his property.

Costs of the appeal to come out of the residuary estate.

Garth, C.J.—I am of the same opinion. I fully appreciate the arguments upon which the judgment of the Court below proceeds, and there is no doubt that, generally speaking, the rule of construction which is laid down in the *Bishop of Oxford's case* (L. R., 4 Q. B. D., 245) is the correct one.

But, as regards the Hindu Wills Act, I cannot help thinking that there is much truth in what fell from Mr. Justice PONTIFEX in the case of *Cally Nath Naugh Chowdry v. Chunder Nath Naugh Chowdry* (I. L. R., 8 Cal., 378; s.c., 10 C. L. R., 207), that the difficulty in construing that Act arises "from the mode of legislation": from the way in which upwards of 150 sections of the Indian Succession Act have been imported into s. 2 of the Hindu Wills Act, without sufficient consideration, as to whether some of those sections, which were quite appropriate in the first Act, were equally so in the second. I doubt, for instance, whether it ever occurred to the learned [643] authors of the Hindu Wills Act, that, in introducing ss. 99 and 100 of the Succession Act into s. 2 of the Wills Act, they were enacting provisions which were either inconsistent with the last proviso of s. 3 of that Act, or which would bring about a radical change in Hindu law.

And there is also much truth, as it seems to me, in another observation made by Mr. Justice PONTIFEX,—namely, that, at the time when the Hindu Wills Act was passed, it was by no means finally decided, that by Hindu law property could not be bequeathed to a person not in being at the time of the testator's death. This point could hardly be said to have been conclusively settled, until judgment was given in the *Tagore case* (9 B. L. R., 377; s.c., L. R., I. A., Sup. Vol., 47) by the Privy Council in the year 1872.

My opinion of this case proceeds upon two main points:—

1st.—I think it clear from the preamble of the Hindu Wills Act, that it was merely passed for the purpose of providing rules for the execution, attestation, and interpretation of Hindu wills, and was not intended to introduce any material change in Hindu law. This is not only apparent from the language of the preamble itself, but also from the fact, that the Act only

extends to the Province of Bengal and to the Presidency-towns of Madras and Bombay. It could never have been intended to make an important change in the Hindu law in those portions only of the Empire, and to leave that law unchanged in all the other provinces.

2ndly.—I think that the last clause of s. 3 ought not to be read in the restricted sense which is attributed to it by the learned Judge in the Court below. If a Hindu testator leaves a life-estate in land to a person who is not born at the time of the testator's death, that is, in my opinion, an attempt "to create an interest in property which he could not have created before the Act." In other words, the prohibition, as it seems to me, extends to the person who is to take the interest, as well as to the interest itself.

Attorney for the Appellant: Baboo Abhaya Churn Ghose.

Appeal allowed.

NOTES.

[HINDU WILLS ACT (1870)—BEQUEST TO UNBORN PERSONS —

A similar opinion was expressed by PONTIFEX, J. in 8 Cal. 378 at 390. It has been held that the capacity to take should be determined independently of the Act :—(1885) 9 Bom. 491 (506) ; (1910) 38 Cal. 188 ; 15 C.W.N. 113 ; (1897) 24 Cal. 646 (650) ; (1905) 28 Mad. 363. *See* also 16 M.L.J. 491. (As regards gift to a class, *see* (1886) 12 Cal. 663 ; (1911) 38 Cal. 468 P.C.). In (1889) 16 Cal. 549 (551) the predeceased donee was held to be a person in existence at the testator's death by virtue of sec. 96 of the Succession Act.

See also 30 Mad. 369 ; 17 M.L.J. 269 ; 2 M.L.T. 242.

Trevelyan, Hindu Law (1912) p. 514, expresses this opinion, "should the question come before the Judicial Committee, that Board may take the view that effect must be given to all the sections of the Indian Succession Act which have been applied, and that the word '*interest*' does not include the '*capacity to take*' " citing (1896) 23 Cal. 563 ; *Bank of England v. Vagliano* (1891) A.C. 107.]

[644] CRIMINAL REFERENCE.

The 25th April, 1882.

PRESENT :

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

Mailamdi Fakir

versus

Taripulla Pramanik.*

Record of inferior Court—Explanation of order passed—Criminal Procedure Code (Act X of 1872) s. 295—Indefinite period of imprisonment in default of security, order for.

Where a Sessions Judge has, under s. 295 of Act X of 1872, called for the record of an inferior Court, he is, before referring the case to the High Court for orders, bound to call upon the inferior Court for an explanation of the order passed, and should submit such explanation, together with the rest of the record, to the High Court.

* Criminal Reference, No. 90 of 1882, Letter No. 120, from the order made by C. A. Kelly, Esq., Sessions Judge of Pubna and Bogra, dated the 19th April 1882.

An order directing an accused "to be imprisoned until he gives security," is bad; a definite period for such imprisonment, not exceeding one year, should be stated in the order.

ONE Mailamdi Fakir charged Toripulla Pramanik under s. 352 of the Penal Code with assault.

The case was tried summarily by a Bench of Honorary Magistrates, who convicted him, and sentenced him to a fine of Rs. 10, and in default to fifteen days' rigorous imprisonment; and further bound him over to enter into a personal recognizance in Rs. 100, with two sureties for a like amount, to keep the peace for one year, and in default to simple imprisonment until the order was complied with.

The Sessions Judge, after expressing his opinion that the order was bad, without calling upon the Honorary Magistrates for an explanation, referred the case to the High Court.

No one appeared for the Parties.

The **Judgment** of the Court (McDONELL and FIELD, JJ.) was delivered by

McDonell, J. There has been great delay on the part of the Sessions Judge in making this reference. The explanation [645] of the Honorary Magistrates who sat on the Bench and are alive ought to have been submitted. The record says that the charge was under s. 352; and there is no serious contention that anything else was intended. So much of the order as directs the accused to be imprisoned until he gives security is bad, and a definite period not exceeding one year should have been inserted in this part of the order.

Under all these circumstances we think it will be sufficient to set aside so much of the order as requires recognizance and security to keep the peace, and we set aside this portion accordingly.

Order varied.

[8 Cal. 645 : 7 C.L.R. 88]

SMALL CAUSE COURT REFERENCE.

The 15th July, 1880.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE AND MR. JUSTICE PONTIFEX.

Manick Chund

versus

Jomoon Doss.*

Promissory note—Acknowledgment—Stamp Act (I of 1879), s. 34.

The plaintiff sued on two documents, signed by the defendant, each bearing a one-anna stamp, in one of which a sum of Rs. 203 was stated to be "due to you, and payable on the 16th July;" and in the other a sum of Rs. 515 was mentioned "for which I give you this writing, the whole amount of which will be paid up in full on the 3rd August"

Held, that the documents were not mere acknowledgments, but promissory notes, and being payable otherwise than on demand, were not sufficiently stamped, and consequently not admissible in evidence under s. 34, Act I of 1879.

* Case stated for the opinion of the High Court under s. 7 of Act XXVI of 1864, by H. Millet, Esq., First Judge, Calcutta Court of Small Causes.

THE following case was stated for the opinion of the High Court by the First Judge of the Calcutta Small Cause Court.

"This suit is brought by the plaintiff on the following cause of action : 'For money due on two acknowledgments of difference in the price of Government securities of the value of Rs. 25,000 each, of which the defendant promised to deliver to [646] the plaintiff under contracts dated the 3rd and 15th June 1879 respectively, and which the defendant failed to deliver in terms of the said contracts'.

"The two documents referred to, and called in the cause of action 'acknowledgments,' have admittedly been signed by the defendant, but his pleader has taken the objection that they are not sufficiently stamped, they being promissory notes and not acknowledgments merely. The decision on this point remained in abeyance until I had decided a plea of minority put in by the defendant : on hearing the evidence I was not satisfied that the defendant was a minor, and so rejected the plea.

"The two documents relied on are in Nagri, but the following translations have been made by one of the officers of the Court.

'Sree Ramjee help.

'Auspicious letter to brother Manick Chund Keerut Chund, from Jomoona Dass, whose compliments you read, that the paper for rupees 25,000, ($4\frac{1}{2}$) four-and half interest, which I purchased from you at (8 ans.) eight annas discount, that I sell to you at (1-5) one rupee five annas, which, at the difference rate of (13 ans.) thirteen annas per cent., is rupees (203-2-0) two hundred and three, annas two, due to you and payable on 15th, 16th July.

'Signature of Jomoona Dass, the entire writing written above is admitted, dated 3rd Assar lightside, Sumbut 1935 (should be 1936), 22nd June 1879.

Stamp
one anna
2-7-79.

Jomoona Dass Khettry.'

'Sree Ramjee help.

'Auspicious letter to brother Manick Chund Keerut Chandjee, from Jomoona Dass, whose compliments you read, that the paper for rupees (25,000) twenty-five thousand, ($4\frac{1}{2}$) four-and half interest, which I sold to you at 3-13, due dates for delivery of the same were 3rd, 4th August 1879, which I contracted. That paper I could not hold, and made up with you by making the difference at the rate of rupees 2-1, by which the loss amounts to rupees (515-10) five hundred and fifteen and annas ten, for which I give you this chitta (writing), the whole amount of which will be paid up in full of this bill on 3rd, [647] 4th August, and to which no objection will be made. Dated 6th Assar darkside, Sumbut year 1935 (should be 1936), 10th June 1879.

Stamp
one anna
10th June 1879

Signature of Jomoona Dass Khettry, 10th June, year 1879.'

"If they are acknowledgments, as suggested by the plaintiff's pleader, they are correctly stamped, as they bear a stamp of one anna each ; but if promissory notes, as suggested by the defendant's pleader, the Court has no power to stamp them, promissory notes being excluded from the provisions of s. 34 of the Indian Stamp Act, 1879.

"No interpretation is given of 'promissory notes' in the Indian Stamp Act, 1879; but it may be said that whatever the words used in the document are, they must amount to a promise to pay. In one document the words used are 'payable on the 15th, 16th July,' in the other 'the full amount of which will be paid in full of this bill on 3rd, 4th August.' Both, in my opinion, amount to a promise by the person signing to pay on the dates specified.

"The English cases, to some extent, depend on Statute, but so far as they can be considered as a guide, they seem to show that a document of this description is a promissory note. In *Morris v. Lee* (2 Lord Raymond, 1396), the defendant promised 'to be accountable to A or order for £100 value received,' and it was held to be within the Statute as importing a promise to pay. *White v. North* (3 Ex., 689), also turned on Statute-law, and a suggestion was thrown out by the Court that the document in question could not be a complete instrument, because the time for payment was not fixed. In an older case - *Casborne v. Dutton* (Selwyn's N. P., 12 Ed., 426)—the words were 'to be paid on demand;' and it was held, these words amounted to a promise to pay. If any distinction can be drawn between the words 'payable,' 'which will be paid,' or 'to be paid,' it might be said that one document would constitute a promissory note and another not, but they all appear to me to mean the [648] same thing, and in effect to constitute a promise to pay by the person signing.

"I am of opinion, therefore, that both the documents in question are promissory notes, and, as such, cannot be stamped by the Court and received in evidence.

"No other evidence has been offered by the plaintiff of proof of his debt, he relying exclusively on the documents in question.

"The plaintiff's pleader has requested me to refer the point to the High Court, which I accordingly do, as follows:—

"1. Whether the two documents in question are sufficiently stamped according to law?

"2. Whether, if not sufficiently stamped, the Court can stamp them, and receive them in evidence under the Indian Stamp Act, 1879?

"Putting the questions in the above form will leave it open to the Honourable Judges of the High Court to decide—whether the documents are mere acknowledgments, or agreements, or promissory notes; or whether, if promissory notes, they can be stamped by the Court.

"Contingent on the opinion of the High Court my **Judgment** will be for the defendant."

Mr. Piffard for the Plaintiff.

Mr. Palt for the Defendant.

Garth, C.J. --We shall answer both questions in the negative, and we make no order as to costs.

Attorneys for the Plaintiff: Messrs. *Swinhoe & Co.*

Attorney for the Defendant: Baboo *Morally Dhar Sen.*

[11 C.L.R. 186 : 6 Ind. Jur. 636]

[649] APPELLATE CIVIL.

The 20th January, 1882.

PRESENT :

MR JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Badri Roy and another.....Defendants

versus

Bhugwat Narain Dobey and others.....Plaintiffs.¹

Hindu Law - Partition - Mitakshara Law - Share of grandmother - Self-acquired property of father on partition - Partition of revenue-paying estate - Jurisdiction of Civil Court.

Under the Mitakshara law, a grandmother, on partition, is entitled to a share in the joint family property.

Semble.—The rule of law, to be found in the 2nd Vol. of Vyavastha Chandrika, pp. 356-359, which lays down that, when the father makes the partition of his own choice, his mother is not entitled to a share, is intended to apply only to the self-acquired property of the father.

Partition of an estate paying revenue to Government cannot be effected in a Civil Court. ON the 8th September 1874, one Badri Roy purchased at an auction-sale the right, title, and interest of one Gondom Dobey, in a four-anna share in a certain mouza paying revenue to Government, and at the same time took an assignment of a mortgage-deed on the property from one Gopi Lal.

The wife, son, and mother of Gondom Dobey alleged, that their rights had not passed to Badri Roy under the sale, and brought this suit to recover possession of a three-anna share out of the four annas purchased by Badri Roy, and of which he was in possession, and also for wasilat.

The defendant Badri Roy denied his liability for wasilat, and maintained that, under the Mitakshara law, the sale against Gondom, who was the managing member of the family, passed the entire interest of the family.

The following issues were raised before the Subordinate Judge of Tirhoot :—

1.—Are the female plaintiffs entitled to a share in the ancestral property under the Hindu law ?

[650] 2.—Was the debt contracted by the judgment-debtor for the benefit of the joint family ? If so, are not other members of the family bound by his acts ?

3.—To what share, if any, are the plaintiffs entitled, and are they entitled to wasilat ?

The Subordinate Judge found that the female plaintiffs were entitled, on partition, to take each a share equal to that of a son, and that the plaintiffs were entitled to a three-fourths share in the property ; and, disallowing the claim for wasilat, gave the following decree :—“ I would therefore pass a contingent decree in favour of the plaintiffs, declaring their title to take a

* Appeals from Original Decrees, Nos. 196 and 244 of 1880, against the decree of Baboo Mohendro Nath Bose, Subordinate Judge of Muzafferpore in Tirhoot, dated the 19th July 1880.

three-fourths share of the property on a partition to be held with the defendants in the execution department, upon their contributing a three-fourths share of the debt discharged, or paying Rs. 718-8 annas to the defendant auction-purchaser."

The defendants appealed to the High Court. The plaintiffs brought a cross-appeal on the question of mesne profits, and on the ground that the Judge should not have ordered them to pay Rs. 718 on account of Gopi Lal's decree.

Baboo Mohesh Chunder Chowdhry and Baboo Aabinash Chunder Banerjee for the Appellants.

Baboo Rajendro Nath Bose and Baboo Chunder Madhub Ghose for the Respondents.

The **Judgment** of the Court (MITTER and MACLEAN, JJ.), was delivered by

Mitter, J. -This is a suit to recover possession of three annas out of four annas of Mouza Bhugwanpore Gidha, a revenue-paying estate, with wasilat. The plaintiff No. 1 is the son of Gondom Dobey, the defendant No. 2; and the plaintiffs Nos. 2 and 3 are mother and grandmother of the plaintiff No. 1. The plaintiff No. 4 is the purchaser of a share of the disputed property from the plaintiffs Nos. 1, 2 and 3.

It appears that the aforesaid four annas formed one of the properties belonging jointly to the plaintiff No. 1 and Gondom Dobey. In execution of a decree against Gondom Dobey, the [651] right, title, and interest of the debtor in Mouza Bhugwanpore were sold on the 8th September 1873, and purchased by the first defendant. The purchaser took possession of the whole four annas. The plaintiffs contend, that only the father's interest in the property was sold, and that as, on partition of the joint family property, that share would be one anna, the son, the mother, and the grandmother receiving each one-anna share, the plaintiffs seek to recover possession of three annas.

The defendants state that the whole of the family property was sold to satisfy the decree, which was obtained by one Portab Singh on a bond executed by Gondom, who raised this loan for joint family purposes; that, after purchasing this property, the first defendant took an assignment of a mortgage decree upon the mouza in question from one Gopi Lal; that, under any circumstances, he is not liable for mesne profits.

The lower Court finds that the debt incurred to Portab by Gondom was contracted for immoral purposes; that what was sold in execution of Portab's decree was only the interest of the father; that the plaintiffs are not entitled to recover mesne profits; and that the decree of Gopi Lal was a valid charge upon the property in dispute. Upon these findings of fact, the lower Court made a decree in the following terms: -"I would therefore pass a contingent decree in favour of the plaintiffs, declaring their title to take a three-fourths share of the property on a partition to be held with the defendants in the execution department, upon their contributing a three-fourths share of the debt discharged, or paying Rs. 718-8 annas to the defendant, auction-purchaser."

The decree, so far as it directs partition to be effected in the course of the execution thereof, is erroneous; because no partition of a revenue-paying estate can be effected through the Civil Court; and also because, even if the partition could be effected through the Civil Court, it should not have been left to be carried out in the course of the execution of the decree. If the other portion of the decree be correct, the error pointed out above will have to be rectified.

The defendants have appealed on the ground that the auction sale mentioned above conveyed the whole of the family pro-[652]perty. The plaintiffs, in their appeal, question the decree on two grounds: (i) because it does not award mesne profits, and (ii) because the order of the payment of Rs. 718-8 on account of Gopi Lal's decree is erroneous. The defendants further contend that, even if the finding of the lower Court, that only the father's interest passed by the auction-sale, be correct, the grandmother, the plaintiff No. 3, is not entitled to any share.

The first question to be determined is what was sold in the execution of the decree of Pertab. We are of opinion that the decision of the lower Court upon this point is correct.

The defendants have produced only the decree and the sale-certificate, which, as usual, recites that only the right and interest of the debtor were sold. There is nothing on the face of the decree which shows that the father was sued as representing the joint family. That being so, we think the decision of the lower Court upon this point is right. We are also of opinion that the decision of the lower Court, as regards the claim for mesne profits, and the liability of the plaintiffs in respect of their share of Gopi Lal's decree, is correct. The plaintiffs, after the auction-purchase, having, without any protest, allowed the defendant Badri Roy to take possession of the whole four annas of the mouza in suit, are not entitled to recover mesne profits from the latter, who honestly believed that he acquired good title to the said share. As regards Gopi Lal's decree, it not having been shown that the debt, which was the foundation of it, was contracted by the father for immoral purposes, the lower Court is right in holding that the plaintiffs are liable for this decree to the extent of their share.

We are also of opinion that the grandmother, on partition, is entitled to a share. The latest decision upon the point, the case of *Sibbosondery Dabia v. Bussomatty Dabia* (I. L. R., 7 Cal. 191), takes the same view. All the authorities upon this subject are collected in the 2nd Vol. of Vyavastha Chandrika, pp. 356 to 359. They clearly support the view we take of this question. There is one passage, however, upon which appellants' pleader relies, *viz.*, the one in which it is laid down that, [653] when the father makes the partition of his own choice, his mother is not entitled to a share. As regards this passage, it is sufficient to point out that, in this case, the partition is not being effected by the choice of the father. But we are also inclined to think, that this rule of law applies only to the self-acquired property of the father.

Both appeals therefore fail; but, for the reasons above given, the decree of the lower Court in its present form cannot stand. Instead thereof we make the following decree, *viz.*:—That the plaintiffs do recover possession of three-annas of the property in dispute on payment to the auction-purchaser, defendant, of Rs. 718-8, and the plaintiffs further recover costs in both Courts with interest at the rate of six per cent. per annum.

Appeal dismissed—decree varied.

NOTES.

[I. HINDU LAW—GRANDMOTHER'S SHARE AT PARTITION—

The grandmother is entitled to a share equal to any grandson's at a partition between the grandsons or the grandsons and great-grandsons:—(1904) 31 Cal. 1065 8 C.W.N. 763 (Dayabhaga law). As regards the great-grandmother, the opinion of Trevelyan is that she will be entitled:—Hindu Law (1912) p. 320.

See also the Notes to 8 Cal. 537.

II. PARTITION OF REVENUE-PAYING ESTATE—

See also (1891) 16 Bom. 528; (1897) 21 Cal. 725 F.B.]

The 22nd November, 1881.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Issuridutt Singh and others.....Plaintiffs

versus

Ibrahim and others.....Defendants.*

Limitation Act (XV of 1877), sch. ii, art. 127--Suit for possession and partition--Acquiescence in alienation.

In a suit to obtain a share by partition of a joint family property, the interest of the plaintiffs' father having been sold in execution of a decree, limitation is to be computed from the time when exclusion from his share first becomes known to the plaintiffs.

ON the 22nd February 1878, the plaintiffs, the sons and grandsons of one Chowdhry Raghurur Dutt, sued to recover possession from the defendants, the heirs of one Nubi Buksh, of a one-anna ten-gandas three cowries and two krant share in certain joint ancestral property, and to have the several shares determined by partition.

[654] The plaintiffs stated that they owned and held jointly with their father under the Mithila law a two-anna one-ganda and one-cowrie share in certain mouzas; that their father became indebted to one of the present defendants, one Lachmessur Singh, on account of rent, under a ticca lease taken by their father, and that Lachmessur instituted a suit against him for such rent and obtained a decree on the 22nd April 1862; that, in execution of this decree, Lachmessur attached the right and interest of Chowdhry Raghurur Dutt in a two-anna share in one of the mouzas belonging to the family; and that, at the auction-sale, one Nubi Buksh, on 24th February 1866, became the purchaser, and forcibly dispossessed the present plaintiffs. They further alleged that, at the time the ticca lease was executed by their father, they themselves had attained their majority, and that they had not consented to the lease.

The defendants contended that the suit was barred by limitation, they having obtained possession through their ancestor Nubi Buksh, at and from the 13th January 1866; and in support of this, they produced from amongst the execution-proceedings an order of attachment, the date of which was illegible, but which set out that the under-tenants were to cease paying rent to the holders of the share with effect from 13th January 1866; they further contended that the plaintiffs were bound by the acts of their father in connection with the ticca lease, as he was then acting as manager on their behalf.

The Subordinate Judge found that the actual date of the sale was the 24th February 1866, and that the actual date on which the auction-purchaser was put into possession by the Nazir was the 17th August 1866, and that the period of limitation should be computed from that date, and that, therefore, the suit was not barred. He further found that the suit was not one for the reversal of the ticca potta, and consequently that it was not necessary to try the question

* Appeal from Appellate Decree, No. 536 of 1880, against the decree of J.C. Geddes, Esq., Officiating Judge of Tirhoot, dated the 8th January 1879, reversing the decree of Baboo Ram Persad, Second Subordinate Judge of that district, dated the 23rd September 1878.

as to whether the ticea tenure for the arrears of which the auction-sale was held, was acquired for the benefit of all the members of the family, and that it was not open to the defendants to say that the plaintiffs' rights were sold at the auction-sale, inasmuch as they were not parties to the rent suit. He, therefore, decreed the suit in favour of the plaintiffs.

[655] The defendant appealed to the District Judge, who found that the sons of Raghur Dutt had not objected to their father taking the ticea lease, nor taken any objection to it until the time of this suit; and with respect to the question of limitation, that it should be computed from the 13th January 1866, from which date the rents payable to Chowdhry Raghur Dutt, as head of the family, ceased to be payable to him; and he, therefore, considered the suit barred under art. 126 of sched. ii of Act XV of 1877, and reversed the decision of the Subordinate Judge.

The plaintiffs appealed to the High Court.

Baboo Mohesh Chunder Chowdhry and *Baboo Chunder Madhub Ghose* for the Appellants.

Mr. C. Gregory and *Baboo Hem Chunder Banerjee* for the Respondents.

The **Judgment** of the Court (MITTER and MACLEAN, JJ.) was delivered by

Mitter, J.—We think that the decision of the lower Appellate Court is correct, although we do not agree with the Judge in holding that art. 126 of Act XV of 1877 applies to this case. This was not a suit to set aside a father's alienation of ancestral property. In the first place, it was a suit for partition; and in the next place, it was a suit not to set aside an alienation made by the father, but to obtain a share by partition of a joint family property, the interest of the father having been sold in execution of a decree. That being so, art. 127 would apply. Under that article, a person excluded from joint family property and bringing a suit to enforce his right to a share therein must bring that suit within twelve years from the date or time when the exclusion becomes known to him. Now, in this case, upon the finding of the District Judge, the plaintiffs became aware of the alleged exclusion on the date of the attachment. The District Judge was, therefore, right (under art. 127) in holding that the plaintiffs' claim was barred by limitation, inasmuch as the suit was brought more than twelve years after the date of the attachment. We have dealt with the question of limitation **[656]** with reference to the provisions of Act XV of 1877, no question as to the applicability of the proviso under s. 2 of that Act having been raised in the lower Courts.

On the merits we also think that the District Judge's decision is correct. He found from the circumstances proved in the case that the plaintiffs, the sons, although they were adults at the time when the ticea lease was taken, were consenting parties to the transaction, and not only were they consenting parties to it but that they stood by and remained silent for a long time (nearly twelve years) without questioning the validity of the transaction. Upon these

*Art. 126:—

Description of suit.	Period of limitation.	Time from which period begins to run.
By a Hindu governed by the law of the Mitakshara to set aside his father's alienation of ancestral property.	Twelve years...	When the alienee takes possession of the property.]

facts, the District Judge came to the conclusion that the original lease was a transaction in which the sons consented to the father acting on behalf of the whole joint family, and that afterwards they acquiesced in the sale of the property.

The suit has been properly dismissed, and the appeal is, therefore, dismissed with costs.

Appeal dismissed.

NOTES.

[LIMITATION—EXCLUSION FROM SHARE—

The exclusion must be to the knowledge of the person excluded :—6 Bom. L.R. 925 ; 6 Bom. 741 ; 10 Bom. 24 ; 5 Bom.L.R. 355 ; 11 Cal. 777 ; (1899) 2 O.C. 348 (350).]

[8 Cal. 656 : 9 I. A. 27 : 11 C. L. R. 210 : 6 Ind. Jur. 272 : 4 Sar. P. C. J. 332]

PRIVY COUNCIL.

The 13th January, 1882.

PRESENT :

LORD BLACKBURN, LORD WATSON, SIR B. PEACOCK, SIR R. P. COLLIER,
SIR R. COUCH, AND SIR A. HOBHOUSE.

Durgapersad.....Defendant
versus

Keshopersad Singh and Nund Keshorepersad Singh, by their mother
and guardian, Ghaneshyam Konwari.....Plaintiffs.

[On Appeal from the High Court of Judicature at Fort William in Bengal.]
*Act XL of 1858 Guardian and ward Minors—Relation of manager of
joint estate to co-sharers under age—Effect of separation in estate.*

A co-sharer in ancestral family estate, under the Mitakshara law, the co-proprietors being minors, though he may have power to manage the estate is not, in consequence, the guardian of such minors for the purpose of binding them by the execution of a bond charging the estate : nor is the eldest male member of the family, being of full age, guardian of such minors for the purpose of defending suits brought against them for money advanced in respect of the estate, unless he has obtained a certificate of administration under Act XL of 1858, s. 3. That Act shows that he is not guardian of the [657] minors ; the care of whose persons and property (unless taken under the protection of the Court of Wards, by s. 2) are subject to the jurisdiction of the Civil Courts.

A family having become separate in estate with apportionment of a debt, once joint, among its several members, the sons of one of the latter, on their father's decease, are not liable for the whole debt for which he, at one time, was responsible jointly with the rest of the family, but only for his portion of the debt.

APPEAL from a decree of the High Court of Bengal (7th August 1879), modifying the order of the Subordinate Judge of Bhagalpore (8th February 1877).

The question on this appeal was, whether or not the shares in an ancestral estate belonging to minor members of a family, living under the Mitakshara

law, were chargeable in satisfaction of a decree obtained against them, in regard to the circumstances under which it had been obtained.

Ancestral estate in the Bhagalpore District belonged to three brothers,—Lalji Singh, Sheonandan Singh, and Harnandan Singh,—jointly with their cousin Nilkant Persad Singh, descended from a common great-grandfather. Lalji Singh died in 1866, leaving two sons, the present respondents, and a widow, their mother.

Harnandan Singh died in August 1870, having, in April of that year, executed a deed to Durgapersad, a banker, admitting, on behalf of the family, a debt of Rs. 16,348, and mortgaging the family property. At the end of 1870, Sheonandan Singh and his nephews, the minor sons of Lalji Singh, deceased, became separate from Nilkant Persad Singh.

The widow obtained in the Court of the District Judge, under Act XI. of 1858, an order for a certificate of guardianship of her two sons, empowering her to manage the estate of her deceased husband, Lalji Singh. But, on the 16th of February 1872, the High Court, on Sheonandan's appeal, on the ground that the widow of a brother was not entitled, under the Mitakshara law, to the management of a portion of the family property equal to her husband's share, reversed this order. The widow then remained guardian only of the persons of her children: see the report of these proceedings in *Sheonandan Pershad Singh v. Mussamat (Chaneshyam Kooeree* (17 W. R., 237).

[658] On the 11th of September 1875, Durgapersad, the banker above-mentioned, obtained a decree on the bond of April 1870 against the two minor sons of Lalji Singh, deceased, co-defendants with Sheonandan Persad Singh, who was described in the decree as defendant "for himself and as guardian of his two nephews."

These minors, suing by their mother as their guardian, in August 1876 brought the suit against Durgapersad, out of which this appeal arose, alleging that the decree of 11th September 1875 had been made in a suit in which they had not been properly represented, and had been obtained upon a mortgage bond not duly executed on their behalf. They, therefore, prayed for the exemption of their shares in the ancestral estate from liability on this account.

The defence was, that the debt, for which the mortgage-bond had been executed and for which the decree had been made, was an ancestral debt incurred for the family necessities, and that adjustments thereof had been, from time to time, made by different members of the joint-family for the others, the adjustment by Harnandan in 1870 having been one of them.

The Subordinate Judge, referring to the judgment in *Hunooman Persad Panday v. Mussamat Babooee Munraj Koonweree* (6 Moore's I. A., 393), found that the debt had not been contracted from necessity, nor for the benefit of the minors; and that Durgapersad had not inquired as to the existence of any necessity: also that, in the suit which had resulted in the decree of 11th September 1875, the minors had not been legally represented, nor were they liable on the bond of 1870. An order was accordingly made that the decree was not to be executed against the minors' shares.

On appeal, the High Court (MITTER and TOTTENHAM, JJ.) modified this decree.

The High Court concurred with the first Court in finding that, in the suit which resulted in the decree of the 11th September 1875, the minors were not properly represented. Then, in effect after upholding the finding of the first Court also as to the debt secured by the bond not being binding on the

[659] minors, the High Court differed from the Subordinate Judge in his conclusion, deciding as follows :—

“ But the balance which was due to the defendant's kothi from the plaintiffs' family at the time of Lalji's death, stands upon a different footing. It amounted to Rs. 10,623. The plaintiffs, the sons of Lalji, would be bound to pay their father's debt, unless it be proved that they are of such a nature as would not be obligatory upon them under the Mitakshara law. This the plaintiffs have entirely failed to establish. But the original debt due from the plaintiffs' family has been apportioned amongst the several members who have now separated. The plaintiffs, whose share in the family property is one-sixth, are, therefore, liable to that extent for the amount which was due from their father and the other members of the family at the time of his death.

“ The next question we have to determine is, whether the plaintiffs are entitled to a perpetual injunction upon the defendant, restraining him from executing the decree, dated the 11th September 1875, although, upon the finding in this suit, it is clear that they are liable for a portion of the debt secured by the bond which was the foundation of that decree. In justice and equity, we think the plaintiffs are entitled to be relieved from the liability of the decree of the 11th September 1875, to the extent to which their non-liability is established in this case. In the case of *Lalla Bunseedhur v. Koonwur Bindeseree Dutt Singh* (10 Moore's I. A., 454), the Sadr Dewany Adawlut made the decree in favour of the minor, making, at the same time, such provision in it as ensured the payment to the creditor of the amount found justly due to him. The Judicial Committee approved of this course.

“ The plaintiffs, therefore, are entitled to a declaration, that they are not liable under the decree of the 11th September 1875 further than to the extent to which their liability has been established in this case. They are bound to pay interest at the rate at which the loan was carrying interest at the time of Lalji's death,—i.e., at the rate of 18 per cent. per annum, till [660] the date of the bond, i.e., 6th Bysakh 1277 (18th April 1870), and from the last-mentioned date to the date of the institution of the suit resulting in the decree of the 11th September 1875, at the rate stipulated in the bond, i.e., 13½ per cent. per annum, and from the date of the institution of that suit to the date of realization at the rate of 6 per cent. per annum. A perpetual injunction is to issue upon the defendant not to execute the decree of the 11th September 1875 against the minor plaintiffs or their heirs and representatives, after they have realized under it one-sixth of Rs. 10,623, with such interest as is mentioned above.

“ The costs of this suit, both in this as well as in the lower Court, are to be apportioned according to the result of our decision.”

Mr. R. V. Doyne and Mr. C. W. Arathoon for the Appellant.

Mr. J. Graham, Q. C., and Mr. J. T. Woodroffe for the Respondents.

For the appellant it was argued, that the decree of 11th September 1870 was well founded on the liability of the sons to pay the debt of their father; that a certain portion of the debt claimed having been rightly treated as payable by the sons, it was incumbent on them to show, but they had not shown, that the rest of it was of a different character, and was such that no liability for it attached to them. Reference was made to Mayne's Hindu Law and Usage, Chap. IX; and the cases of *Hunooman Persad Panday v. Mussamul Babooee Munraj Koonweree* (6 Moore's I. A., 393) and *Lalla Bunseedhur v. Koonwur Bindeseree Dutt Singh* (10 Moore's I. A., 454).

Counsel for the respondents were not called upon.

Their Lordships' **Judgment** was delivered by

Sir B. Peacock.—This is an appeal from a judgment of the High Court in a suit brought by the respondents, who are infants, in the name of their guardian, against the appellant, in the Court of Bhagalpore. The object of the suit was to prevent the appellant from executing a decree which he had obtained [661] against the respondents. The case arose in this way: The plaintiffs and Sheonandan and Harnandan were members of a joint Hindu family and joint proprietors of an ancestral family estate situate in the district of Bhagalpore and subject to the Mitakshara law. The suit in which the decree was obtained was brought on a bond, dated 21st of April 1870, for Rs. 16,348, executed by Harnandan on behalf of himself and as uncle and guardian of the present plaintiffs. Harnandan was not at the time when he executed the bond the guardian of the present plaintiffs, or at any time the manager of the estate; the elder brother, Sheonandan, after the death of Lalji, the father of the present plaintiffs, was the manager. The suit in which the decree about to be executed was obtained was brought against Sheonandan and the present plaintiffs. The present plaintiffs being minors, the suit was stated to be brought against Sheonandan as heir of Harnandan, and against the present plaintiffs under the guardianship of Sheonandan and Mussamat Ghaneshyam Konwari, mother and guardian of the minors. It turned out that the mother was not the guardian; that although a certificate of guardianship had been granted to the mother, that certificate had been set aside, and that the mother really was not the guardian. An *ex parte* decree was obtained against the defendants; but the mother came in and asked to have the decree set aside upon the ground that no notice had been served upon her. The Court ordered that the case should go down for another trial, but upon the second trial, the Judge who tried the case struck off the name of the mother and did not allow her to appear as the guardian of the infants. The suit was decreed against Sheonandan Persad and the plaintiffs for the total amount of the bond, with interest. The plaintiffs contend that that decree was not binding upon them, inasmuch as they were infants at the time, and were not represented by a guardian. On the other hand, it is contended, that Sheonandan Persad, who was named as guardian in the suit, was their guardian, he being the co-proprietor and manager of the estate. It is clear that the manager of an estate, although he may have the power to manage the estate, is not the guardian of infant co-proprietors of that estate for the purpose of binding them by a bond, [662] as Harnandan did, or for the purpose of defending suits against them in respect of money advanced with reference to the estate. Act XL of 1858, passed for making better provision for the care of the persons and properties of minors in Bengal, enacted (s. 2) that, "except in the case of proprietors of estates paying revenue to Government, who have been or shall be taken under the protection of the Court of Wards," which does not apply to this case—"the care of the persons of all minors (not being European British subjects), and the charge of their property, shall be subject to the jurisdiction of the Civil Court." That shows that Sheonandan Persad, although he was a co-proprietor and manager of the estate, was not the guardian of the infants, who, according to the Act, were subject to the jurisdiction of the Civil Court. Then s. 3 enacts, that "every person who shall claim a right to have charge of property in trust for a minor under a will or deed, or by reason of nearness of kin or otherwise, may apply to the Civil Court for a certificate of administration; and no person shall be entitled to institute or defend any suit connected with the estate of which he claims the charge until he shall have obtained such certificate." No certificate

was obtained by Sheonandan Persad; and although it is stated that he was the guardian of the infants, he clearly was not the legal guardian, and had no right to defend that suit in their name. The decree in the suit, therefore, was not binding upon the infants. The plaintiff in that suit attempted to execute his decree against the property of the infants. The Judge of the first Court says:—"Sheonandan Persad's entire ancestral property, and what he had inherited after the death of Harnandan as his legal heir, were sold for satisfaction of several decrees." He had, therefore, no property upon which the decree could be executed; and therefore the plaintiff in that suit attempted to execute the judgment which he had obtained against the minors by seizing their property in execution of the decree. The object of the suit under appeal was to declare that the plaintiff in the former suit was not entitled to execute the decree against the infants' property and to restrain them from executing it against that property.

Then it was attempted to show that, although the decree had [663] been obtained against the infants without their having been represented by a guardian, still the suit was brought for a debt for which they were liable. Whether that could justify the execution of the decree it is not necessary now to inquire, because the Courts below went into the question whether the bond was given for a debt for which the infants were liable, and held that it was not. After stating all the facts of the case, the Judge says: "It would appear that the debt was contracted by a person who was not manager of the plaintiffs' estate; that it was not for any unavoidable or pressing necessity, or for any benefit of the estate of the plaintiffs; that the defendant did not inquire into those matters; and that he obtained a decree in a case wherein the plaintiffs were not properly represented. The decree cannot, therefore, be enforced against the person or property of the plaintiffs."

The case was appealed to the High Court, and that Court came to the same conclusion with reference to the greater portion of the debt included in the bond, *viz.*, that the money had not been borrowed on account of any necessity; that it had not been borrowed for any benefit to the estate; and that no inquiry had been made by the plaintiff in the suit, at the time when he advanced the money, as to whether those advances were necessary for the protection of the estate or for the benefit of it; and the High Court therefore upheld the decision of the first Court to a certain extent. But then they found that a portion of the debt for which the bond was given was a debt which was due from Lalji, the father of the present plaintiff; and they held that although the present plaintiffs might not be liable upon the decree, they were bound to pay the debt due from their father. The debt which was due from their father was a sum of about Rs. 10,623. The High Court, however, did not award the whole of that sum against the plaintiffs. After stating that the father was liable for the original debt to the extent of that amount, they say, "But the original debt due from the plaintiffs' family has been apportioned amongst the several members, who have now separated. The plaintiffs, whose share in the family property is one-sixth, are therefore liable to that extent for the amount which was due from their father and [664] the other members of the family at the time of his death." It is objected that the decision of the High Court was wrong in that respect, and that if the plaintiffs were liable for the debt of their father, they were liable for the whole amount of the debt. But it appears to their Lordships that the plaintiffs were not liable for the whole debt for which their father and the other joint members of the family were originally liable, the debt having been apportioned amongst the several members of the family, who had separated, and several bonds given for the several portions of the debt. It

appears, therefore, to their Lordships that the High Court was right, and that the infants were not bound to pay the whole of the debt for which the father was at one period jointly liable with the other members of the family, and that they were liable only for the father's portion of the debt.

Under these circumstances, their Lordships are of opinion that the High Court came to a correct decision; and they will humbly advise Her Majesty that the decree of the High Court be affirmed. The appellants must pay the costs of this appeal.

Appeal dismissed.

Solicitor for the Appellant: Mr. T. L. Wilson.

Solicitors for the Respondents: Messrs. Watkins and Lattey.

NOTES.

[I. THE HEAD-NOTE IS DEFECTIVE AND MISLEADING—

The official head-note is both defective and misleading. The portion as regards guardianship is only an *obiter dicta*, *vide* para. II infra; and that as regards apportioned debt is erroneous, *vide* para. III infra. The case is best described in (1884) 8 Bom. 395 (396, 397):—“A member of a joint family, who was neither the guardian of certain minors nor the manager of the family estate, had affected to deal with the interests of the minors by executing a money bond in the name of himself and them, and a decree had been obtained by the obligee against the real manager personally and as guardian of the minors in virtue of his being the co-proprietor and manager of the estate; and the object of the suit, by the quondam minors, was to prevent the obligee from executing his decree against them. Their Lordships held that ‘the manager, although he may have the power to manage the estate, is not the guardian of infant co-proprietors of that estate for the purpose of binding them by a bond . . . or for the purpose of defending suits in respect of money advanced with reference to the estate’; and they proceeded to consider the provisions of the Bengal Minors’ Act, XI of 1858, which corresponds is most particulars with the Bombay Minors’ Act, XX of 1864. No doubt, it would seem, from their Lordships’ remarks on the Act, that an application for the appointment of an administrator of the interest of minors in a joint family estate is contemplated, but it is obvious that their Lordships were not considering the general principle of the Act with reference to the estate of an undivided Hindu family, and we think their observations must be read strictly with reference to the particular case then under consideration.”

II. NO GUARDIAN CAN BE APPOINTED FOR A MINOR MITAKSHARA COPARCENER IN RESPECT OF HIS SHARE IN JOINT FAMILY PROPERTY—

“It has been well settled by a long series of decisions in India that a guardian of the property of an infant cannot properly be appointed in respect of the infant's interest in the property of an undivided Mitakshara family. And in their Lordships’ opinion those decisions are clearly right, on the plain ground that the interest of a member of such a family is not individual property at all, and that therefore a guardian, if appointed, would have nothing to do with the family property”—*Gharib-ul-lah v. Khalak Singh* (1903) 25 All. 407 at 416; 30 I. A. 165 at 170. The Privy Council have, in these observations, settled that the apparently contrary dicta in this case are *obiter dicta*, and recognised the authority of cases in India to the same effect:—(1898) 20 All. 400; (1894) 19 Bom. 309; (1891) 19 Cal. 301; (1895) 17 All. 529; (1884) 8 Bom. 395; (1880) 10 Bom. 21. Those cases dealt also with the statutory provisions on the subject, XL of 1858, XX of 1864; VIII of 1890; (1892) 14 All. 498; (1887) 12 Bom. 18; (1882) 6 Bom. 593, were earlier cases on the subject; (1888) 11 Mad. 309 was with reference to the Boundary Act of 1860.

III. SON'S LIABILITY FOR PARTITIONED DEBT—

The head-note to this case gives the impression that this case is an authority for the position that the son is liable to the extent apportioned to the father, *even though the father*

might be liable to the creditor for the whole debt. But this is wrong. †For, at the end of the judgment, p. 664, Sir Barnes Peacock says : " But it appears to their Lordships that the plaintiffs were not liable for the whole debt for which their father and the other joint members of the family were originally liable, the debt having been apportioned amongst the several members of the family, who had separated, and several bonds given for the several portions of the debt."

As regards the liability of the son for the debt of the father, *incurred* before, but *enforced* after partition, see 22 Mad. 519 : 9 M. L. J. 127.

IV. MINOR COPARCENER WHETHER A NECESSARY PARTY TO THE SUIT OR TRANSACTION—

He is not, and the manager represents him : see *Doulat Ram v. Mehrehand* (1887) 15 Cal. 70 ; (1910) 33 All. 71 ; (1898) 22 Mad. 461 ; (1899) 26 Cal. 319.

But it has been held, that when the minor is a party to the suit, the formalities prescribed by the Civil Procedure Code should be conformed to, in order to bind him :— (1913) 36 Mad. 295 **P.C.** cf. (1901) 23 All. 459 (married woman cannot defend, as guardian *ad litem*) ; 11 Cal. 509 (written order of permission not necessary).]

[8 Cal. 664 : 9 I.A. 33 : 11 C.L.R. 215 : 6 Ind. Jur. 274 : 4 Sar. P.C.J. 325]

PRIVY COUNCIL.

The 30th November, 1881, and 21st January, 1882.

PRESENT :

SIR B. PEACOCK, SIR M. E. SMITH, SIR R. COUCH, AND SIR A. HOBHOUSE.

Bilasmoni Dasi and others.....Defendants

versus

Raja Sheopersad Singh.....Plaintiff

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Construction of patta Mukurari ijara—Absence of words of inheritance.

The word ' mokurari ' does not necessarily import perpetuity, although it may do so. Used in connection with the grant of an ijara in a patta, this word is not inconsistent with such interest, being only for life.

By a patta was granted a mokurari ijara at a fixed rent in a mouza, consisting mainly of waste lands, part of the grantee's zamindari, without words [665] of inheritance. On the death of the grantee, who brought the land under cultivation and died in possession many years after, the question arose whether the patta was for life, or for a heritable and transferable estate.

Held, that there being in the patta no words importing perpetuity, notwithstanding the use of the word ' mokurari,' the question was whether the intention of the parties that the grant should be perpetual, was shown with sufficient certainty in any other way ; *e.g.*, by the other terms of the instrument, its objects, the circumstances under which it was made, or the conduct of the parties to it. *Held* also, that such intention was not shown.

APPEAL from a decree of the High Court of Bengal (30th August 1879), reversing a decree of the Subordinate Judge of Bhagalpore (23rd June 1877).

The suit out of which this appeal arose was brought by the respondent, the son and heir of the late Moharaja Jaimangul Singh, Zamindar of Pargana Gedhour, Zilla Monghyr, against the successors in estate of Roghunath Singh,

who died in 1875. The latter had been tenant to the Moharaja, having obtained from him, in the year 1798, a patta granting to him a mokurari ijara of Mouza Balwani, uncultivated land belonging to the Moharaja's recently-settled zamindari of Gedhour. In this suit the respondent claimed possession of Mouza Balwani, on the ground that, according to the patta, the mokurari ijara was only for the life of Roghunath Singh, and that consequently, on his death in 1875, the right of possession attached to the Moharaja's estate had devolved on his successor. The defence was, that the mokurari ijara was hereditary and transferable, and that, therefore, Roghunath Singh's heirs and assigns were entitled to the possession, whilst they continued to pay the fixed rent. The patta is set forth in their Lordships' judgment, where all the facts material to this report are stated.

The suit was dismissed by the Subordinate Judge of Bhagalpore, who was of opinion that, by the patta, there was a grant in perpetuity.

On appeal to the High Court that decision was reversed, and the plaintiff was declared entitled to recover possession of the property in suit, with the mesne profits claimed.

The judgment of the Divisional Bench of the High Court [GARTH, C.J., and PRINSEP, J.] is reported in the Indian Law Reports, 5 Calcutta Series, 550.

[666] On this appeal,

Mr. J. F. Leith, Q.C., and Mr. R. V. Dwyne appeared for the Appellants.

Mr T. H. Cowie, Q.C., and Mr. J. T. Woodroffe for the Respondent.

For the appellants it was argued, that an hereditary and permanent interest was granted by the patta of 1798, although express words of inheritance were not contained in it. The patta followed in its terms the Government grant to the Raja. Words of inheritance were not strictly required by Hindu law and usage in order to create a permanent interest. In *Joba Singh v. Meer Nujeeb-Oolla* (4 Sel. Rep., 271), where there had been a long possession by the tenant and his predecessors, a patta not containing words of inheritance was construed as if it contained them. In *Dhunput Singh v. Gooman Singh* (11 Moore's I. A., 433, at p. 463; s.c., 9 W. R., P. C., 3, at p. 7), the evidence of recognition of the hereditary character of a grant, and of long continued possession, received effect. In this case the state of things at the date of the patta, and the conduct of the parties, especially in certain litigation which had taken place, showed that the grant was of a permanent interest. The obligations imposed would hardly have been undertaken by them for less than an hereditary interest, for which a rent, adequate in regard to the state of the land, had been reserved.

For the respondent it was contended that the interest granted by the patta was only for life. Although evidence might supply the want of words of inheritance, yet a patta not containing such words was, *prima facie*, not perpetual, as appeared from the decision of *Dhunput Singh v. Gooman Singh* (11 Moore's I. A., 433, at p. 463; s.c., 9 W. R., P. C., 3 at p. 7). The case of *Joba Singh v. Meer Nujeeb-Oolla* (4 Sel. Rep., 271) rested, also, on the existence of intention to create a permanent interest. Here no such intention had been shown. A patta, notwithstanding the use of the expression 'mokurari,' did not, of itself, convey an hereditary interest, unless such terms as 'ba farzandan,' or 'naslan bád naslan,' or other words denoting descents, were contained in it; a proposition established by [667] many decisions of

the Indian Courts since 1827. Reference was made to "*Dyaram v. Bhobindur Naraen*" (1 Sel. Rep., 131), "*Joba Singh v. Meer Nujeeb-Oolla*" (4 Sel. Rep., 271), "*Doed Nemoo Sircar v. Watson*" (Morton's Dec., 255), "*Ameeroon Nissa Begum v. Maharaja Hetnarain Singh*" (S. D. A. (1853), 648), "*Soulutoonnissa v. Savi*" (S. D. A. (1859), 1575), "*Sorobur Singh v. Raja Mohender-narain Singh*" (S. D. A. (1860), 577), "*Raja Modenarain Singh v. Kantlall*" (S. D. A. (1859), 1573). In "*Mussamut Lakhu Kowar v. Roy Hari Krishna Singh*" (3 B. L. R., A. C., 226), it was held, that the words '*mokurari istemrari*' in a patta conveyed a right in perpetuity. See also "*Karunakar Mahati v. Niladhiro Chowdri*" (5 B. L. R., 652). But this had not been supported on appeal in the case of "*Dhunput Singh v. Gooman Singh*" (11 Moore's I. A., 433; s.c., 9 W. R., P. C., 3). The word '*maurasi*' was the apt expression for an hereditary interest: see W. Macnaghten's note on this subject in the report of "*Dyaram v. Bhobindur Naraen*" (1 Sel. Rep., 131). In connection with the words in the patta, and their meaning, were cited—"*Munrunjun Singh v. Raja Leelanund Singh*" (3 W. R., 84), "*Raja Leelanund Singh v. Thakoor Monorunjun Singh*" (5 W. R., 101), "*Baboo Gopal Lall Thakoor v. Telukchunder Rai*" (10 Moore's I. A., 183), "*Raja Suttosurrun Ghosal v. Mohesh Chunder Mitter*" (12 Moore's I. A., 263), "*Lekraj Roy v. Kunhya Singh*" (L. R., 4 I. A., 223). Reference was also made to Reg. VIII of 1793, s. 16, as showing how certain mokurari leases had been dealt with by the Legislature as life-tenures at the Permanent Settlement.

Mr. *Leith*, Q. C., replied.

[668] Their Lordships' **Judgment** was delivered by

Sir R. Couch.—This is an appeal from a decree of the High Court at Calcutta whereby the decree of the Subordinate Judge of Bhagalporo was reversed, and the respondent, the plaintiff in the suit, was awarded possession of Mouza Balwani with mesne profits thereof from the 22nd of August 1876, together with interest and costs.

Mouza Balwani is situate within, and forms part of, Pargana Godhour, the respondent's ancestral zamindari. On the 21st of February 1798, a patta was granted by the Government to Raja Gopal Singh and Raja Bharat Singh, therein described as zamindars of Pargana Gedhour, in which it is stated that the annual consolidated jama of the said Pargana, inclusive of the ganjats, markets, bazaars, all sayers and motahariffas, and also of rent-free lands held under sanads and without sanads, had, together with the fee of kanungos, been fixed and assessed permanently at sicca Rs. 15,001 from 1205 Fasli. In the register of Pargana Godhour for the year 1205 Fasli, the gross proceeds of Mouza Balwani are entered as Rs. 6-3-10, and the sudder jama as Rs. 4-1-5, and it is not disputed that at that time it was almost wholly in jungle and unprofitable. It appears from the thakbust map, which was prepared in 1846, that the entire area of the mouza is 7,500 bighas, of which 3,000 were then under cultivation.

On the 28th Kartick 1206 Fasli, corresponding with the 21st of November 1798, Raja Gopal Singh granted to Roghunath Singh, the father of the appellant Ram Lall Singh, a patta in the terms following:—

"I have acquainted myself with the contents of this.

* Reg. VIII of 1793, s. 16, enacted, that mokurari leases to persons not the actual proprietors of the lands included in such leases, if granted or confirmed by the Government, or obtained previously to the Company's accession to the Diwani, should be continued during the lives only of the lessees, subject to an abatement of the fixed jama for the authorized sayer resumed or abolished; and on their death the settlement to be made with the actual proprietor of the soil.

"The stipulation of patta granted, on receipt of kubulyat, to Roghunath Singh, mokurari ijardar of Mouza Balwani, appertaining to Pargana Gedhour, in the Sircar and province of Behar, on behalf of Raja Gopal Singh, is to the effect and purport following :—

"Whereas the mokurari ijara patta of the said mouza is granted from 1206 F. S., at a consolidated jama specified below, inclusive of malikana subject to no objection or excuses on the score of calamities of weather together with fisheries and fruit trees ; with the exception of abkari and toddy gunjas bazaars, hats, all [669] sayer, mothurfa (taxes levied on professions), lakheraj lands, covered by sanads and not covered by sanads, rosum of rosumdars, daily allowances of *rozanadars* and *chandads* of chandadars ; the above-named person should, with ease of mind, make cultivation and improvement, pay the above amount year after year, crop season after crop season, instalment after instalment, as per kistbandi, in full, into the treasury of this Sircar (raj), raise no objection whatever on the score of drought, inundation, hailstorms, deaths and desertions, but himself bear the losses arising therefrom. In addition to the above jama, whatever profits may be derived from salutary improvement in cultivation by him shall belong to the mokuraridar, the Sircar having nothing to do with the same. In case of non-payment of instalments agreeably to the kistbandi, month after month, the mutsuddis of the Sircar shall have authority to realize the arrears by sale of the goods and chattels of the abovenamed, to send a sazawal or attaching officer to the said village, and make and receive the collections. The expenses of entertaining sazawal, tehsildar, and others shall be borne by the abovenamed. He should keep the tenants of the said village satisfied and contented by his good treatment, and make collections from the tenants according to order of Government, agreeably to pattas of nakdi and *bhaoli* lands to be granted to them, and never demand any sum in excess. He should not in any way cominit oppression upon tenants, so that they may be able to stand to their engagements, and he should not oust them until the determination of their leases. He should grant receipts to the tenants upon payment of rent, instalment after instalment. He should not give a single span of land in the said village without asking permission, and without consent of the huzoor, nor resume any previously granted without the orders of the huzoor. Should the said lakheraj lands be hereafter resumed under orders of the huzoor, and the huzoor be pleased to make a settlement of the rent thereof with the ticea mokuraridars, then the abovenamed shall pay the rent thereof according to the settlement to be made by the huzoor. He should not suffer a single span of the land on the limits and boundaries to pass and to be included in the boundary of others. Should it so happen, he should of his own accord inform the Sircar of it, have the matter settled with the aid of the Sircar, and maintain and preserve the boundaries and limits of the said mouza. He should not allow thieves and paddlers to settle within the estate leased to him. God forbid ! should anybody's property be robbed and plundered, he should trace out the thieves and robbers with the property, and produce them [670] before the thanadar or the district authority. Should the thanadar apprehend the robbers and apply to him for aid, he shall forthwith afford assistance to him. He should bring without fail to the notice of the huzoor whatever property may be found belonging to dead persons, or that is deserted or lying buried under ground, without heirs to claim it. He should act in strict conformity with the orders already passed or to be hereafter passed by the huzoor for regulating settlement of rent with tenants and malgulzars of all classes, and should never raise any excuse or objection whatsoever. He should not demur or put forward any excuse in this, and should act up to the above.

'Rent for four years to be paid without any objection or excuse, Rs. 24.

			Rs.
For 1206 Fasli	...	...	6
„ 1207 „	...	...	6
„ 1208 „	...	...	6
„ 1209 „	...	...	6

“ Uniform rent from 1210 Fasli to be paid year after year, crop season after crop season, without any objection or excuse, sicca Rs. 25 current in the province.

“ One-half of which is Rs. 12-8.

“ Dated 28th Kartick 1206 Fasli.”

Roghunath Singh executed a corresponding kabuliat bearing the same date.

The other appellants are the representatives of the defendants in the suit, who derived their title from Roghunath Singh and denied the plaintiff's title; and no question is raised in this appeal as to their derivative title, nor as to Raja Bharat Singh not having joined in the patta.

On the death of Raja Gopal Singh, in or about October 1812, his son Raja Jaswant Singh declined to receive the rent of Mouza Balwani, alleging that his father had taken possession thereof at the end of the year 1219 Fasli under Reg. VII of 1799, and that a fresh patta had been granted to Roghunath Singh for eleven years from 1220 Fasli, at the yearly rent of Rs. 51. Thereupon summary proceedings were taken by Roghunath Singh to compel the Raja to receive his rent at the old rate, the result of which was that Jaswant Singh [671] was referred to a regular suit if he desired to substantiate his allegation.

On the 13th of February 1821, Raja Nawab Singh, the younger brother and successor of Jeswant Singh, who had died in the previous year, brought a suit in the Court of the Registrar of Monghyr against Roghunath Singh and his surety, to recover the rents then due for Mouza Balwani under the alleged lease for eleven years. In his answer, Roghunath Singh asserted that he held under the patta of 1798, and denied the eleven years' lease. And the District Judge, by a decree, made on the 9th of January 1826, on appeal from the decision of the Registrar, directed that Roghunath Singh should remain in possession in accordance with the patta of 1798, and pay the rent therein reserved.

In 1869, the respondent succeeded to the zamindari, and on the 24th of July 1875, Roghunath Singh died. This suit was brought on the 22nd of August 1876, and the only question in the appeal before their Lordships is whether the patta is a lease for life or in perpetuity.

Their Lordships were referred by the learned counsel for the respondent to several cases in the late Sudder Court, in which it was ruled that a lease at a fixed rent without more did not import perpetuity, and that to create a perpetual lease the addition of the words “from generation to generation,” or other words importing perpetuity, were necessary.

On the other hand it was held by the High Court at Calcutta, in a case of ghatwali tenure, where the words “mokurari istemrari” were used, that the holding was perpetual—*Munorunjun Singh v. Leelanund Singh* (3 W. R., 84) and *Raja Leelanund Singh v. Thakoor Munorunjun Singh* (5 W. R., 101).

But this Committee, on an appeal from that decision, held, that these words might mean either permanent during the life of the person to whom the grant was made, or permanent as regards hereditary descents (13 B. L. R., 124).

In the present case the word 'istemrari' is not used. The instrument is called "the mokurari ijara patta," and their Lordships, in the case of the *Bengal Government v. Nawab* [672] *Jafir Hossein Khan* (5 Moore's I. A., 467, at p. 498), stated their opinion to be, that though 'mokurari' might import perpetuity, that was not the necessary meaning of the word.

The question then is, whether the intention of the parties is shown by the other terms of the instrument, the circumstances under which it was made, or the subsequent conduct of the parties, with sufficient certainty, to enable the Courts, in the absence of words importing perpetuity, to pronounce that the grant was perpetual? The Subordinate Judge held, that the patta was intended to be hereditary, because it appeared that the mouza was covered with jungle when the mokurari was granted, and that it had since been brought under cultivation through the exertions and labour of the original mokuraridar and his representatives, and therefore it might, "consistently with the principles of equity, be presumed that the lessor and lessee must have thought at the time that the lease in question should be granted in perpetuity, because it is void of reason to suppose that the lessee should have taken the lease for his life, and brought it under cultivation at heavy expense and through great exertion." As to the subsequent conduct of the parties he said, that "if the representatives of Gopal Singh had considered the lease as one for life, they would have never adopted such steps as were incompatible with their position and dignity to cancel such life-interest as was thought by themselves to last only for a few days, and Roghunath Singh himself would not have described the mokurari as a permanent one." Their Lordships are unable to see the force of this observation; but it appears from it that the Subordinate Judge did not fail to consider everything that he thought might show the intention of the parties. It is, therefore, to be remarked that he did not refer to any of the provisions in the patta or of the words used to express them. Apparently he thought they did not show any intention that the patta was to be perpetual.

The High Court agreed with the Subordinate Judge that the lease was granted with a view to the improvement of the mouza, but thought that this did not show it was intended to be [673] hereditary, and referred to some of the provisions which they said seemed necessarily to imply that a substantial interest in the property remained in the Raja, and were quite inconsistent with his having permanently parted with that interest. Their Lordships do not concur in all the views taken by the High Court of these provisions, but on the other hand they do not find in them sufficient to show an intention that the lease should be permanent. They are consistent with either intention.

A case in the High Court at Calcutta, printed in the Record, was referred to by the learned counsel for the appellants, in which Mr. Justice MITTER said,—"We do not find it usual that tenants taking upon themselves the trouble and outlay for clearing and reclaiming jungle lands are contented with anything short of hereditary interest in them." But the judgments of the learned Judge and the lower Court are expressly stated to be founded upon the fair construction of the terms of the grants, and the surrounding circumstances attendant on the execution of them, as well as the conduct of the plaintiff in connection with that and similar other tenures in his zamindari. The learned Judge only refers to what is usual as a circumstance which supports his view.

Their Lordships would repeat what was said by this Committee in *Dhunput Singh v. Gooman Singh* (11 Moore's I. A., 465), where it was proved that the hereditary character of the patta had been recognized by the successive zamindars. "If, on the one hand, it is improbable that the grantee should undertake such an obligation without some fixity of tenure and some assured and permanent interest in the lands, it is, on the other hand, equally improbable that the grantor should part for ever with all his interest in the improveable value of the lands."

As the appellant is unable to point to any words in the patta importing perpetuity, it appears to their Lordships, upon a consideration of the object of the patta and its language and provisions, as well as the surrounding circumstances, that the intention to grant a perpetual lease does not sufficiently appear; and they are, therefore, unable to say that the decision of the [674] High Court is not the right one. They will, therefore, humbly advise Her Majesty to dismiss the appeal, and the costs thereof will be paid by the appellants.

Appeal dismissed.

Solicitor for the Appellants : Mr. T. L. Wilson.

Solicitors for the Respondent : Messrs. Barrow and Rogers.

NOTES.

[I. "MOKURRARI"—"ISTEMRARI"—

These do not necessarily import *perpetuity* :—30 Cal. at 883 ; 30 Cal. 20 ; 15 Cal. 343 ; 5 Cal. 543 ; 5 M.L.A., 467 ; 12 Cal. 117 ; 27 Cal. 156 ; 8 All. 569 ; 12 C.W.N. 154 ; 175 ; 7 C.L. J. 202 ; 12 C.L.J. 117.

II. OBJECT OF LEASE—CLEARING JUNGLE—PERMANENT TENANCY—

This case is an express authority, that permanency is not a necessary presumption even in such a case. See also the Notes to 3 Cal. 696 ; 8 Cal. 960.]

[8 Cal. 674]

APPELLATE CIVIL.

The 26th January, 1882.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE BOSE.

Noimollah Pramanick.....Defendant

versus

Grish Narain Moonshee.....Plaintiff.*

Second Appeal—Remand—Civil Procedure Code (Act X of 1877),

ss. 562, 588, cl. 28.

On an appeal from an order under s. 562 of the Civil Procedure Code remanding the case, the High Court cannot consider the facts on which the lower Appellate Court passed the order of remand. All that it can do under s. 588, cl. 28, is to consider whether, on the findings of fact by the lower Appellate Court, that Court was right in remanding the case.

* Appeal from Appellate Order, No. 285 of 1881, against the order of Baboo Jibun Krishna Chatterjee, Subordinate Judge of Pubna, dated the 10th August 1881, reversing the order of Baboo Dwarkanath Bhattacharjee, Munsif of Sherajunge, dated the 28th April 1881.

Bahoo *Preonath Pundit* for the Appellant.

Bahoo *Mohiny Mohun Roy* and Bahoo *Gurudas Banerjee* for the Respondent.

THE facts of this case sufficiently appear from the **Judgment** of the Court (PRINSEP and BOSE, JJ.), which was delivered by

Prinsep, J.—The only ground taken before us in this appeal is, that it being an appeal from an order under s. 562 of the Code of Civil Procedure remanding the case, the appellant in second appeal is entitled to ask us to consider the facts on which the lower Appellate Court passed the order of remand. It [675] appears to us that this is altogether opposed to the principle of the Code of Civil Procedure, which, except in the cases provided for in chap. xlii, allows no second appeal. As we understand s. 588, cl. 28, we are competent merely to consider whether, on the findings of fact by the lower Appellate Court, that Court was right in remanding the case under s. 562. It would be a striking anomaly if it were possible, on an appeal such as this against an interlocutory order, for us to do more than we could do against the final order passed in the same case, —that is to say, to deal with findings of fact by the lower Appellate Court.

We dismiss this appeal with costs.

Appeal dismissed.

NOTES.

[See also (1886) 12 Bom. 589 (593) ; (1889) 14 Bom. 14 (17) F.B.]

[8 Cal. 675 10 C.L.R. 399]

APPELLATE CIVIL.

The 31st January, 1882.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE BOSE.

Krishtendra Roy.....Plaintiff

versus

Aena BowaDefendant.*

*Landlord and tenant—Suit for arrears of rent—Ejectment—
Beng. Act VIII of 1869 s. 59.*

The term 'under-tenure,' as used in s. 59 of Beng. Act VIII of 1869, is not confined to a tenure intermediate between the zamindar and the ryot but includes any tenure which "by title-deeds, or by the custom of the country, is transferable by sale," and therefore a zamindar, who has obtained a decree for arrears of rent against a ryot who has a transferable jote, is not entitled to eject the ryot, but his only remedy is to sell the holding under s. 59 of the Act.

* Appeal from Appellate Decree, No. 340 of 1880, against the decree of Bahoo Bhugwan Chunder Chuckerbutty, Subordinate Judge of Rungpore, dated the 24th November 1879, modifying the decree of Bahoo Alat Bhary Ghose, Second Munsif of Rungpore, dated the 12th September, 1879.

Nund Lall Ghose v. Seedee Nazir Alli Khan (S. D. A. Vol. II, 1860, p. 382) followed.

IN this case the plaintiff, a zamindar, had obtained a decree against a ryot for arrears of rent. It was found in the lower Court that the jote was of a transferable nature. The decree provided that, if the amount due was not paid within twenty-one days, the defendant should be ejected. The defendant appealed, and the lower Appellate Court held, that the jote being of a transferable nature, the defendant could not be ejected. The plaintiff appealed to the High Court.

[676] Baboo *Sreenath Dass* and Baboo *Kishory Mohun Roy* for the Appellant.

Mr. *Mendies* for the Respondent.

The **Judgment** of the Court (PRINSEP and BOSE, JJ.) was delivered by

Prinsep, J.—The plaintiff in this case on appeal contends, that, having obtained a decree for arrears of rent, he is entitled to an order for ejectment within the terms of s. 52 of the Rent Act. The lower Appellate Court has held, that the defendant, having a transferable jote, is protected against ejectment, and that the only remedy which the plaintiff has, is under s. 59 to sell that holding.

It is argued on behalf of the appellant, by Baboo *Sreenath Dass*, that, although the zamindar might have the right of sale, he is entitled, if he so desires it, to eject the ryot, and he maintains that s. 59 does not apply to a jote such as it has been found the defendant holds, she being a cultivating ryot, but to intermediate tenures between the zamindar and the cultivating ryots.

It is a matter of some surprise to us to find that, although the present Rent Law has been in force for more than twenty years, this point should not have been determined by the High Court. The only case at all in point is that of *Nund Lall Ghose v. Seedee Nazir Ally Khan* (S. D. A., Vol. II, 1860, p. 382). In that case, it is true, the tenure was a ganti-tenure of some considerable dimensions, but the rule laid down by the Court in that case is, in our opinion, equally applicable to the conditions of the present case. Following that decision, in our opinion, the term 'under-tenure,' as used in s. 59, is not confined to a tenure intermediate between the zamindar and the ryot, but it would include any tenure which, to use the words of s. 59, "by title-deeds or the custom of the country is transferable by sale."

In this view, we think that the lower Appellate Court was right in holding that plaintiff was not entitled to a decree for ejectment.

The appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[This was followed in (1884) 10 Cal. 547 (548).]

[677] ORIGINAL CIVIL.

The 1st February, 1882.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE PONTIFEX.

Shama Churn Dey and another.....Two of the defendants

versus

Chunder Coomar Mookerjee and others.....Plaintiffs.

Chunder Coomar Mookerjee and others.....Plaintiffs

versus

Koylash Chunder Sett and others.....Defendants.

Easement—Right of way—Unity of possession—Severance.

APPEAL from the decision of WILSON, J., dated 20th July 1881.

The hearing of this case in the lower Court will be found reported in I. L. R., 7 Cal., 665. The suit was for an injunction to restrain the defendants from trespassing on, or in any way using, a certain lane, to which the plaintiffs laid claim under an express grant from the original owner of the property. The defendants contended that the lane had been dedicated by one Bydonauth Dutt to the public as a passage to the lands of his tenants, and that they had used the lane in question for more than twelve years before suit.

Mr. *Bonnerjee* (with him Mr. *Allen*) for the Plaintiffs.

Mr. *Jackson* (with him Mr. *Mitra*) for the Defendants.

Mr. Justice WILSON found that the defendants had a right of way over the lane, and that the plaintiffs had not proved a title to the soil of the lane, but only a right of way over it, and granted an injunction restraining Tarusoondery and Shama Churn Dey (two of the defendants) from using their mehter's doors for cleaning their privies into the lane or otherwise using the lane in connection with the cleaning of their privies, except merely for the carriage of the night-soil from their premises to the street; and he dismissed the suit against the other defendants.

The two defendants against whom the injunction had been granted appealed; and the plaintiffs brought a cross-appeal.

Mr. *Phillips* and Mr. *Mitra* for the Appellants in the first appeal and Respondents in the cross-appeal.

Mr. *Evans*, Mr. *Bonnerjee*, and Mr. *Allen* for the Respondents in the first appeal and appellants in the cross-appeal.

[678] The **Judgments** of the Court were delivered by both GARTH, C.J., and PONTIFEX, J., in which they agreed with the Court below for substantially the same reasons, *first*, that the plaintiffs had failed to prove a title to the soil of the lane, and could be considered as entitled only to a right of way over it; *secondly*, that the defendants had a right of way over the land and a right to use the lane for the purpose of carrying away nightsoil from their premises in such way as would least affect the plaintiffs in the enjoyment of their premises; and *thirdly*, that this suit had been rightly dismissed as

against the defendants against whom it had been dismissed in the lower Court. But being unable to agree with the Court below as regarded the injunction granted against the appealing defendants, their Lordships reversed so much of the decree as granted the injunction, and dismissed the suit against all the defendants.

Appeal allowed.

[8 Cal. 678 : 11 C.L.R. 225]

SMALL CAUSE COURT REFERENCE.

The 2nd March, 1882.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE WHITE.

Chundee Churn Dutt.....Plaintiff

versus

Edujlee Cowasjee Bijnee and others.....Defendants.*

Notice of dissolution of partnership—Contract Act (IX of 1872), s. 264—

Jurisdiction—New trial, Ground of.

Section 264 of the Contract Act is not intended to be an exhaustive exposition on the question of notice of a dissolution of partnership.

The mode of notification of dissolution required in the case of old customers, who are known to the firm as having dealt with it, is an express or specific notice by circular or otherwise. But in the case of the general public, the most effectual public notice which can reasonably be given is requisite.

Roop Chund Pundit v. Madhub Chunder Bose (see note, *post*, p. 681) overruled.

A new trial may be granted on the ground of want of jurisdiction in the Court, though such ground was not formally raised or recorded at the original hearing.

THIS was a suit brought in the Calcutta Court of Small Causes on a promissory note signed by a firm under the name and style of 'Greeschunder Mookerjee & Co.'

[679] The suit was brought against Edujlee Cowasjee Bijnee, Shamasoodery Dabee, and Kally Puddo Mookerjee. The first defendant alone appeared and defended, denying the partnership and denying his indebtedness; and although not formally recorded at the trial, a plea of want of jurisdiction was raised on a day subsequent to the delivery of judgment. The Judge decided the case against the defendants.

A new trial was applied for on the ground (amongst others) that the Court had not considered the plea of want of jurisdiction. The Judges before whom the application was made differed in opinion; and, in consequence of such difference, a new trial was allowed.

At the re-hearing the following facts were admitted :—

1st.—That the first defendant carried on business with the other defendants up to the 29th February 1880.

2nd.—That a deed of dissolution of partnership was executed between the first defendant and the other defendants, dated 21st May 1880, in which it was recited that the dissolution took effect on and from the 29th February 1880.

* Case stated for the opinion of the High Court under s. 55 of Act IX of 1850.

3rd.—That notice of dissolution was advertised on the 27th May 1880 in the 'Englishman,' 'Daily News,' and 'The Statesman,' and in the 'Exchange Gazette' of the 27th and 28th May 1880.

4th.—That there was no advertisement in the 'Calcutta Gazette' or in the 'Gazette of the Government of India,' or any direct notice to the plaintiff.

5th.—That the promissory note sued on was given to the plaintiff in the name of 'Greeshunder Mookerjee & Co.,' on the 23rd April 1881, fourteen months after the interest of the first defendant in the firm had ceased.

6th.—That the first defendant had not, since the 29th February 1880, carried on any business in Calcutta, except so far as he might be considered to have been a member of the firm of Greeshunder Mookerjee & Co., under s. 264 of the Contract Act, and that he had not resided, or personally worked for gain, in Calcutta since February 1880.

7th.—That there had been other dealings with the plaintiff [680] before the dissolution of the partnership, but unconnected with this promissory note.

The officiating First Judge (Mr. MacEwen) was of opinion, that although the first defendant might be liable, having regard to the decision in the case of *Roop Chund Pandit v. Madhub Chunder Bose* (see note, *post*, p. 681), yet it did not necessarily follow that the liability could be enforced in the Calcutta Court of Small Causes, inasmuch as the first defendant only carried on business in Calcutta constructively, and section 28 of Act IX of 1850 implied the carrying on of business in which a defendant had an actual interest; and that s. 264 of the Contract Act did not affect the construction to be put upon s. 28 of Act IX of 1850; the expression 'affected' in s. 264 of the Contract Act had reference only to the right of a party dealing with the firm to recover his money when no public notice had been given, but could not confer on the Court jurisdiction unless it existed independently of s. 264.

The Second Judge (Bahoo Koonjolall Banerjee) was of opinion that there being no evidence that the plaintiff had any notice of the dissolution of the partnership, there had been no legal dissolution of that partnership, and therefore, that it must be taken to be subsisting, and that inasmuch as the other partners of the firm carried on business in Calcutta, the Court had jurisdiction.

Judgment was, therefore, given in favour of the plaintiff, contingent on the opinion of the High Court, on the following questions:—

1st.—Whether, having regard to the facts as stated, the suit should not be dismissed as against the first defendant and decreed against the second and third?

2nd.—Or whether judgment should not be given against all the defendants?

3rd.—Whether, in consequence of the plea of want of jurisdiction not having been formally raised at the original hearing, and there being nothing on the face of the record to raise the plea, the new trial should not have been refused; and if so, whether this new trial is not *ab initio* bad.

Mr. Trevelyan for the plaintiff contended that the questions of jurisdiction and partnership were, in this case, one, inasmuch as, [681] if the notice given

of the dissolution was insufficient, the partnership would be in existence, and the Court would have jurisdiction. As to the notice of dissolution required, it should be such as would be likely to reach all the public living in places where the partners carry on their business. The notice here was advertised in the daily papers, and in the 'Exchange Gazette.' Was that sufficient notice to the plaintiff, who does not understand English?

Mr. *Allen* for the defendant.—An advertisement in the 'Exchange Gazette' is sufficient notice of dissolution, and is a sufficient 'public notice' under s. 264 of the Contract Act. The Legislature, when intending that matters should be made public, give the way in which these matters should be published;—see ss. 347 and 354 of the Code of Civil Procedure. "The local Official Gazette and the public newspapers" are mentioned. These channels have, we contend, been made use of by us. The case of *Roop Chund Pundit v. Madhub Chunder Bose** says, that no notice save one published in the 'Official Gazette' is good. [GARTH, C.J.—In that case the question referred was whether a dissolution should be advertised in the 'Calcutta Gazette' or in the 'Gazette of the Government of India,' but the deed of partnership stipulated that any dissolution should be advertised in the 'Calcutta Gazette.' When you look at s. 264, it does not follow that persons dealing with a firm will be affected even if a public notice has been given,—i.e., the converse of the proposition stated in the section is not affirmed.] I read the section as meaning, that if a special notice is given, there need be no public notice. Section 264 is an amendment of the existing law, and not a definition of it. The Contract Act is stated in the Preamble to be an Act to define and amend the [682] law of contracts existing before the Act was passed. In England, the 'London Gazette' is the gazette used for the publication of bankruptcies, because it is the gazette used in the mercantile world, and I apply the same reason for the use of the 'Exchange Gazette' here. On the question of jurisdiction, I contend that it was raised in the lower Court; it was raised in the new trial. The Court allowed me to raise the question, and it was at an end, as I obtained a new trial. The Second Judge has now tried to refer the question. I say he cannot do so, as it was finally decided in the Small Cause Court.

The **Opinion** of the Court (GARTH, C. J., and WHITE, J) was given by

Garth, C.J.—Having heard these questions properly argued, I am satisfied that, in the case of *Roop Chund Pundit v. Madhub Chunder Bose* (ante, p. 681 n), Mr. Justice PONTIFEX and myself were wrong in holding that, as a matter of law, the Official Gazette was the only proper medium of publication under s. 264 of the Contract Act. I discussed this subject with Mr. Justice PONTIFEX before he left the Court, and I am authorised by him to say, that he quite agrees with me in so thinking.

In that case, unfortunately, we had not the advantage of hearing counsel; and we rather took it for granted, without sufficiently considering the relative character of the two publications, that the Official Gazette in Calcutta was, in most material respects, the same sort of paper as the 'London Gazette' in England. But in fact this is not so. The 'London Gazette' has not only a

* The opinion of the High Court, GARTH, C.J., and PONTIFEX, J., in this case, was as follows:—

We think that the notice of dissolution required by s. 264 of the Contract Act should be published in the Official Gazette; the publication of such a notice in the 'Calcutta-Exchange Gazette' would clearly not be sufficient.

We may add that, with respect to old customers of a firm as distinguished from subsequent purchasers after a dissolution, it would probably be necessary that, besides the advertisement in the Gazette, special notice by circular or otherwise should be proved.

large and general circulation in the commercial world, but it is the usual and now almost the invariable mode of advertising new partnerships, dissolutions of partnership, bankruptcy and insolvency notices, and all that class of news.

The 'Calcutta Gazette,' on the other hand, deals principally with official matters. It does indeed contain a number of advertisements of partnerships, insolvencies and the like, but not nearly the same amount of such information as the 'London Gazette,' and we have reason to believe, that, in the commercial [683] world, especially among the natives, its circulation is not nearly so wide as that of the 'London Gazette' in England.

So far as we can ascertain, the 'Exchange Gazette,' although not properly speaking, a newspaper, has a larger circulation, especially in the native quarters of this city, than the Official Gazette; but having considered the question referred to us very carefully, I am not prepared to say, that, as a matter of law, the publication of a notice of dissolution of partnership in either of those papers, or in both, is always sufficient public notice within the meaning of s. 264 of the Contract Act.

I think, moreover, that the question of sufficiency of notice, whether public or otherwise, is one rather of fact than of law. It may be a question of law, to what sort of notice any particular customer, or class of customers, is entitled; but how far in each case such notice may have been actually given, must generally be a question of fact.

I confess that I feel great difficulty in ascertaining the true meaning of s. 264 of the Contract Act; especially as regards old customers, who, like the plaintiff in the present case, have dealt with the firm before its change or dissolution. I suppose the section means, that all persons dealing with a firm, whether old customers or new, will be affected by any dissolution of the firm or any change of its members if they have actual notice of the fact. This would be quite in conformity with the law of England. But supposing they have no actual knowledge of the fact, is it intended that all persons dealing with the firm, whether old or new customers, are to be bound by public notice of such dissolution or change, whatever the words 'public notice' may mean? The defendant contends, that this is the true meaning of the section; and there is certainly some difficulty in giving a meaning to the words "of which no public notice has been given" unless they are read in that way. And yet I cannot but believe, that if it had been intended to introduce such a serious change into the law, as that construction would involve, the language used would have been much more clear and explicit, and that the rule would have been laid down in an affirmative and not in a negative form.

It is possible that the section was not intended to apply to [684] old customers at all, but only to the general public after the dissolution. But however that may be, I think, after careful consideration, that the section was not intended as an exhaustive exposition of the law, and that we must look elsewhere in the Act for a rule to guide us on this occasion.

The law which regulates the liability of partners for the acts of their co-partners is a branch of the law of agency; and in the absence of any specific rule upon the subject under the head of partnership, we must look to the law of agency for the solution of our present question. Each partner is the agent of his co-partners for the purpose of conducting debts and obligations in the

usual course of partnership business (see ss. 249^{*} and 251[†] of the Contract Act, Lindley on Partnership, 3rd edition, p. 248). And when this agency has once been established, it does not cease as regards third persons, until its termination has become known to them (see s. 208[‡] of the Contract Act).

In the case, therefore, of a dissolution of the partnership, or of the retirement of one of its members, the agency as between the partners themselves would cease from the time of such dissolution or retirement; but as regards third persons, the agency would continue until it had been duly notified. And the mode of notification which the law requires is different in the case of old and known customers of the firm from what it is in the case of other persons. In the case of old customers, who are known to the firm as having dealt with it, an express or specific notice by circular or otherwise should be given (see Lindley on Partnership, 3rd edition, pp. 429 and 430, and the cases there cited). But as regards persons who have not dealt with the firm (or, in other words, the general public), it is impossible in a large community to give any specific notice; and therefore, as regards them, the most effectual public notice which can reasonably be given is sufficient to terminate the agency (see Lindley on Partnership, 3rd edition, p. 430). What is such a public notice must depend upon circumstances, upon the locality, and whether there are any and what newspapers in circulation there, or upon what are the usual means of giving public notice in the neighbourhood. And this, as I have said before, will generally be a question not of law, but of fact.

[685] In this particular case the plaintiff was an old and known customer of the firm. There was no reason why he should not have had express notice of the retirement of the first defendant; and as he had no such notice, and is not proved to have been aware of the fact, we are of opinion that the first defendant was liable upon the promissory note.

Another objection was then taken, that the first defendant was not subject to the jurisdiction of the Court; and as to this the first question is, whether, under the circumstances, that defendant was entitled to raise the point when moving for a new trial. We think it was in the discretion of the Court whether it should be raised or not; and as it was allowed to be raised, and formed one of the grounds on which the new trial was granted, we think that the first defendant was at liberty to insist upon it when the new trial was had.

In our opinion it is a good answer to the suit.

The question turns upon whether Eduljee, the first defendant, was, within the meaning of s. 28 of the Small Cause Courts Act, carrying on business within the Calcutta jurisdiction at the time of bringing the action or at the time when the cause of action arose. We understand, although it is not so expressly stated in the case, that, at both those periods, Eduljee was absent

*[Sec. 249 :—Every partner is liable for all debts and obligations incurred while he is a partner in the usual course of business by or on behalf of the partnership; but a person who is admitted as a partner of an existing firm does not thereby become liable to the creditors of such firm for anything done before he became a partner.]

Partner's liability for debts of partnership.

†[Sec. 251 :—Each partner, who does any act necessary for or usually done in carrying on the business of such a partnership as that of which he is a member, binds his co-partners to the same extent as if he were their agent duly appointed for that purpose.]

Partner's power to bind co-partners.

When termination of agent's authority takes effect as to agent and as to third persons.

‡[Sec. 208 :—The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or, so far as regards third persons, before it becomes known to them.]

from Calcutta and living at Bombay. He had dissolved partnership with his co-defendants on the 21st of May 1880; but from his omission to give notice to the plaintiff, who was an old customer of the firm, had not determined, as between himself and the plaintiff, the agency of his co-defendants to bind him by a promissory note executed in the name of the old firm, and he is therefore liable upon the note.

Is this a carrying on business by him within the meaning of the above section? We are of opinion that it is not. Since the dissolution of the partnership, Eduljee has taken no part nor had any interest in the business. If he can be said to carry it on, it is only in the sense that he has not, as against the plaintiff and other old customers, properly put an end to the authority of his former partners to bind him by their acts done in the partnership name. We are not prepared to dissent from the authorities cited in the reference of *Subheraya Mudali v. The [686] Government* (1 Mad. H. C. Rep., 286) and *Mitchell v. Hudson* (23 L. J., Q. B., 273), which lay down, that the carrying on of business must be personal on the part of a defendant, if it is sought to bring him within the jurisdiction of the Small Cause Court on the ground of carrying on business.

As the result of our judgment will be, that the plaintiff can get no decree against the first defendant in the Calcutta Small Cause Court, and it is doubtful whether, if he accepts a decree against the two other defendants in that Court, he will not lose his remedy against the first defendant, we think, that the plaintiff should have an opportunity afforded him to elect, whether he will accept a decree against the two last defendants alone, or will submit to a nonsuit with a view to hereafter suing the first defendant in some other Court.

If the plaintiff declines to submit to a nonsuit, our answer to the two first questions submitted to us by the Small Cause Court is :—

1. That, upon the facts stated, the suit should be dismissed against the first defendant Eduljee, and decreed against the second and third defendants alone.

2. Our answer to the question submitted at the instance of the plaintiff's vakeel is, that the now trial was properly granted.

As it is stated in the case that the first defendant undertook to have the case argued by the Counsel in this Court at his own expense, we shall make no order as to costs.

Attorney for the Plaintiff : Baboo N. C. Bose.

Attorneys for the Defendants : Messrs. Beeby and Rutter.

NOTES.

[I. NOTICE OF DISSOLUTION OF PARTNERSHIP

The retirement of a dormant partner does not call for notice :—(1886) 9 Mad. 492 ; (1908) P. R. 75 ; as regards liability to a new customer after the retirement of a partner, see (1903) P. R. 78. See also (1901) 25 Bom. 606.

II. WHETHER CARRYING ON BUSINESS SHOULD BE PERSONALLY DONE—

See 3 M.H.C. 146, in which Scotland, C.J. modified his opinion expressed in 1 M.H.C. 286 ; see also 17 Bom. 662.

III. WHEN OBJECTION TO JURISDICTION MAY BE RAISED—

See now C.P.C. 1908, sec. 21 ; under the former Code, see (1891) 13 All. 300 ; (1887) 12 Bom. 155 ; (1884) 7 All. 230 ; (1889) 13 Mad. 273 ; (1897) 23 Bom. 22.]

[= 10 C. L. R. 609]
 [687] APPELLATE CIVIL.

The 8th March, 1882.

PRESENT :

MR. JUSTICE FIELD AND MR. JUSTICE O'KINEALY.

Krishtokishore Dutt and others.....Judgment-debtors

versus

Rooplall Dass and another.....Decree-holders.*

Form of decree -- Drawing up of decree -- Duty of decree-holder --

Execution of decree in two or more districts.

It is the duty of the judgment-debtor as well as the decree-holder to see that the decree is properly drawn up; and if he does not do so, the Court will execute it according to its terms.

A decree may be executed simultaneously in two or more districts.

Saroda Prosand Mullick v. Lutchemput Singh Doogar (11 Moore's I. A., 529; S. C. 10 B. L. R., 214) followed.

IN this case the judgment and order of the Court below were as follows:—

“ In the application for execution of decree the decree-holders state that the properties which the judgment-debtors have within the jurisdiction of the Court are not sufficient to liquidate the debt due under the decree, and pray that the properties which the judgment-debtors have in the districts of Burrisaul, Furreedpore, and the 24-Parganas be also attached, and the amount covered by the decree be realized by selling those properties. The properties which the judgment-debtors possess in the districts of Burrisaul and Furreedpore have already been directed to be attached under this Court's order of the 1st instant. Against the said order the judgment-debtors have raised an objection, stating that, in an execution case, this Court has no power to pass an order directing the attachment of properties lying within the jurisdiction of another Court. This objection appears to be well founded. The only thing this Court can do towards the execution of the decree, is to forward a certificate to the Court within the jurisdiction of which the property lies. See *Saroda Prosand Mullick v. [688] Lutchemput Singh Doogar* (14 Moore's I. A. 529; S.C. 10 B. L. R. 214). It appears from the ruling in that case that this Court can forward certificates to one or more Courts, keeping the decree in the course of execution on the file of this Court.” The following order was passed: “ Ordered, that the decree in question be kept on the file of this Court in the course of execution; that copies of the decree and of this order, accompanied by a certificate, be forwarded to the authorities in the districts of Backergunge and Furreedpore; that the decree-holders should, in the first place, cause the properties of the judgment-debtors lying within the jurisdiction of this Court to be attached and sold; that, in case the whole of the amount due to them under the decree be not realized by means of the sale aforesaid, then they, the decree-holders, shall be at liberty to realize the portion of the decretal amount which may remain unrealized by the sale of the properties which the judgment-debtors possess in the districts of Backergunge and Furreedpore. This order, however, will not preclude the decree-holders from causing, in the first place, under the certificates hereinbefore referred to, the properties of the judgment-debtors lying within the jurisdiction of another

* Appeal from Original Order, No. 208 of 1881, against the order of Baboo Gunga Churn Sarkar, Subordinate Judge of Dacca, dated the 17th June 1881.

Court to be attached. But it is stated that the decree-holders have not at present applied for a certificate of attachment of the judgment-debtors' property lying in the district of the 24-Parganas."

From this order the judgment-debtors appealed.

Baboo Bama Churn Banerjee for the Appellants.— There is no provision in the Procedure Code of 1877 by means of which a decree may be executed concurrently by the Court which passed it and by other Courts. The case of *Saroda Prosad Mullick v. Lutcheepur Singh Doogar* (14 Moore's L. A., 529; s.c., 10 B. L. R., 211) was a case under Act VIII of 1859. Besides, this is a mortgage-decree under which the Court is bound to sell the mortgaged property first, and there is no allegation that it is insufficient.

Babu Mohony Mohun Roy and *Baboo Lall Mohun Dass* for the Respondents.

[689] The **Judgment** of the Court (FIELD and O'KINEALY, JJ.) was delivered by

Field, J. We think there are no grounds for this appeal. The suit was brought to recover a sum of money which was secured by a mortgage. The decree declared that the amount claimed was due to the plaintiffs, and it further declared that, for the recovery of the amount, the property mortgaged could be made liable; in other words, it was a decree in the nature of a money-decree, which also contained a declaration of lien upon certain property. But the decree did not say in express language that the amount decreed was to be recovered in the first instance from the mortgaged property; and that any balance not recovered therefrom might be recovered from the other property belonging to the judgment-debtors. It is now contended before us that, although these express words are not to be found in the decree, it ought to be construed as if they had been actually inserted. We think that we cannot accede to this contention. If the appellants were dissatisfied with the decree in the particular form in which it was drawn up, they should have applied to the Court which passed such decree to amend it by inserting words which would have precluded the decree-holders from proceeding against any other property belonging to the judgment-debtors, until they had first exhausted the property included in the mortgage-bond.

The second contention raised before us is, that the decree cannot be simultaneously executed in more than one district. The decree was a decree of the Dacca Court, and the mortgaged property is situated not in Dacca only, but in other districts; and the judgment-debtors are further stated to have property in the districts of Burrisaul, Furreedpore, and the 24-Parganas. With reference to clause (b) of s. 223¹ of the Code of Civil Procedure, the decree-holders stated in their application for execution, that the whole of the decretal amount could not be recovered from the property situate in the Dacca district and it was, therefore, a proper case for sending a certificate to other districts to have the decree executed in them. We may observe that s. 239 empowers

* [Sec. 223: A decree may be executed either by the Court which passed it or by the Court to which it is sent for execution under the provisions hereinafter contained. The Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court,

* * * *

(b) if such person has no property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court, or

the Court in any other district to which a decree is sent for execution to stay such execution, in order to enable the judgment-debtors to make any necessary application to the Court by which the decree was made, and that the effect of the provisions contained in this section is to alleviate any hardship that might be the result of more than the decretal amount being realized by simultaneous executions in more than one district. The proposition contended for, viz., that a decree can be executed in one district only, and cannot simultaneously be executed in two or more districts, is a proposition which is opposed to the decision of the Privy Council in *Saroda Prosaul Mullick v. Lutchnieput Singh Doogar* (14 Moore's I. A., 529; S.C. 10 B. L. R., 214) and to several decisions of this Court, and is, in our opinion, wholly untenable.

This appeal must, therefore, be dismissed with costs.

Appeal dismissed.

NOTES.

[See also (1905) 1 C.L.J. 315 (318); (1905) 28 Mad. 466; 15 M.L.J. 116 F.B.; (1900) 13 C. P. L. R. 169.

Simultaneous execution must be by order of the Court which passed the decree, and, until it is done, the Court executing it has the seisin and even the Court which passed the decree is not the proper Court within Art. 182 of the Limitation Act :—(1912) 23 M.L.J. 236; 15 L. C. 738.]

[8 Cal. 690]

APPELLATE CIVIL.

The 16th March, 1882.

PRESENT :

MR. JUSTICE CUNNINGHAM AND MR. JUSTICE TOTTENHAM.

Chunder Nath Mullick and others.....Defendants

versus

Nilakant Banerjee.....Plaintiffs.*

*Mortgage by executors—Suit on mortgage—Administration-suit—Writ of
fi-fa—Sheriff's sale—Execution of decree—Lis pendens—
Sale in execution of decree.*

In a suit by the representatives of P. D., against his brother A. D., and after A. D.'s death against his executors, it was found that there was over Rs. 1,32,400 due to the plaintiff from the estate of the deceased; and, on the 29th of August 1866, the executors were ordered to pay this sum into Court. The executors disobeyed; and, on the 24th of December 1866, a writ of *fi-fa* was issued from the High Court, in execution of which certain property belonging to the estate of A. D. was sold to the defendants on the 18th of July 1867. Previously, however, on the 12th of October 1866, the executors had mortgaged the same property to the plaintiff, who brought a suit on his mortgage on the 10th of June 1867. On the 28th of August 1867, the present defendants were made parties to that suit, and in their written statement they alleged that they had been improperly made [691] parties and claimed a title superior to that

* Appeal from Original Decree, No. 62 of 1880, against the decree of Baboo Bhoopatty Roy, Subordinate Judge of East Burdwan, dated the 27th December 1879.

of the plaintiff. That suit was dismissed with costs as against the present defendants, on the ground, that they were improperly added; but a decree for sale was given against the executors, in execution of which the mortgaged property was sold to the plaintiff. In a subsequent suit brought by the plaintiff for possession,—

Held, that the defendants were entitled to redeem, and were not affected by the suit of 1867, as a *lis pendens*.

IN this case the plaintiff sued for the possession of certain lands, which were, he alleges, mortgaged to him by the executors and executrix of Ashutosh Dey, on the 12th October and 14th December 1866; and which, having obtained a decree on the mortgage, he purchased at an execution-sale on the 27th September 1870. He says, that his possession of the property has been resisted by Khogendro Nath, since deceased, and the principal defendants. Khogendro having purchased the property at a Sheriff's sale with notice of plaintiff's mortgage, the plaintiff urges, that his mortgage gives him a preferential right to that of the defendants. He prays accordingly for possession.

The material facts in this case are as follows :—In a suit brought in the Supreme Court by the representatives of one Promothonath Dey, against his brother Ashutosh, and after his death against his representatives, it was ordered, on the 29th of August 1866, that the sum of Rs. 1,32,406, due from the estate of the deceased, should be paid by his representatives, they having admitted assets, into Court to the credit of the suit.

On the 12th October 1866, the executors and executrix of Ashutosh, by deed of that day's date, mortgaged the property therein set forth for the sum of Rs. 22,347 to the plaintiff. On the 14th December 1866, the same parties mortgaged the same property to the plaintiff by way of further charge for Rs. 8,652.

On the 21st December 1866, a writ of *fi-fa* issued from the High Court, ordering the Sheriff of Calcutta to levy from the land and effects of the late Ashutosh Dey, the sum of Rs. 1,32,406 with interest, declared to be due by the decree of 29th August 1866. This writ was received in the Sheriff's office on the 26th January 1867.

On the 10th June 1867, the plaintiff sued (O. S. 476 of [692] 1867) on his mortgage of the 12th October 1866, and further charge of 14th December 1866, praying for recovery of the mortgage-money, and in default of recovery that the mortgage might be foreclosed, or the mortgaged property sold.

On the 18th July 1867, the Sheriff's sale under the *fi-fa*, issued 24th December 1866, took place, and the right, title and interest of Ashutosh Dey was put up to sale and sold to Khogendro Nath for Rs. 3,200.

On the 28th August 1867, the plaintiff petitioned the Court, setting forth the *fi-fa* proceedings in Promothonath Dey's suit, and the sale in execution of the right, title and interest of Ashutosh Dey in the mortgaged property, and amongst others the purchase by Khogendro Nath of the Mehal Mymaree for Rs. 3,200, and the sale of several other portions of the property for smaller sums. In consequence of this petition, Khogendro Nath and the other purchasers at the *fi-fa* sale were added as defendants in the mortgage-suit (O. S. 476 of 1867), and the plaint was further amended by the addition of a prayer on the part of the plaintiff to have it declared by the decree whether his title as mortgagee was to any, and if to any, to what, extent preferable to that of the several added defendants, under the sales to them by the Sheriff in the *fi-fa* proceedings.

On the 13th January 1868, Khogendro filed a written statement in original suit No. 476 of 1867, urging amongst other objections, that he had been improperly added as a party, denying that he owed any portion of the mortgage-debt, or was a party to the mortgage, stating that he had purchased certain parcels but not from the executors and executrix of Ashutosh, and declining to set forth his title; and he urged that the alleged mortgages could not affect the property purchased by him, and prayed that, as against him, the suit might be dismissed. On the 28th February 1868, the suit No. 476 was dismissed with costs, as against Khogendro and the other added defendants: and the original defendants were directed to redeem within six months, and in default, their right, title and interest in the mortgaged property was to be sold. In drawing up the decree, objections were raised to the form in which the Registrar had proposed that it should be couched. These [693] objections were dealt with by the Court on April 27th, 1868. The Judge explained that "the suit having been originally brought against the representatives of Ashutosh, subsequently, on the application of the plaintiff, a number of persons claiming various portions of the property by a title prior to, and independent of, that of the mortgagor, were added as defendants; but when the cause came on for settlement of issues, I considered that, as these added defendants claimed under different titles, and sought to raise a variety of different issues, and as their interests could not be affected by the result of the suit, the suit, as it then stood, was improperly framed, and I accordingly dismissed the suit as against all but the three original defendants." The Judge went on to say that the counsel for one of the defendants objected to the form of the decree, which simply ordered the sale of the mortgaged property. "All that the Court intends to order to be sold," the learned Judge observed, "and all that it has power to sell, is the interest which the mortgagor had at the time of the mortgage. If any of the other defendants have any claim on the property, it will in no way affect their title, however the decree may be worded." In order, however, to guard against possible misapprehension, the Court directed that the decree should run as ordering the sale of the right, title and interest of the mortgagors in the premises mortgaged to the plaintiff by the indenture and further charge. In execution of the decree settled in compliance with this direction, the plaintiff purchased the right, title and interest of the three original defendants in the mortgaged-premises for Rs. 1,600, and obtained a certificate to that effect dated 27th September 1870.

The question raised in the present appeal was the right of the plaintiff, as such auction-purchaser, as against the defendants, who were in possession of the mortgaged premises under the Sheriff's sale of 18th July 1867. In the original suit a question was raised as to the identity of the property now claimed with that mortgaged to the plaintiff. That point was abandoned in appeal, the defendants' counsel admitting that the properties claimed in the suit were identical with those mortgaged. It was also admitted that the defendants having purchased in [694] July 1867, the present suit having been filed 20th May 1879, was not barred by limitation.

The Court of First Instance held: (i) that the decree of 29th August 1866, against the representatives of Ashutosh, was no bar to the mortgage and further charge of 12th October 1866 and 14th December 1866 respectively; (ii) that the lands were not under attachment at the time of the mortgage and further charge; (iii) that the suit was not barred by limitation; (iv) that Khogendro having been joined as a defendant in the plaintiff's mortgage-suit, chose not to claim through the mortgagors, but set up an independent title;

(v) that the decree, drawn up in the presence of Khogendro's counsel, directed the sale of the right, title and interest of the mortgagor at the time of the mortgage, and that this had been purchased by the auction-purchasers; (vi) that Khogendro's purchase was subject to the plaintiff's mortgage; that Khogendro having had knowledge of plaintiff's decree, had not chosen to redeem, and did not even now propose to redeem the mortgaged premises, but set up a preferential title. "The defendants," the judgment says, "cannot with propriety say that Khogendro Nath was no party to the plaintiff's suit. It was by his conduct and act that Khogendro Nath had not had the question arising between the mortgagee and the purchasers from the mortgagors tried and determined in that case. The line of defence adopted by Khogendro Nath was quite distinct from that of a purchaser claiming through the mortgagors. He did not in his answer take the falsity or invalidity of plaintiff's mortgage as a ground of attack to plaintiff's cause, but did raise divers questions other than his purchase of the equity of redemption. Khogendro Nath, having been a party to the suit, chose to set up a distinct title, and I think his representatives are barred by s. 13 of the Civil Procedure Code from raising the same question as ought to have been a ground of attack in the defence to the plaintiff's suit. The High Court gave a decree to the plaintiff against the mortgagors, and held, that the decree should not affect the defendant Khogendro Nath, who set up a distinct title. The decree in the plaintiff's case ultimately determined the question of mortgage between the mortgagee and mortgagors, [695] and if Khogendro Nath, who was a party to the decree, did not claim through the mortgagor, he or his representatives cannot criticise it."

The defendants appealed to the High Court.

Mr. *Evans*, Baboo *Bhounb Chunder Banerjee*, Baboo *Rash Behary Ghose*, and Baboo *Sharada Churn Mitter* for the Appellants.

Mr. *Bonnerjee*, Baboo *Gopal Lall Mitter*, and Baboo *Behary Lall Mitter* for the Respondent.

Mr. *Evans*.—A suit for possession is not maintainable here. The plaintiff must foreclose the equity of redemption that has passed to the defendants - *Syed Enam Montazooddeen Mahomed v. Raj Coomar Dass* (11 B. L. R., 408; s. c., 10 W. R., 187), *Byjnath Singh v. Gobardhan Lall Mohasohree* (24 W. R., 210), *Cheit Narain Singh v. Gunga Pershad* (25 W. R., 216), *Kokil Singh v. Duli Chund* (5 C. L. R., 243), *Bolaki Lal v. Thakur Pertan Singh* (6 C. L. R., 370), *Radha Pershad Misser v. Monohur Das* (7 C. L. R., 293). The property being situated in the mofussil, the suit in the High Court for foreclosure could not affect defendants' title, and the theory of *lis pendens* is not applicable - *Anundomoyee Dossee v. Dhonendro Chunder Mookerjee* (14 Moore's I. A., 101; s. c., 8 B. L. R., 122). Besides, there would be a *lis pendens* on each side, the suit of *Dey v. Dey* having been pending and the property attached before plaintiff brought his suit in the High Court. The defendants having been discharged from the suit on the ground of multifariousness, the decree in that case is not binding on them; they must be dealt with as not having been parties thereto. As to the effect of a writ of *ji-fa*, see *Bhuggobutty Dossee v. Shamachurn Bose* (I. L. R., 1 Cal. 337), and *Monmothonnath Dey v. Greender Chunder Ghose* (24 W. R., 366). The plaintiff having purchased some of the properties pledged, there must be an apportionment of the mortgage-debt; but the [696] present suit is not so framed - *Nawab Azimut Ali Khan v. Jowahir Singh* (13 Moore's I. A., 404), *Kaliprosanna Ghose v. Kamini Soonduri Choudhrai* (I. L. R., 4 Cal., 475). The Court ought at least to follow the course taken in *Kasumunnissa Bibee v. Nilratna Bose* (*ante*, 79), which was a suit in respect of another portion of the Dey's property.

Mr. *Banerjee* for the Respondent. —The present contention is opposed to the defence made by these parties in the former suit. They then claimed to be dismissed from this suit, and they cannot now contend that they ought to have been made parties. *Anundomoyee Dossce v. Dhonendro Chunder Mookerjee* (14 Moore's L. A., 101; S.C., 8 B. L. R., 122), is not in point here. The parties are bound by *lis pendens*. They undoubtedly had full notice of the plaintiff's former suit, and might then have redcomed if they pleased.

Mr. *Evans* in reply.

The **Judgment** of the Court (CUNNINGHAM and TOTTENHAM, JJ.) was delivered by

Cunningham, J. (who, having stated the facts as above set out, continued: — It is conceded that, for the purposes of the present argument, the decree against Ashutosh's estate, of the 29th August 1866, did not constitute a charge on the property, and consequently that the commencement of the defendant's title cannot date earlier than 24th December 1866, *i.e.*, subsequent to the plaintiff's mortgage, and that consequently the interest which the defendants purchased was subject to the plaintiff's mortgage; and, therefore, that the independent title set up in the mortgage-suit, which led to its being dismissed as against them, cannot be made out.

The question therefore is, whether the original Court is right in considering that the defendants, having got themselves struck out of the plaintiff's mortgage suit on the strength of a title independent of the mortgagors, and not having chosen to assert their rights as holding under the mortgagors, are at liberty in the present suit to set up those rights and to claim to retain the [697] mortgaged-property now in their possession on payment of the plaintiff's claim against it under the mortgage. Section 13 of the Code provides, that "no Court shall try any suit or issue in which the matter directly and substantially in issue having been directly and substantially in issue in a former suit, between the same parties, has been fully heard and determined"; and Explanation II provides, that "any matter which might and ought to have been made a ground of defence or attack in such former suit, shall be deemed to have been directly and substantially in issue." Now the rights of the defendants as holding under the mortgagors certainly constituted a matter which might and ought to have been made a ground of defence, supposing the Court not to have accepted the view that the defendants held by a title prior to, and independent of, the mortgagors, and were on this ground entitled to be discharged from the suit; and it might be contended, therefore, that this question of the defendants' right must be deemed to have been directly and substantially in issue. But it cannot be said that it was "finally heard and decided," the view taken by the Court of the defendants' position having rendered any such hearing and decision unnecessary. We think, therefore, that the defendants are not precluded by s. 13 from raising the question of their rights under the mortgagors, and that we are at liberty to consider what those rights amount to.

The order of events was as follows:—The *ji-fa* proceedings were subsequent to the plaintiff's mortgage, but previous to the institution of the mortgage suit; and the defendants' purchase in the *ji-fa* proceedings was subsequent to the mortgage suit; plaintiff's purchase of the mortgaged property was last of all. It has been urged, with reference to these dates, that Khogendro having purchased subsequently to the institution of the mortgage-suit, his purchase could not withdraw any portion of the mortgaged-property from the operation of the decree in that suit, and, consequently, that plaintiff has a right to what-

ever he bought in execution of the decree in that suit independent of any claim by the defendants under the *ji-fa* sale.

But against this it may be urged that the sale under the *ji-fa* was in virtue of an attachment-proceeding, which commenced [698] as early as January 1867, prior to the institution of the plaintiff's mortgage suit, and that consequently whatever could have been sold in January 1867 could be, and in fact was, sold to the defendants in July '867, notwithstanding that the plaintiff had meanwhile instituted his suit.

We think that this is the right view. The doctrine of *lis pendens* appears to be grounded on the inconvenience which would arise, if mortgagors were able, after action brought, to alienate the mortgaged-property; but it does not follow that the rule would hold good where the alienation is not by the mortgagor, but by the Court, acting on behalf of creditors against the mortgagor, and where the process of sale, or at any rate proceedings with a view to the sale, of the property had commenced before the suit was instituted.

We think, therefore, that the plaintiff is not entitled, in virtue of having filed his suit previous to the defendants' *ji-fa* purchase, to ignore that purchase, and to hold the mortgaged property free from any right which the defendants acquired by the *ji-fa* sale. We think that we are bound to give effect to the well-recognized rule that the interest of a person, who has purchased the mortgagor's equity of redemption, is not affected by any decree in a suit to which he is not a party, and to hold accordingly that the defendants, having purchased the mortgagors' interest in the estate, *viz.*, the right of redeeming the existing mortgage, did not lose that right of redemption in consequence of the decree obtained in a suit, against the representatives of Ashutosh.

The next question is, whether the defendants having been joined in the mortgage-suit on the plaintiff's motion, and having got the suit dismissed as against them, are now precluded from setting up their claim to the mortgaged premises. We are of opinion that the orders passed in that suit, so far as regards the present defendants, had no effect beyond deciding that, whatever their claims might be, they could not conveniently be tried in that suit, and that consequently both parties remained at liberty to contest subsequently, any matter to which the plaintiff's mortgage, or the defendants' purchase, might give rise.

[699] A counter objection has been taken that the defendants do not offer to redeem, but take their stand on an anterior and superior title. An objection has also been grounded on the form of the present suit, and it has been urged that the plaintiff having sued for direct possession, the suit ought, if he be found not entitled to direct possession, to be simply dismissed.

We think, however, that we are at liberty to follow the course taken in a very analogous case regarding the same property by PONTIFEX, J., in *Kasumunnissa Bibee v. Niralatna Bose* (*ante*, p. 79), and to give the plaintiff a decree for possession, conditional on the defendants' failure to redeem, and that we are at liberty to decide what are the equitable terms on which the defendants may be permitted to redeem. The plaintiff has himself purchased several of the mortgaged properties, and he cannot, therefore, throw more than a proportionate share of the mortgage-charge on another portion of the mortgaged-premises: see *Gossyen Luchmee Narain Poori v. Bickram Singh* (4 C. L. R. 294) and *Nawab Azimut Ali Khan v. Jowahir Singh* (13 Moore's I. A. 404).

In the present instance the plaintiff paid Rs. 1,600 as the price of the mortgaged-property, and we think that the equities of the case will be met by giving the defendant six months within which to redeem by payment of this sum, together with interest at 6 per cent. from the date of the plaintiff's

purchase, 27th April 1870; the plaintiff in default of such redemption within six months to be entitled to khas possession. If the defendants redeem, they will do so on the terms of paying all costs of this litigation. If they do not redeem, there will be no order as to costs, and the plaintiff will be entitled to khas possession. The decree of the Original Court will be modified accordingly.

Decree modified.

NOTES.

[This case was **reversed** on appeal to the Privy Council :—(1885) 12 Cal. 414. The doctrine of *lis pendens* is applicable to both execution sales and involuntary alienations :—23 All. 760; 5 C. L. J., 527; 13 C. W. N., 226-9 C. L. J. 96.

The purchaser of equity of redemption is unaffected by suits to which he is not a party : 11 C. W. N. 403 5 C. L. J., 315.

[700] APPELLATE CIVIL.

The 20th March, 1882.

PRESENT :

SIR RICHARD GARTIL, KT., CHIEF JUSTICE, AND MR. JUSTICE MORRIS.

Jonmenjoy Mullick.....Plaintiff

versus

Dassmoney Dasse and another.....Defendants.*

Review of judgment—Subsequent Full Bench decision—Ground for review—

Suit by mortgagee to declare lien—Subsequent suit for possession.

The plaintiff, a mortgagee, obtained a money-decree against the defendant. A third party, in execution of another decree obtained against the same defendant, put up for sale the property included in the plaintiff's mortgage, and himself bought the right, title, and interest of his judgment-debtor in the property mortgaged to the plaintiff. The plaintiff, subsequently, in execution of his decree, bought in the same property himself, and brought a suit against the defendant and the third party to have it declared that the latter held the property subject to his mortgage. The suit was decreed by the Subordinate Judge, but eventually dismissed by the High Court, on the ground that the plaintiff, by suing for his money-decree only, had deprived himself of the benefit of his lien as against the third party. The plaintiff thereupon brought another suit against the same parties to recover possession of the mortgaged property, which suit eventually came up before a Full Bench, where it was decided that the plaintiff had no right to bring the suit for recovery of possession, but that his proper course was to sue to have his lien upon the property declared, the Court intimating that it would be open to the plaintiff to apply for a review of judgment in the suit originally brought by him.

On the review coming on to be heard, it was held, that the plaintiff was entitled to a review of that judgment, and that the case was distinguishable from the general rule as to reviews laid down in *Madhub Chunder Ghose v. Radhika Choudhrai* (7 W. R., 405), *Dwarkanath Doss Biswas v. Manick Chunder Doss* (9 W. R. 102.), and *Shama Churn Chuckerbutty v. Bindabun Chunder Roy* (B. L. R., Sup. Vol., 892; s. C., 9 W. R., 181), inasmuch as the granting the review did not interfere with previous decisions of the Court in other cases between other parties.

THE facts of this case and the arguments used at the hearing sufficiently appear from the judgment.

Baboo Rash Behary Ghose for the Petitioner for review (the Plaintiff).

* Application for review in Special Appeal, No. 60 of 1877, against the decree of L. R. Tottenham, Esq., Judge of Midnapore, dated the 30th August 1876, reversing the decree of Baboo Judunath Roy, Subordinate Judge of that District, dated the 21st June 1875.

[701] Baboo Sreenath Dass and Baboo Bhubany Churn Dutt opposed the application.

The Judgment of the Court (GARTH, C.J., and MORRIS, J.) was delivered by.

Garth, C. J.—We thought it right in this case to grant a review of judgment in consequence of the Full Bench decision in another suit between the same parties and upon the same subject-matter. The Full Bench case is reported in I. L. R., 7 Cal., 714, and the circumstances under which this suit was brought will be found stated at length in the report of the former judgment in I. L. R., 3 Cal., 363 ; s. c., 1 C. L. R., 446.

On the 26th August 1868, the ancestor of the defendant No. 2 borrowed money from the husband of defendant No. 1, upon a simple money-bond. On the 10th January 1869, the same person borrowed money from the plaintiff upon a specially registered mortgage-bond, which hypothecated two estates for payment of the loan. On the 22nd February 1871, the plaintiff obtained a money decree only on this mortgage-bond. On the 25th February 1871, the husband of defendant No. 1, in execution of a decree which had been previously obtained by him for his debt, bought at auction the right, title, and interest of his debtor in one of the properties mortgaged to the plaintiff. The plaintiff then took out execution of his money-decree, and on the 13th of June 1871 his debtor's right, title, and interest in the same property was again put up to sale and bought in by the plaintiff himself. The plaintiff then brought this suit to have it declared, that defendant No. 1 held the property subject to his mortgage.

Under these circumstances the plaintiff's suit, after having been decreed by the Subordinate Judge, was dismissed in the High Court, upon the ground that the plaintiff, by suing for his money-decree only, had deprived himself of the benefit of his lien as against the defendant No. 1.

The plaintiff then brought another suit to recover possession of the mortgaged-property from the defendant No. 1. That case came up on appeal to the High Court, and the learned Judges of the Division Bench, having grave doubts as to the correctness of the former judgment in this suit, referred [702] certain questions to the Full Bench, the first of which was as follows:—Can the purchaser, under the decree obtained under the specially registered bond, sue the first purchaser for restoration of the mortgaged property?

The Judgment of the Full Bench upon that first point being decisive of the rights of the parties, it was not considered necessary to answer the other questions referred. The Full Bench say—"The plaintiff has clearly no right to sue for the restoration of the mortgaged-property; his proper course was that which he adopted in the first instance, namely, to sue to have his lien upon the property declared. The High Court's Judgment in *Dassmoney Dossee v. Jonmenjoy Mullick* (I. L. R., 3 Cal. 363 ; 1 C. L. R., 446), appears to us to be erroneous."

The Full Bench further intimated that in that suit they were of course unable to give the plaintiff any relief, but that it was quite open to him to make an application to a Division Bench for a re-hearing or a review of the judgment in the former suit, as he might be advised.

In consequence of this intimation, an application was made to us by the plaintiff to review the former judgment of this Court; and as both the Judges

who took part in that judgment had left the Court, and we considered there was sufficient ground for a review, we granted the application.

The case has now been re-heard before us on review ; and the only point which has been seriously argued by the defendants is, that the decision of the Full Bench, however clearly it may have declared the right of the plaintiff in the present suit, is no ground for a review.

It is said, and said truly, that if any change in the law, which may be occasioned by a decision of the Privy Council or by a Full Bench of a High Court, were to have the effect of reversing all former decisions in suits which had been decided on a different view of the law, litigation would never be at an end, and the rights of parties would never be secure. And in aid of that argument several authorities were cited by the learned counsel for the defendant, of which the case of *Dwarka Nath Doss Biswas v. Manick Chunder Doss* (9 W. R., 102), *Shama Churn Chucker-[703]butty v. Bindabun Chunder Roy* (B. L. R., Sup. Vol., 892 ; 9 W. R., 181), and *Madhab Chunder Ghose v. Radhika Chowdhraïn* (7 W. R., 405) form illustrations.

In this general rule we entirely agree ; but we think that the present case stands upon a different footing.

The plaintiff in this suit, having been successful before the Subordinate Judge, had his case dismissed in the High Court. In consequence of this he made an alternative claim in a second suit, and upon the question in suit being referred to a Full Bench, the learned Judges unanimously decided, that the course which the plaintiff had taken in the second suit was wrong, and that the course which he had taken in the first suit was right.

Upon this decision of the Full Bench, we think that we are justified in reversing the former judgment on review and carrying into effect the decision of the Full Bench. This appears to us to be a very different thing from interfering with previous decisions of the Court in other cases between other parties.

It is obvious that the justice of the case is entirely in the plaintiff's favour ; and we are not aware of any rule or authority which prevents us from giving him his rights.

The former decision of this Court will, therefore, be reversed, and the decree of the District Judge restored ; and the defendants will pay the plaintiff the costs of this last hearing, but not of the former one.

Review granted and decision reversed.

NOTES.

[See also (1888) 13 Bom. 330 (335) as regards review.]

[8 Cal. 703]

APPELLATE CIVIL.

The 22nd March, 1882.

PRESENT :

MR. JUSTICE FIELD AND MR. JUSTICE O'KINEALY.

Shurroop Chunder Goocho.....Decree-holder

versus

Ameerrunnissa Khatoon.....Judgment-debtor.*

Mortgage decree—Execution of decree—Attachment and sale—Property in different districts—Jurisdiction—Civil Procedure Code (Act X of 1877), s. 19.

A suit was instituted on a mortgage of a single revenue-paying estate in the Court of the Subordinate Judge of the District of Backergunge, under the provisions of s. 19, Act X of 1877, and a decree was obtained for the [704] sale of the mortgaged property. On an application for execution of the decree to the Court which passed it,

Held, that the Court was competent to order a sale of the whole of the mortgaged property, though only a portion of it was situated in the district of Backergunge.

Kally Prosunno Bose v. Dimonath Mullick (11 B. L. R., 56 ; S. C., 19 W. R., 434) cited and followed.

THE proceedings which took place in the Court of the Subordinate Judge in this case are as follows :—

" May 2, 1881.—The decree-holder having filed an application for the attachment of properties of the judgment-debtor situate in this district and in the district of Furreedpore, it is ordered that the application be registered, and that the same be laid before the Court to-morrow.

" May 3, 1881.—There are certain questions regarding the jurisdiction of this Court over certain properties sought to be sold, which questions have been raised and discussed this day. Order to be passed to-morrow.

" May 5, 1881.—Order postponed pending the result of a reference to be made.

" May 11, 1881.—There is an order of the superior Court prohibiting the attachment and sale by this Court of properties situate within the jurisdiction of another Court. It is therefore ordered, that the properties situate in this district be attached and sold ; that the prayer of the decree-holder, for having the properties situate in the Furreedpore District attached and sold, be disallowed, and that the case be laid before the Court on the 14th of June, after the attachment order shall have been made."

The decree-holder appealed to the High Court.

Baboo Kashi Kant Sen for the appellant.—The suit in which this decree was obtained was a suit on a mortgage, instituted in the Court below under s. 19 of Act X of 1877. The defendant made no objection whatever, and the appellant

* Appeal from Original Order, No. 250 of 1881, against the order of Baboo Rajchunder Sannyal, Officiating Subordinate Judge of Backergunge, dated the 11th May 1881.

obtained a decree for the sale of this property, which, though situated in different districts, is but one single estate. It is not competent for the Judge in the execution department to go behind that decree, and we are entitled to have the whole property sold—*Kally Prosunno Bose v. Dinonath Mullick* (11 B. L. R., 56; s. c., 19 W. R., 434), and *Shib Narain [705] Singh v. Gobind Doss Bhukut* (23 W. R., 154). The Subordinate Judge had no authority to refer this matter to any Court other than the High Court, and such reference is of no validity.

The respondent did not appear.

The **Judgment** of the Court (FIELD and O'KINEALY, JJ.) was delivered by

Field, J.—In this case the property, in respect of which execution was sought, consisted of a single revenue-paying estate, part of which lies within the district of Backergunge and part within the district of Furreedpore. The decree, affecting the whole of this property, was obtained in the Backergunge district: and the suit having been instituted after the new Civil Procedure Code, Act X of 1877, came into force, s. 19 of that Act was applicable to the case. The decree-holder applied to have the whole of the revenue-paying estate sold in execution of his decree. The Subordinate Judge rejected this application in so far as that portion of the revenue-paying estate situate within the Furreedpore district is concerned, and he apparently allowed the execution to proceed so far as concerns that portion of the property situate within the Backergunge district. It is now contended in appeal before us, that the Subordinate Judge ought to have allowed execution to proceed in his Court against the whole revenue-paying estate, although only a portion of the estate is situate in Backergunge. We think that this contention is correct. It is supported by the case of *Kally Prosunno Bose v. Dinonath Mullick* (11 B. L. R., 56; s. c., 19 W. R., 434), which has been several times followed in this Court; and we may further observe, that the change introduced by s. 19 of the present Code has been accepted as applicable to execution-proceedings also. The case, of course, would be very different if the property consisted of different talooks or different revenue-paying estates, the whole of any one or more of which was situate within the Furreedpore district. This appeal must be decreed and the order of the Subordinate Judge set aside. He is directed to allow the execution to proceed in respect of the whole property.

Appeal allowed.

NOTES.

[SALE IN EXECUTION—TERRITORIAL JURISDICTION—

The observation of Field, J., to the effect that the case would be very different if the property consisted of different talooks, etc. (pp. 705) has been regarded as a mere *obiter dictum*.

Sales of such property were upheld in (1887) 14 Cal. 661 and in (1888) 15 Cal. 667 the sale was upheld, though the *whole* property had been transferred to another jurisdiction.

See also 19 Cal. 13; 21 Cal. 639; 22 Cal. 871; 28 Cal. 238, as regards sales in suits on mortgages and charges.

As regards other suits, see 17 Cal. 699; 18 Cal. 526.

The judgment of Field, J., is criticised by Hukm Chand in his *Civil Procedure* (1900), Vol. I. pp. 331, 332.]

[706] APPELLATE CIVIL.

The 22nd March, 1882. ●

PRESENT :

Mr. JUSTICE FIELD AND Mr. JUSTICE O'KINEALY.

Brojendra Coomar Bhoomick and others.....Defendants

versus

Woopendra Narain Singh and another.....Plaintiffs.

*Landlord and tenant—Accretion—Enhancement—Arrears of rent, Suit for—
Notice of enhancement.*

When land has accreted to a ryot's holding, the rent paid by the ryot may be enhanced in respect thereof under the provisions of cl. 3, s. 18 of Beng. Act VIII of 1869; and no suit for rent in respect of such accretion will lie unless a proper notice of enhancement has been previously given.

Ramnidhee Manjee v. Parbutty Dassee (I. L. R., 5 Cal., 823) followed.

THESE were suits for rent in respect of certain lands which were formed by accretion to the defendants' holdings. The Court of first instance cited and distinguished the cases of *Watson v. Neel Kant Sircar* (10 W. R., 330), and *Buroda Kant Roy v. Radha Churn Roy* (13 W. R., 163); and, considering that the suits "were, to all intents and purposes, enhancement suits, and should have been brought after notice," dismissed them with costs. On appeal, the Judge said: "These four suits are between the same parties, and the appeals have been heard together. The suits were dismissed by the Munsif, on the ground that they were virtually suits for enhancement, and that they would not lie without service of notice. I do not quite understand the Munsif's reasoning as to the ruling in the case of *Watson v. Neel Kant Sircar* (10 W. R., 330). It appears to me, to render it perfectly clear, that ss. 13 and 17 of Act X of 1859 (of which s. 13 is replaced by s. 14 of Beng. Act VIII of 1869) have no application to the case of new accretions." The learned Judge then reversed the Munsif's decision, and remanded the cases for retrial.

The defendants appealed to the High Court.

[707] Baboo *Doorgadass Dutt* for the appellants contended, that the Judge was wrong in holding that the Rent Law did not apply to these cases. In *Watson v. Neel Kant Sircar* (10 W. R., 330), the defendants held an under-tenure, and were not ryots as here.

Baboo *Gopal Lall Mitter* for the Respondents.

The Judgment of the Court (FIELD and O'KINEALY, JJ.) was delivered by

Field, J.—These are appeals from orders of the Officiating District Judge of Nuddea, remanding four cases under the provisions of s. 562 of the Code

* Appeal from Appellate Orders, Nos. 335, 336, 337 and 338 of 1881, against the order of J. Whitmore, Esq., Officiating Judge of Nuddea, dated the 12th August 1881, reversing the order of Baboo Behari Lall Banerjee, Second Munsif of Kooshtea, dated the 27th July 1880, remanding the case for trial on the merits.

of Civil Procedure. The facts are briefly these. The plaintiffs sued for rent in respect of certain land that had accreted to the tenures or holdings of the defendants. The Munsif was of opinion that these were really enhancement suits, and that the service of the notice required by s. 14 of the Rent Act was necessary. The District Judge on appeal held that notice was not necessary; and he remanded the cases to be tried on the merits. The decision of the District Judge is opposed to the view taken by a Division Bench of this Court in the case of *Ramnidhee Manjee v. Parbutty Dasse* (I. L. R., 5 Cal., 823). In the view there taken we agree. We think that, although the Alluvion Regulation (XI of 1825) entitles a tenant to hold, as part of his jama, additional land which has accreted thereto, yet, as regards the question of rent, the case comes substantially within the grounds of enhancement contained in clause 3 of s. 18 of the Rent Act. We must, therefore, set aside the orders of remand passed by the District Judge, and restore the Munsif's decree dismissing these suits. The appellants will be entitled to their costs in all the Courts.

Appeals allowed.

[708] APPELLATE CIVIL.

The 23rd March, 1882.

PRESENT :

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

Nocury Lall Chuckerbutty.....Plaintiff

versus

Bindabun Chunder Chuckerbutty and others.....Defendants.*

Co-sharers of land—Removal of building erected by one of several co-sharers—Acquiescence.

In a case a permanent building has been erected by some or one of several co-sharers on the land jointly held, and another co-sharer subsequently seeks to have the building removed; the principle upon which the Court acts is, that though it has a discretion to interfere and direct the removal of the building, this is not a discretion which must necessarily be exercised in every case; and, as a rule, it will not be exercised unless the plaintiff is able to show that injury has accrued to him by reason of the erection of the building; and perhaps further, that he took reasonable steps in time to prevent the erection.

THIS was a suit for declaration of ijmal right to a piece of land adjoining the family dwelling-house of the plaintiff and the defendants, who were joint in estate and for the demolition of a building erected upon the land by one of the defendants. The defendants contended that the land belonged to them alone, but the lower Court found that it was joint family property. It was proved that the plaintiff did not raise any objection when the building was commenced, but stood by and allowed the defendants to expend a considerable sum of money on the building before instituting the present suit. Both the lower Courts dismissed the suit, on the ground that he should have taken steps to restrain the defendants from building, and that not having done so, it was too late to come to the Court to ask for the demolition of the building.

* Appeal from Appellate Decree, No. 639 of 1881, against the decree of Baboo Kristo Chunder Chatterjee, First Subordinate Judge of Backergunge, dated the 24th January 1880, affirming the decree of Baboo Gopal Chunder Bose, First Munsif of Burisal, dated the 17th November 1879.

The plaintiff appealed to the High Court.

Baboo *Bhoobun Mohun Doss* for the Appellant.

Baboo *Sreenath Doss* for the Respondents.

[709] The Judgment of the Court (MCDONELL and FIELD, JJ.) was delivered by

Field, J.—The plaintiff in this case sued to have a building removed, which had been erected at very considerable expense upon a piece of land, which has been found to be the joint property of Hindu co-sharers. There is a considerable number of decisions connected with or bearing upon the question at issue in this case. Some of these decisions are directed to define what are the rights of a Hindu co-sharer as regards the use of land which is the joint property of himself and other co-sharers. Others of these decisions are concerned with the proceeding by injunction, and the circumstances, under which an injunction should be granted when the rights of other co-sharers are infringed. A third class of these cases consists of decisions in suits brought to remove permanent buildings erected by one co-sharer upon land forming joint property, and in the alleged infringement of the rights of the other co-sharer. The observations which have been made by the learned Judges of this Court in many of these cases, must be read and understood with reference to the particular facts of the case with which they were dealing, and the particular remedy sought in that case. Observations made with the object of defining the right of one Hindu co-sharer may be inapplicable to a case in which, as in the present case, it is sought to remove a permanent building erected in the infringement of the rights of other co-sharers. There is a considerable difference between a case in which the other co-sharers, acting with diligent watchfulness of their rights, seek by an injunction to prevent the erection of a permanent building; and a case in which, after a permanent building has been erected at considerable expense, he seeks to have that building removed. In a case such as that last mentioned, the principle which seems to have been settled by the decisions of this Court is this, that though the Court has a discretion to interfere and direct the removal of the building, this is not a discretion which must necessarily be exercised in every case; and, as a rule, it will not be exercised unless the plaintiff is able to show that injury has accrued to him by reason of the erection of the building, and perhaps further, that [710] he took reasonable steps in time to prevent the erection. In the present case the Courts below have come to the conclusion that this discretion should not be exercised so as to direct the removal of the building, and the view which has thus been taken by the Courts below is one with which we see no reason to interfere on appeal.

This appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[CO-OWNER'S ENJOYMENT- INJURY—

Similar principles were applied in the following cases —

(1904) 7 O. C. 336 (337), *wells*; (1903) 30 Cal. 901 (903), *wall*; (1900) 20 A. W. N. 55, *building*; (1887) 9 All. 661, *building*; (1886) 14 Cal. 236, *tank*, 189.

In (1911) 2 M. W. N. 437, the Court, in holding that this case was not applicable to *Malabar Tarwads* (under which there is no right of partition), explained it as having proceeded partly on the right of estoppel and partly on the right to partition vested in the co-owner

. See also 14 C. P. L. R. 76.]

The 27th March, 1882.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE BOSE.

Bunnomali Nundi.....Plaintiff

versus

Hurrydass Byragi.....Defendant.*

Malicious prosecution—Damages—Costs, Criminal Court.

In a suit for damages for malicious prosecution the plaintiff is entitled to recover the costs necessarily incurred by him in defending himself on the criminal charge.

THIS was a suit to recover damages for malicious prosecution and the costs of defence in the Criminal Court. The Munsif assessed damages "for the loss of honour or mental anxiety sustained by the plaintiff" at Rs. 79, and awarded Rs. 121 on account of the costs of defence. On appeal by the defendant it was argued, that the plaintiff was entitled to all costs incurred by him in the Criminal Court. The Additional Judge, however, said,—“that is a rule which obtains in England where the damage is assessed by the jurors, but it does not appear that it has ever been acted on by Courts in India” and modified the decree of the lower Court, giving the plaintiff a decree for Rs. 50.

The plaintiff appealed to the High Court.

Baboo *Busunt Coomar Bose* for the Appellant.

Baboo *Anund Gopal Palit* for the Respondent.

[711] The Judgment of the Court (PRINSEP & BOSE, JJ.) was delivered by **Prinsep, J.**—The plaintiff was charged by the defendant, in the Criminal Court of Burdwan, under s. 147, with rioting, and s. 504, with intentional insult likely to cause a breach of the peace, and was acquitted. Under the orders of the Joint Magistrate he received Rs. 20 as compensation. He now sues the defendant for damages, Rs. 500 on account of injury to his reputation, and Rs. 313-7-5 as the costs incurred in the Criminal Court.

The first Court assessed the damages for the loss of honour and mental anxiety at Rs. 79, and allowed him also the pleader's fees in the Criminal Court, Rs. 121, making a total of Rs. 200. The lower Appellate Court reduced this amount to Rs. 50.

There is much in the judgment of the lower Appellate Court that does not meet with our approval, but as the defendant has not appealed, we must take it that it has been rightly held, that he is liable to damages on account of having maliciously and without reasonable or probable cause falsely charged the plaintiff with a criminal offence.

*Appeal from Appellate Decree, No. 2157 of 1880, against the decree of Baboo Brojendro Coomar Seal, Additional Judge of East Burdwan, dated the 2nd August 1880, modifying the decree of Baboo Amrito Lal Pal, First Munsif of Burdwan, dated the 26th February 1880.

The present appeal is really directed against the refusal of the Additional Judge to give any damages on account of legal expenses incurred on the part of the plaintiff in defending himself in the Criminal Court. The Additional Judge observes, that, in England, it is the rule to give the plaintiff the costs that he incurs in defending himself in a Criminal Court, because in England "the damages are assessed by the jurors : but it does not appear that it has ever been acted on by Courts in India." In this respect we would observe that the Judges in India have in such cases to assume the functions of both Judge and jury, and it has not, so far as we know, been laid down that the plaintiff is not entitled to recover the expenses necessarily incurred by him in defending himself on a criminal charge. The law in this respect has been thus stated in *Mayne on Damages*, 3rd Edn., p. 78 : "where the wrongful act of one person places another in a position in which he necessarily or reasonably has recourse to law, the costs incurred by the former will be recoverable from the latter."

[712] Acting on this principle we think that the plaintiff is at least entitled to recover from the defendant the sum of Rs. 121 which was allowed to him in the first Court, that being the amount proved to have been paid to the pleader whom he retained to defend him. We, however, find a difficulty in learning from the judgment of the Additional Judge on what ground he has fixed a sum of Rs. 50 as damages for the plaintiff, but as he has undoubtedly given such damages on both the grounds claimed by the plaintiff, we think we may reasonably assume that half of this sum was awarded as damages for injury to reputation and the other half for expenses in the Criminal Court. For reasons already stated we think that the latter sum, *i.e.*, Rs. 25, for costs, should be increased to Rs. 121. The result is that the plaintiff will get a decree for Rs. 146, with costs assessed on that amount.

Appeal allowed.

NOTES.

[DAMAGES—COSTS INCURRED IN OTHER PROCEEDINGS HOW FAR RECOVERABLE—

"In an action for damages, whether arising out of tort or breach of contract, costs reasonably incurred by the plaintiff, in other proceedings necessitated or brought about through the defendant's act or default, are not deemed too remote a form of damage and are consequently recoverable under proper circumstances".—

Arnold on Damages, (1913) p. 306.

Payment of successful defendant's costs, in an action against two joint tort-feasors, may be recovered :—*Bullock v. London General Omnibus Co*, (1907) 1 K. B. 264.

It does not matter whether the plaintiff was previously plaintiff or defendant.—

Bentley Bros., v. Metcalfe & Co., (1906) 2 K. B. 548.

As regards the costs of appeal, see *Munro v. Bennet* cited in *Arnold* at p. 307.

For Indian Cases, see 1 C. W. N. 537 ; 6 M. H. C. 85, 5 Mad. 162 (counsel's fees) ; the expenses of prosecuting the defendant are not recoverable —12 All. 166.]

[8 Cal. 713]

APPELLATE CIVIL.

The 28th March, 1882.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE BOSE.

Romaprosad Roy and others.....Plaintiffs

versus

Shorup Paramanick.....Defendant.*

Beng. Act VIII of 1869, s. 102—Suit for rent below Rs. 100—Landlord and tenant—Special appeal.

In a suit for rent below Rs. 100, the defendant set up the title of a third person (the third person was, however, no party to the proceedings), and the lower Court finding that the relationship of landlord and tenant existed between the parties, and that the rent was unpaid, decided the suit on that ground in favour of the plaintiffs. The defendant appealed to the District Judge, who decided that the defendant had paid the rent, and reversed the decision of the Court below. The plaintiffs appealed to the High Court, but were met with the objection that no special appeal would lie. *Held*, that s. 102 of Beng. Act VIII of 1869 prohibited the appeal, the case being one between landlord and tenant, and there consequently being no question relating to title as between parties having conflicting claims.

THE plaintiffs were the owners of a plot of land containing 20 bighas, which they leased to the defendant at Rs. 29-8 per [713] annum; and they brought this suit to recover arrears of rent for the years 1282—1285, and a certain sum for road-cess amounting in all to a sum of Rs. 50-2, from the defendant.

The defendant contended that the plot belonged to a third person; that he had deposited the amount of rent which he alleged to be due, *viz.* Rs. 26-8, in Court, and that he had paid the remainder, but that he had received no dakhillas.

The Munsif found that the relationship of landlord and tenant existed between the plaintiffs and the defendant, and awarded to the plaintiffs the amount of rent claimed.

The defendant appealed to the District Judge, who reversed the decision of the Court below.

The plaintiffs appealed to the High Court.

Baboo Durga Mohun Das and Baboo Huri Mohun Chuckerbutty for the Appellants.

Baboo Kishori Mohun Roy for the Respondent.

The Judgment of the Court (GARTH, C.J., and BOSE, J.) was delivered by

Garth, C.J.—In this case an objection has been taken by the respondent, that we have no jurisdiction to hear the appeal as it is for an amount under Rs. 100, and there is no question raised in it "relating to a title to land as between parties having conflicting claims thereto."

* Appeal from Appellate Decree, No. 565 of 1880, against the decree of T. T. Allen, Esq., Judge of Rajshahye, dated the 6th January 1880, reversing the decree of Baboo Probode Chunder Dutt, Munsif of Nattore, dated the 30th June 1879.

We think that this objection is a good one. We have been referred to two cases—*Hurry Mohun Mozoomdar v. Dwarkanath Sen* (18 W. R., 42), and *Shank Dilber v. Issen Chunder Roy* (21 W. R., 42), with which we entirely agree, and which appear to be directly in point. This being a case between landlord and tenant, there is no question of title as between parties having conflicting claims thereto. If the third person whose title was set up by the defendant, had intervened in the suit and claimed the rent against the plaintiffs, we might have had jurisdiction to entertain the appeal, but as it is, we think we have no such power, and that the appeal must be dismissed with costs.

Appeal dismissed.

NOTES.

[See also 10 C. P. L. R. 83 (34), 12 C. P. L. R. 1 (8), 14 C. P. L. R. 31 (82), 8 Cal. 288; 7 Cal. 330.]

[= 10 C. L. R. 533]

[714] ORIGINAL CIVIL.

The 28th March, 1882.

PRESENT

MR. JUSTICE WILSON.

Stephen

versus

Stephen and others.

*Act XL of 1858, s. 3—Minors—Certificate of administration—
Majority Act (IX of 1875), s. 3.*

In the interval between an application for a certificate of administration to the property of a minor under s. 3 of Act XL of 1858 and the issue of the certificate, the minor attained the age of 18 years and signed a promissory note

Held, that the certificate afforded no defence to a suit on the note

In this case the plaintiff sued one A. J. Stephen, Mary Stephen his wife, and St. George Stephen their son, upon a joint and several promissory note executed by the three defendants on the 27th of October 1880. St. George Stephen was born on the 7th of April 1861. In 1877 his father petitioned the Dacca Court for a certificate of administration to his property under s. 3 of Act XL of 1858. On the 10th of December 1879 the Judge made an order granting the certificate, which was issued on the 10th of December 1881, and bore date as of that day.

The defendants pleaded, among other things, that, under s. 3 of Act IX of 1875, St. George Stephen was a minor, under the age of 21 years when the note was executed.

Mr. Trevelyan and Mr. Amir Ali for the Plaintiff.

Mr. Hill for the Defendant.

Wilson, J.—This is a suit on a promissory note signed by the th defendants for Rs. 1,700. Two questions were raised: 1st, How much did the plaintiff advance by way of consideration? 2nd, Is the third defendant liable on the note?

As to the first question, on one point no doubt is raised. The amount of Rs. 1,700 was made up in part by a sum of Rs. 440, deducted for future payment of premiums on a life policy effected as security for a loan. As to this it appears, that plaintiff only [716] paid Rs. 220, and then let the policy drop. as to Rs. 220, therefore, the consideration has failed. The main question is, whether the rest of the consideration was paid. The plaintiff says, it was. Defendants say, only Rs. 270, were paid, and that, as to the rest, the note was given for a wholly different purpose. The plaintiff swears that he has paid the money, and he is confirmed by a witness, who says he chanced to be present. On the other side the two male defendants contradict him. The note itself gives little help. It was one of a series of transactions, in none of which did the documents represent the transaction as it really occurred. Several circumstances are admitted tending to confirm the defendant's story. On the whole, I believe the defendants' story. Therefore the decree can only be for Rs. 220 and 270.

The second question is as to the liability of the third defendant. It is said that he was under age when the note was signed, on the ground, that though he was over 18, yet, by reason of s. 3, of the Majority Act of 1875, he was still a minor up to 21, a guardian of his property having been appointed by the District Court of Dacca.

It appears that, in September 1877, the first defendant, father of the third defendant, petitioned the Dacca Court for a certificate of administration under s. 3 of the Minors Act (XL of 1858) to the property of the third defendant. On the 10th December 1879 the Judge made an order: "Certificate of administration under Act XL of 1858 is hereby granted." On the 10th December 1881 a certificate was issued bearing date the last mentioned day. In the meantime, between the date of the order and the issue of the certificate, the third defendant had attained the age of 18, and had signed the note in question.

It is not necessary to consider whether the judge might have issued the certificate dated as of the day when the Judge's order was made, or what the effect would have been. It is quite possible that if the delay were the act of the Court arising from the pressure of office business, and if the date were material, it might be the right course to date the certificate, as of the day when it was ordered, upon the principle *actus curæ neminem gravabit*. Here the delay was not that of the Court but of the [716] parties, and I must take it that the certificate was intended to operate and did operate only from the day of its date. But by then the third defendant had attained his majority and signed the note in question, therefore, the certificate affords no defence.

Decree against three defendants for Rs. 490 without costs

Judgment for plaintiff.

NOTES.

[This case was affirmed on appeal in (1883) 9 Cal. 901. See the notes thereto.]

APPELLATE CIVIL.

The 30th March, 1882.

PRESENT :

Mr. JUSTICE WHITE AND Mr. JUSTICE MACPHERSON.

Ram Coomar KurDecree-holder

versus

Jakur AliJudgment-debtor.*

Limitation--Acknowledgment in writing--Authority to sign acknowledgment—Limitation Act (XV of 1877), s 19, sched. ii, art. 179.

On the 7th of December 1877, additional time for payment of the amount of a decree, dated the 24th of March 1876, was granted to the judgment-debtor upon a petition signed by his vakeel. On the 4th of December 1880 a fresh application for execution was made.

Held, that it was not barred under art. 179, sched. ii of Act XV of 1877, inasmuch as the petition constituted an acknowledgment of liability under s. 19† of the same Act, and a new period of limitation began to run from the 7th of December 1877. The object of the words "application in respect of any property or right" in s. 19 is to extend to the applications mentioned in sched. ii the same privilege as is accorded to suits.

Ramhit Rai v. Satgur Rai (1. L. R., 3 All., 247) approved of.

IN this case a decree had been made on the 24th of March 1876. On the 3rd of October 1877 an order for attachment was made, under which certain properties of the judgment-debtor were attached. On the 7th of December 1877 three months' additional time was granted by the Court to the judgment-debtor to enable him to raise money to satisfy the decree. This order [717] was made on a petition signed by the vakeel of the judgment-debtor. On the 4th December 1880 a fresh application for execution was made, which was refused by the Subordinate Judge, on the ground that it was barred by limitation.

* Appeal from Original Order, No. 296 of 1881, against the order of Baboo Giris Chunder Chowdhry, Subordinate Judge of Chittagong, dated the 6th August 1881.

† [Sec. 19 :—If, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability

in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the acknowledgment was so signed.

When the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but oral evidence of its contents shall not be received.

Explanation 1.—For the purposes of this section an acknowledgment may be sufficient, though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come, or is accompanied by a refusal to pay, deliver, perform, or permit to enjoy, or is coupled with a claim to a set-off, or is addressed to a person other than the person entitled to the property or right.

Explanation 2.—In this section "signed" means signed either personally or by an Agent duly authorized in this behalf.]

The judgment-creditor appealed to the High Court.

Baboo *Aukhil Chunder Sen* for the Appellant.

Baboo *Tarucknath Palit* and *Munshi Serajul Islam* for the Respondent.

The **Judgment** of the Court (WHITE and MACPHERSON, JJ.) was delivered by

White, J.—The present application for execution was made on the 4th of December 1880. The one immediately preceding was made on the 3rd of October 1877, consequently the present application is *prima facie* barred under art. 179, " sched. ii, of the Limitation Act (XV of 1877). But it is contended by the vakeel on behalf of the judgment-creditor, that, under s. 19 of the Act, an acknowledgment of liability was made by the judgment-debtor on the 7th of December 1877, by virtue of which a new period of limitation has been given to his client starting from the latter date.

It appears that, upon the application of the 3rd of October 1877, an order for attachment was made, under which certain properties of the judgment-debtor were attached; and that, on the 7th of December in the same year, the judgment-debtor, through his vakeel, presented to the Court a petition, which, after setting out the facts relating to the attachment, prayed that the judgment-debtor might be permitted himself to sell or mortgage the property attached, and out of the proceeds so realized satisfy the amount of the decree. It also prayed that, in the meantime, execution might be postponed for one year. The Court did not grant a year's grace, but acceded so far to the prayer of the petition as to allow to the judgment-debtor three months' time within which he might endeavour to pay off the decree, by raising sufficient money through the medium of a private sale or mortgage.

We are of opinion that the petition did constitute an acknowledgment of liability in writing within the meaning of s. 19. It expressly admitted the debt under the decree to be due and [718] the judgment-creditor's right to have execution; and even if there had been no express admission, we should have implied one from the fact that the judgment-debtor asked for leave to sell the attached properties by private sale for the purposes of the decree.

We also think that the application of the 4th December 1880 is an application in respect of a right, *viz.*, the right to have execution of the decree, and that the acknowledgment of liability contained in the petition of the 7th of December 1877 was in respect of such right. The words "application in respect of any property or right" were not in the previous Limitation Act. They are introduced for the first time into the one now in force, and clearly with the object of extending to the applications which are mentioned in sched. ii the same privilege as was under the old Act and is also under the present Act accorded to suits.

It is contended that the acknowledgment in question has not been signed by an agent duly authorized by the judgment-debtor as required by Expln. II of s. 13. We think that it has. The vakeel who signed the petition for the judgment-debtor held a vakalatnama from him to represent him in the suit, and acted as his vakeel throughout the suit and execution-proceedings. Looking to the nature of the application of the 7th of December, and to the fact that it

* [q. v. *supra* 8 Cal., 29.]

was substantially granted, we think there can be little doubt but that the judgment-debtor expressly authorized his vakeel to make it; but whether he did so or not, he must be taken to have ratified the act of his vakeel. The judgment-debtor having, in consequence of the success of the application, had the benefit of a suspension of the execution for three months in order that he might himself sell or mortgage the attached property, it does not lie in his mouth to dispute that the vakeel was his duly authorized agent for the purpose of the application.

Section 19 of the Limitation Act does not appear to have been the subject of decision in this Court as far as we know (see *Mungul Prashad Dichit v. Shama Kanto Lahory Chowdry*, I.L.R., 4 Cal., 708; & *Parhottinath Roy v. Tejomoy Banerji*, I. L. R., 5 Cal., 303), [719] but it has been so in the Allahabad High Court in the case of *Ramhit Rai v. Satgur Rai* (I. L. R., 3 All., 247). We agree with that Court in the construction which it has there put upon the section.

Such being our opinion, we hold that the point of departure in this case for the purpose of limitation, is the 7th of December 1877, and consequently that the application for execution made on the 4th of December 1880 was in time. We, therefore, reverse the decision of the lower Court; but, inasmuch as the point on which we have decided this appeal was not clearly taken in the lower Court, we shall allow no costs.

Appeal allowed.

NOTES.

[STATUTORY DECLARATION—RULES AS TO ACKNOWLEDGMENT APPLICABLE TO EXECUTION APPLICATIONS—

The Legislature in the Limitation Act of 1908 added Exp. III to Sec. 19, whereby, "For the purposes of this section, an application for the execution of a decree or order is an application in respect of a right."

This sets at rest the previous conflict of case-law on the subject, the Madras High Court holding that the section was not applicable:—5 Mad. 171; 28 Mad. 40; while the other High Courts held otherwise:—9 Cal. 790=13 C. L. R. 91; 3 C. L. J. 347; 7 C.W.N. 766; 8 C. W. N. 470; 3 All. 247; 10 All. 228; (1885) P. R. 28; 6 I. C. 366.]

[8 Cal. 719=11 C. L. R. 13]

APPELLATE CIVIL.

The 4th April, 1882.

PRESENT:

MR. JUSTICE PRINSEP AND MR. JUSTICE O'KINEALY.

Khetter Mohun Dutt.....Defendant

versus

Welds.....Plaintiff.*

Power of Manager under s. 243 of Act VIII of 1859—Notice of enhancement—Civil Procedure Code (Act X of 1877), s. 503.

A manager appointed under s. 243 of Act VIII of 1859 is appointed merely to collect rent and other receipts and profits of the land, to carry on the existing state of affairs as the proprietor himself had been doing, and he has no power to issue notice of enhancement.

*Appeal from Appellate Decree, No. 1194 of 1880, against the decree of W. H. Page, Esq., Officiating Additional Judge of the 24-Perganas, dated the 31st May 1880, reversing the decree of Baboo Jogesh Chunder Mitter, First Munsif of Alipore, dated the 21st January 1880.

Mr. Jackson and Bahoo Jadub Chunder Seal for the Appellant.

Baboo Unnoda Persad Banerjee for the Respondent.

THE facts of this case sufficiently appear from the **Judgment**, which was delivered by

Prinsep, J.—The plaintiff, as a manager appointed under s. 243 of Act VIII of 1859, has sued for rent at an enhanced rate after service of notice of enhancement under the Rent Law. The objection taken has throughout been as to his power as a manager to issue such notice of enhancement. The Munsif pro-[720]perly held, that "the Court that appoints this manager has no greater powers than those which the statute-law confers on it, so that the manager himself cannot possess more powers than this." The Munsif accordingly held, that the plaintiff had no authority to issue the notice of enhancement. The District Judge, in appeal, considered that the manager stands exactly in the same position as a *gomashta* or administrator. In this view of the law he held, under the authority of two cases which apply to *gomashtas*, that the manager had rightly exercised his powers. It appears to us that the view taken by the Munsif is the correct view. A manager under s. 243 is, in our opinion, appointed merely to collect rents and other receipts and profits of the land; in fact, to carry on the existing state of affairs as the proprietor himself had been doing. We observe that, under the present law, s. 503* of Act X of 1877, higher powers are conferred on him; but so far as under the terms of the law under which he acted, we think that he exceeded his powers. We, therefore, set aside the decree of the lower Appellate Court, and restore that of the first Court. The defendant will receive his costs in this Court and in the lower Appellate Court.

Appeal allowed.

NOTES.

[COURT FEES—CLAIM APPEALS—

Similar rulings were given in (1886) 10 Bom. 238; (1905) 29 Mad. 172 (173). The case of (1900) 14 C. P. L. R. 100 related to appeals against order absolute for fore-closure or sale.]

*[Sec. 503 :—Whenever it appears to the Court to be necessary for the realization, preservation or better custody or management of any property, moveable or immoveable, the subject of a suit, or under attachment, the Court may by order

- (a) appoint a receiver of such property, and, if need be,
- (b) remove the person in whose possession or custody the property may be from the possession or custody thereof;
- (c) commit the same to the custody or management of such receiver; and
- (d) grant to such receiver such fee or commission on the rents and profits of the property by way of remuneration, and all such powers as to bringing and defending suits, and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of instruments in writing, as the owner himself has, or such of those powers as the Court thinks fit.

Every receiver so appointed shall (e) give such security (if any) as the Court thinks fit duly to account for what he shall receive in respect of the property,

Receiver's liabilities.

- (f) pass his accounts at such periods and in such form as the Court directs,
- (g) pay the balance due from him thereon as the Court directs, and
- (h) be responsible for any loss occasioned to the property by his wilful default or gross negligence.

Nothing in this section authorizes the Court to remove from the possession or custody of property under attachment any person whom the parties to the suit, or some or one of them, have or has not a present right so to remove.]

[8 Cal. 720=11 C L. R. 98]

CIVIL REFERENCE.

The 7th April, 1882.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE.

Mahbuban and others.Defendants

versus

Umrao Begum and others.....Plaintiffs

Shayama Sunduri Dasi.....Defendant

versus

Robert Watson and Co.....Plaintiffs.*

Appeal from Order under s. 331 of the Civil Procedure Code (Act X of 1877) as amended by s. 52 of Act XII of 1879— Court-Fees Act (VII of 1870), Art. 11, cl. (b), Sched. ii.

Appeals from Orders under s. 331 of Act X of 1877, as amended by s. 52 of Act XII of 1879, are chargeable with the same court-fee as is required in the case of appeals from decrees.

[721] IN these cases appeals were filed against orders made in two suits, under s. 331 of Act X of 1877. The memorandum of appeal bore in both cases a stamp of Rs. 2, in accordance with art. 11, cl. (b) of sched. ii of Act VII of 1870.

The Deputy Registrar and the Taxing Officer were both of opinion that the amendment of s. 331 of Act X of 1877 by s. 52 of Act XII of 1879 restored in effect the procedure under the provisions of s. 229 of Act VIII of 1859, and that therefore the ruling of *Asap Khan* (9 Sevestre, 43) and of *Sayud Ameer Aly* (9 Savestre 95) must be followed, which rulings laid down that the court-fee chargeable on such an order was the same as that chargeable for an appeal from a decree.

The Taxing Officer, however, referred the matter to the Chief Justice in the following terms :—" Are appeals from orders passed under s. 331 of Act X of 1877, as amended by Act XII of 1879, chargeable with a court-fee of Rs. 2, as under art. 11, cl. (b), sched. ii of Act VII of 1870, or are they chargeable with a full stamp as in the case of appeals from decrees ? "

Baboo Saligram Singh for the Appellants.

The **Opinion** of the Chief Justice was as follows :—I think that these appeals are chargeable with a full stamp as in the case of appeals from decrees. They clearly do not come within art. 11, cl.(b), sched. ii of Act VII of 1870, because that article does not apply to orders which have the force of a decree.

* Reference under s. 5, Court-Fees Act, VII of 1870, in Regular Appeal No. 111 of 1882.

† [Art. 11 :—

Number,	—	Proper fee.
11. Memorandum of appeal when the appeal is not from an order rejecting a plaint or from a decree or an order having the force of a decree, and is presented.	(b) to a High Court or Chief Commissioner, or other chief controlling executive or revenue authority.	Two rupees.]

APPELLATE CIVIL.

The 20th April, 1882.

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE AND MR. JUSTICE BOSE.

Radhakant Shaha and others.....Plaintiffs

versus

Abhoy Churn Mitter and others.....Defendants.*

Hundi stamped with adhesive stamps admissibility in evidence—"Duly stamped"—Stamp Act (I of 1879), ss. 3 (10) 10, 34.

The words 'duly stamped' in s. 3 of the Stamp Act signify "stamped or written upon paper bearing an impressed stamp."

[722] A bill of exchange for Rs. 500, payable otherwise than on demand, must under art. 11 of sched. i of the Act, be stamped with an impressed stamp of the value of six annas.

ON the 29th Bysakh 1286 (11th May 1879), the plaintiffs advanced to the defendants Rs. 500 on the security of a hundi payable in fifteen days. The hundi was stamped with six one anna receipt stamps. On presentation, the defendants refused payment. The plaintiffs thereupon brought this suit. The defendants contended, amongst other things, that the instrument was insufficiently stamped.

The Assistant Commissioner held, that, under the provisions of s. 10 of the Stamp Act of 1879, and of s. 5 of the Act of 1869, such a stamping was insufficient; and that the defect could not be rectified by payment of a penalty, nor could independent evidence of consideration be received. He, therefore, dismissed the suit.

The plaintiffs appealed to the Deputy Commissioner, who affirmed the decree of the lower Court, and dismissed the appeal.

The plaintiffs appealed to the High Court.

Baboo *Srinath Doss* and Baboo *Ganendro Nath Doss*, for the Appellants, contended. (i) that no rules had been made by the Government under s. 60, and therefore it was impossible to say whether impressed or adhesive stamps were required; and (ii) that oral evidence should have been admitted to prove the consideration; (iii) that the instrument was a bill of exchange, and only required a one-anna stamp.

Baboo *Okil Chunder Sen* for the Respondents contended, that s. 34 laid down that no instrument should be used in evidence unless 'duly stamped,' and that those words meant "stamped or written upon paper bearing an impressed stamp in accordance with the law in force in British India, when such instrument was first executed," the only exception to this being given in s. 10.

The Judgment of the Court (GARTH, C.J., and BOSE, J.) was delivered by

Garth, C.J.—This is a suit brought upon a hundi for Rs. 500, payable fifteen days after dato. The instrument was [723] stamped, not with an impressed stamp, but with six one-anna receipt stamps; and, under these circumstances, both Courts held that it was not admissible in evidence.

* Special Appeal No. 1216 of 1880, from the decree of M. O. Boyd, Esq., Deputy Commissioner of Cachar, dated the 10th April 1880 confirming that of Baboo Juggut Bundhoo Nag, Extra Assistant Commissioner and Sudder Munsif of Silchar, dated the 26th January 1880.

On appeal to this Court it was first contended that the instrument was a bill of exchange payable on demand ; and that, consequently, it required only a one-anna stamp. It is clear, however, that this is not so. It is payable fifteen days after date, and therefore comes under the latter part of art. 11 of sched. i, Act I of 1879.

Two further points were then raised. The first was, that although s. 9 of the Act itself says, that "all duties with which any instruments are chargeable" shall be paid by means of stamps, it also says, that "rules may be made by the Governor-General in Council in the case of each kind of instrument regulating the description of stamps that may be used;" and it is argued that, as no rules have been made by the Government under this section, there is no provision indicating the particular stamp with which a bill of this kind should be impressed. Looking only at this section, there might seem to be something in that point; but when we look at s. 34, and also at the interpretation-clause in s. 3, all difficulty is removed. By s. 34 it is enacted, that "no instrument chargeable with duty shall be admitted in evidence for any purpose, unless such instrument is duly stamped." And then, when we look for the meaning of 'duly stamped,' we find in s. 3 (the interpretation-clause), that those words, as applied to an instrument, mean "stamped or written upon paper bearing an impressed stamp." Therefore, taking these two sections together, it is clear, that an instrument of this kind, which is a bill of exchange for Rs. 500, must be duly stamped under art. 11, sched. i of the Act with an impressed stamp of the value of six annas. The exception in s. 10 provides for cases, amongst others, "of instruments chargeable with the duty of one anna," and if this had been a bill of exchange payable on demand, it would have been chargeable with the one-anna duty only, and so would have come under the provisions of sub-section (a) of s. 10.

The second point taken by the appellants was, that even although the instrument itself was not admissible in evidence, the [724] plaintiffs were entitled to recover upon proving the consideration for the bill. Of course, if the consideration for the bill had been an independent cause of action, complete in itself before the bill was given, the appellants' argument would have been well founded. But here it is stated in the plaint, and it is evidently the fact, that the Rs. 500, which was the consideration of the bill, was advanced by the plaintiffs to the defendants upon this particular bill, and as the bill itself is the best evidence of the terms upon which the advance was made, the plaintiffs could not establish their case without proving the bill.

The law upon this subject was fully explained by this Court in the case of *Sheik Akbur v. Sheik Khan* (I. L. R., 7 Cal., 256).

The appeal must be dismissed with costs.

Appeal dismissed.

NOTES.

[I. STAMP ACT—'DULY STAMPED'—

The definition was amended in the Stamp Act 1899 Sec. 2 (II) whereby 'duly stamped' as applied to an instrument means that the instrument bears an adhesive or impressed stamp of not less than the proper amount and that such stamp has been affixed or used in accordance with the law for the time being in force in British India.

II. DOCUMENT BEING INADMISSIBLE, RECOVERY INDEPENDENTLY OF IT—

See the notes to 7 Cal. 256 ; also 12 Bom. 443 ; 26 All. 178 ; 6 N. L. R. 125.]

[8 Cal. 724]

CRIMINAL REFERENCE.

The 20th April, 1882.

PRESENT :

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

Abasu Begum

versus

Umda Khanum and another.*

Recognizance to keep the peace—Form of summons under s. 492 of the Criminal Procedure Code (Act X of 1872).

The words of s. 492 of the Code of Criminal Procedure are directory, and not imperative ; and an omission to insert in a summons under that section the amount of the recognizance and security required will not invalidate any subsequent proceedings binding over the parties to keep the peace.

ON the 27th October 1881 an Assistant Magistrate passed an order under s. 491 of the Criminal Procedure Code, calling upon certain persons to appear and show cause why they should not be bound down to keep the peace: the amount of the bond, the term for which it was to be in force, the number of sureties [726] required, and the amount in which they were to be bound were not stated in the summons.

The Sessions Judge considered the order to be illegal, inasmuch as s. 492 of the Code of Criminal Procedure had not been complied with, and referred the following question to the High Court :—Whether the provisions of s. 492 of the Criminal Procedure Code (in regard to the amount of the bond, the term for which it is to be in force, the number of sureties required, and the amount in which they are to be bound) should be strictly adhered to, or whether a simple order to show cause, without specifying any of the particulars required by the section, is sufficient ?

Baboo Romesh Chunder Bose, Baboo Ram Churn Mitter, and Baboo Jogesh Chunder Dey for the different parties concerned by the order.

The **Opinion** of the Court (McDONELL and FIELD, JJ.) was delivered by

Field, J.—In this case one Umda Khanum has been required to give rupees one thousand as recognizance and two sureties in rupees five hundred each to keep the peace for the term of one year, and one Bahadoor Lall has been required to give rupees two hundred as recognizance and two sureties in rupees one hundred each to keep the peace for the same term.

The Sessions Judge of Gya has referred the case to this Court to have the order quashed, on the ground that the summons issued under ss. 491, 492 of the Code of Criminal Procedure did not, as it should have done, specify the amount of the recognizance, the number of sureties required, and the amount in which they were to be bound respectively.

Section 492 distinctly provides that the summons shall set forth the substance of the report or information on which it is issued, the amount of the bond, and the term for which it is to be enforced, and, if security is called for,

* Criminal Reference, No. 80 of 1882, from the order made by G. E. Porter, Esq., Sessions Judge of Gya, dated the 1st April 1882.

the number of sureties required and the amount in which they are to be bound respectively, and the time and place at which the person summoned is required to attend. We think it very desirable that [726] Magistrates should, in the performance of their duties, attend strictly to the provisions of the law. This is desirable on many grounds ; and if there were no other reason for desiring it, on this ground alone, that it would save a number of references which take up a considerable portion of the time of this Court, and which are rendered possible merely because Magistrates do not pay that attention which they might reasonably be expected to pay to the express provisions of the law.

What we have to decide in the present case is, whether the omission by the Assistant Magistrate to insert in the summons certain of the particulars required by the section is an omission which will invalidate all proceedings had upon a summons so informally issued.

Now, in this case, we find that the summons did intimate to both parties who have been bound over, that they were to show cause why recognizance and security should not be taken from them. The summons did not specify, as it should have done, the amount of the recognizance or the amount in which the sureties were to be bound respectively.

What then is the nature of the precepts contained in this section of the Code of Criminal Procedure ? Are they imperative or directory merely ? The Code does not in express language say, what shall be the consequence of not attending to the exact provisions contained in s. 492, and it has been said that where the Legislature has expressed no intention on the point, that intention should be imputed to it which is most proper, and it must be that which is most consistent with reason and with due regard to convenience and justice.

In applying this principle it has generally been considered that where the proscriptions of a Statute relate to the performance of a public duty, they are to be understood as instructions merely for the guidance and government of those on whom the duty is imposed : in other words, they are to be considered as directory merely, and not imperative. Instances are :—Where a Statute provided that no person named in the commission of peace should be authorized to act as a justice of the peace until he had taken and subscribed the oaths required by law, and a person named in the commission did act without [727] having taken and subscribed those oaths, it was held, that his not having taken those oaths did not affect the validity of the acts done by him. Again, where a Parochial Assessment Act required that poor-rates should contain certain particulars relating to the person and property to be rated, this provision was held to be directory, and not to affect the validity of a rate which did not contain all the particulars required.

In a very excellent little work on statute-law recently published by Mr. Wilberforce, the result of the cases is thus stated : “ A similar construction is placed upon Statutes which provide that things shall be done in a certain manner. Such a provision is usually considered directory, unless the Legislature has used negative words or other words showing an intention to treat the manner of performance as essential to the validity to the act, or unless the Statute confers a special authority which must be strictly followed.”

Now in the case before us, if the summons had not expressly given notice to the petitioners that they would have to show cause why they should not give security, and notwithstanding this omission security had been taken from them, we think that they would have been prejudiced by the form of the summons. But as the summons did give distinct notice that both recogni-

zance and security would be required of them, although the amount of such recognizance and security was not specified, we think that the irregularity was not one which really prejudiced the petitioners, and that the provisions of the law as to the insertion in the summons of the amount of the recognizance and security ought to be regarded as directory only, and not as imperative. In this view the omission in the summons will not invalidate the subsequent proceedings.

We, therefore, decline to interfere with the order of the Assistant Magistrate.

NOTES.

[IRREGULARITY—WHEN CURABLE—

For similar rulings, see 7 Cr. L. J. 94=10 O. C. 365; (1891) A. W. N. 40; *contra*, II Weir 56; Ratanlal 421. But these rulings have to be considered in the light of 25 Mad. 61 P. C. As regards summons, see 11 Bom. L. R. 740; 8 All. 293; 31 Bom. 611; 35 Cal. 1076.

7 All. 79 (89) referred to time of rejection of plaints.

* See the explanation of this case in (1904) 31 Cal. 834=8 C. W. N. 529 in the light of 11 Cal. 175 F. B.]

[=11 C. L. R. 223]

[728] APPELLATE CRIMINAL.

The 20th April, 1882.

PRESENT :

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

In the matter of the Petition of Gopal Chunder Sirdar.

Gopal Chunder Sirdar

versus

Foolmoni Bewa.*

Abetment—Extortion—Village chowkidar—Penal Code (Act XLV of 1860), s. 384.

The mere fact that the offence of extortion under s. 384 of the Penal Code is committed in the presence of the village chowkidar, without eliciting any disapproval on his part, will not render him liable as an abettor of the offence.

In this case the petitioner Gopal Chunder Sirdar was charged with aiding and abetting one Shib Chand Bhandari in extorting Rs. 15 from one Foolmoni Bewa. The Deputy Magistrate, in his judgment, said : " The evidence for the prosecution proves that the accused Shib Chand charged the complainant with the theft of the *bythuk* of his hookah, and threatened to 'challan' her unless she paid him Rs. 30, and that accused eventually agreed to take Rs. 15, which sum the complainant, by making over her personal jewellery to one Umesh Purkhait as security, managed to raise and pay the accused. The presence of the accused chowkidar, Gopal Chunder Sirdar, is deposed to, and though it does not appear that he said or did anything in particular, his presence during the occurrence, added to the fact of his not having disapproved of the accused Shib Chand's words and conduct and action, sufficiently indicate the abetment on his part." The Deputy Magistrate convicted Shib Chand Bhandari under s. 384 of the

* Criminal Motion, No. 75 of 1882, against the order of E. M. Reilly, Esq., Deputy Magistrate of Diamond Harbour in the 24-Parganas, dated the 7th March 1882.

Penal Code, and sentenced him to one month's rigorous imprisonment, and to pay a fine of Rs. 30, or in default to similar additional imprisonment for one month. He convicted the petitioner Gopal Chunder Sirdar under ss. 384 and 109 of the Penal Code, and sentenced him to one month's rigorous imprisonment. Shib [729] Chand appealed to the District Judge, who, disbelieving the evidence for the prosecution, reversed his conviction and ordered the fine to be returned. Gopal Chunder moved the High Court to have the finding and sentence of the Deputy Magistrate reversed and annulled.

Baboo Boido Nath Dutt for the Petitioner.

The **Judgment** of the Court (MCDONELL and FIELD, JJ.) was delivered by

McDonell, J.—In this case one Shib Chand Bhandari was charged with extortion, the extortion being said to consist in taking Rs. 15 from a woman by threatening to bring a charge of theft against her.

The petitioner before us, Gopal Chunder Sirdar, was the village chowkidar, and he has been convicted of abetment of the extortion committed by Shib Chand Bhandari.

The Deputy Magistrate says in his judgment, "though it does not appear that he (Gopal Chunder Sirdar) said or did anything in particular, his presence during the occurrence, added to the fact of his not having disapproved of the accused Shib Chand's words and conduct and action, sufficiently indicate the abetment on his part."

We think that the omission on the part of Gopal Chunder Sirdar to disapprove of the conduct of Shib Chand Bhandari, cannot, under the circumstances, be said to amount to abetment. The only portion of the definition in s. 107 * of the Penal Code which can be supposed to apply is the third clause, namely, "intentionally aids by any act or illegal omission the doing of that thing." Now, there was no illegal omission on the part of the chowkidar in this case. He was not bound by s. 89 or by s. 90 of the Code of Criminal Procedure to report the offence of extortion; and even if he were so bound, his subsequent omission to report the commission of the offence could not be said to be intentionally aiding the doing of the thing itself which must have been done before it could be reported by the chowkidar.

The offence of extortion is not a "cognizable offence;" and [730] therefore, even if we suppose that the chowkidar knew the charge of theft to be false, and this does not appear, s. 95 or s. 97 of the Code of Criminal Procedure would not apply.

That the chowkidar intentionally aided the commission of the offence of extortion by any act is negatived by the Deputy Magistrate's finding; and we are unable to see that he aided by any illegal omission. We must, therefore, set aside the conviction and sentence.

Conviction set aside.

Abetment of a thing. * [Sec. 107:—A person abets the doing of a thing who—

First.—Instigates any person to do that thing; or

Secondly.—Engages with one more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly.—Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation I.—A person who, by wilful misrepresentation or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Explanation II.—Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.]

[8 Cal. 730]

APPELLATE CIVIL.

The 21st April, 1882.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE BOSE.

Mahomed Fayez Chowdhry.....Plaintiffs

versus

Jamoo Gazee and another.....Defendants.*

*Rent Suit—Beng. Act VIII of 1869—Stipulation to pay collection charges—
Illegal Cess.*

A condition in a lease, that the tenant will pay to the landlord collection charges, can be enforced if the condition is definite and certain in its nature, and forms part of the consideration for the lease.

THE question raised in this appeal is fully stated in the judgment.

Moonshi *Serajul Islam* for the Appellant.

Baboo *Bussunt Coomar Bose* for the Respondents.

The **Judgment** of the Court (GARTH, C. J., and BOSE, J.) was delivered by

Garth, C. J.—The only question raised in this appeal is, whether the sum which the defendants undertook to pay to the [731] plaintiff for collection charges at the rate of two annas in the rupee, was a claim which the plaintiff has a right to enforce.

The plaintiff granted to the defendants a patni talook at a fixed jama of Rs. 600, for which the defendants gave the plaintiff a kabuliat; and the defendants, by the same kabuliat, agreed to pay the plaintiff collection charges at the rate of two annas in the rupee along with the instalments of the annual rent.

This suit was brought both for arrears of rent and also for arrears of the two annas in the rupee for collection charges; but the defendants contended that the latter claim could not be enforced, inasmuch as it represented the illegal cesses which were collected from ryots.

Both the lower Courts have disallowed the claim upon the ground, and apparently upon the authority, of the case of *Kamala Kant Ghose v. Kalu Mahomed Mandal* (3 B. L. R., A. C., 44).

The plaintiff has appealed to this Court, and contends, that as the two annas for collection charges was a definite sum agreed to be paid by the defendants

* Appeal from Appellate Decree, No. 914 of 1880, against the decree of Baboo Oma Churn Kastogiri, First Subordinate Judge of Tipperah, dated the 27th February 1880, affirming the decree of Baboo Sham Loll Haldar, First Munsif of Ramroygram, dated the 26th of May 1879.

over and above the rent, and as there was no evidence that the charges were illegal, there is no good reason why it should not be recoverable.

The defendants, on the other hand, contend that this sum of two annas in the rupee, which professes to be for collection charges, is in fact the average amount of illegal cesses which the plaintiff, before the grant of the patni, was in the habit of collecting from the ryots, but which, under the patni, became recoverable from them by the patnidar.

There having been some doubt during the argument as to the true meaning of the language of the patni patta in this respect we have had the instrument translated by one of the translators of the Court, and we find that the passage upon which the question turns has been rendered thus: "According to the practice prevailing in the pargana, we shall annually pay the collection charges at the rate of two annas per rupee along with the instalments of the annual rent." We see no reason to doubt the accuracy of this translation; and inasmuch as it has [732] not been shown that this part of the agreement is illegal or is founded upon the collection of any illegal cess or cesses, the claim appears to us unobjectionable.

We believe that agreements of this kind are by no means unusual, and if they are certain and definite in their nature, and form part of the consideration for the lease, there is no reason why they should not be enforced. See *Jugodish Chunder Biswas v. Turrikoolah Sirkar* (24 W. R. 90) and *Jeeutoollah Paramanick v. Jugodindro Narain Roy* (22 W. R. 12).

The appeal will, therefore, be decreed, and the plaintiff will be entitled to the arrears claimed for collection charges, in addition to the sum which has already been adjudged to him by the lower Court, with interest at 6 per cent. from the date of suit.

He will also have his costs accordingly in all the Courts.

Appeal allowed.

[8 Cal. 732—10 C. W. R. 529]

APPELLATE CIVIL.

The 21st April, 1882.

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE BOSE.

Wahid Ali.....Defendant

versus

Ashruff Hossain and another.....Plaintiffs.*

Mahomedan Law—Wukf or endowed property—Office of mutwali, Nature of—Transfer of, or performance of duties of, by agent.

The office of mutwali is a trust which a woman, equally with a man, is capable of undertaking, but it is a personal trust, and the office may not be transferred, nor the endowed property conveyed to any person whom the acting mutwali may select.

The word 'deputy,' in Book 9, Chap. V, p. 591 of Baillie's Mahomedan Law, signifies some one who, as an agent, may be employed to perform the duties of the office, as to collect rents and to assist the mutwali in expending the proceeds of the endowed property for charitable purposes.

* Appeal from Original Decree, No. 223 of 1880, against the decree of Moulvi Mahomed Nurul Hossain, Subordinate Judge of Patna, dated the 28th of June 1880.

The plaintiff in this case alleged that one Mahomed Ali Jamadar endowed a one-anna share in Mouza Samai and a [733] garden to defray the expenses connected with a mukbora situated in Patna; and that he, under a deed of towliatnama, dated the 16th June 1823, nominated his eldest son, Khoda Buksh, and his descendants as mutwalis thereof; that Rajub Ali, son of Khoda Buksh, on the death of his father, became mutwali, and on his (Rajub Ali's) death, Medhi Hossain, his son, became mutwali; but that he laid claim to the endowed property as his own and misappropriated the proceeds. Upon this, one Sheik Wahid Ali (the defendant in the present case), one of the heirs of Mahomed Ali Jamadar, but not a lineal descendent of Khoda Buksh, was put forward as the mutwali with the consent of the family, and brought a suit against Medhi Hossain to dispossess him of the property. In that suit Wahid Ali was successful, and from 1861 to 1879, himself acted as mutwali. The plaintiffs further alleged that Wahid Ali was discovered to have converted the endowed properties to his own use, and that thereupon one Pearunnessa, a daughter of Khoda Buksh, and heir of Mahomed Ali Jamadar, dismissed him, and under a deed, dated the 11th December 1878, made Ashruff Hossain and Amjad Ali mutwalis; and on the refusal of Wahid Ali to give up possession, Ashruff Hossain and Amjad Ali, on the 12th June 1879, brought this present suit against Wahid Ali, praying that possession might be given them as mutwalis of the endowed properties, and that the defendant might be ordered to render an account, and to make good certain portions of the property which he was said to have misappropriated.

The defendant contended that Pearunnessa was not competent to appoint a mutwali, neither had she the power to dismiss him; and that he, the defendant, was appointed mutwali under a decree of Court, and had committed no malversation.

The Subordinate Judge found that Wahid Ali had mismanaged the endowed property, and that Pearunnessa, being the lineal descendent of Khoda Buksh, had a right to become mutwali herself, and to depute the plaintiffs by the deed of December 1878; and ordered the plaintiffs to be put into possession of the property in dispute, and the defendant to be dismissed from the office of mutwali.

The defendant appealed to the High Court.

[734] Mr. C. Gregory and Moonshi Mahomed Yusuf for the Appellant.

Baboo Mohesh Chunder Chowdhry and Moonshi Serajul Islam for the Respondents.

The Judgment of the Court (GARTH, C. J., and BOSE, J.) was delivered by

Garth, C. J.—We think that this case must be decided upon a point which appears to have been improperly considered by the Court below.

(After stating the facts as above, his Lordship continued):—

The defendant denies the right of the plaintiffs to dispossess him of the endowment. He denies that he is in any respect unworthy of the post, or has misappropriated any part of the property; and he also denies the plaintiffs' right to bring this suit. He further says, that the plaintiff Ashruff Ali is himself an improper person to be mutwali.

The lower Court has found in favour of the plaintiffs. It has decided that Wahid Ali has mismanaged the endowment and is otherwise an improper person to hold the office of mutwali. It also finds that Mussamut Bibi Pearunnessa, being the lineal descendant of Khoda Buksh, had a right to be mutwali herself, and to depute the plaintiffs, by the deed of 1878, to be mutwalis in her place. Now, if the question had been simply, whether the defendant Wahid Ali was a proper person to perform the duties of mutwali, and whether Mussamut Pearunnessa, as being the lineal descendant of Khoda Buksh, had a right to be mutwali in his stead, we might probably have agreed with the Court below. But the point which has been urged upon us here, and which we consider to be an answer to the suit, is this, that although Mussamut Pearunnessa might herself have had a right to claim to be mutwali in the room of Wahid Ali, she had no right to appoint the plaintiffs by deed or otherwise to be mutwalis in her stead.

We consider that the office of mutwali is a trust, which a woman, equally with a man, is capable of discharging; but we think that it is a personal trust, and we find no authority for [735] the position, that the office may be transferred and the endowed property conveyed to any person whom the acting mutwali may select. Besides which, there is this further difficulty in this case, that Pearunnessa, although she might have a right to become the mutwali, and to dispossess Wahid Ali, has never taken any steps to assert her claim, and she professes to have conveyed away the office to the plaintiffs before she had acquired it herself. It has been contended by the plaintiffs, that this passage at commencement of Book 9, Chap. V, p. 591, of Baillie's Mahomedan Law, is an authority in support of their claim: "No one should be appointed but an ameen or trustee who is able to act by himself and by deputy; and in this males and females are alike."

It is said that the word 'deputy' justifies a complete transfer of the office of mutwali from the superintendent to some other person; but we think this is not so. The word 'deputy' in that passage merely means some one who, as an agent, may be employed to perform the duties of the office, as to collect the rents or other proceeds of the property, and to assist the mutwali in expending them for charitable purposes. But the employment of an agent in this way is a totally different thing from a complete transfer of the office of mutwali to a third person. The office in such case would remain with the mutwali, although he might employ this or that person to perform some of the duties attached to it.

In this case it appears to us that the only person who could claim the office and bring the suit would be the Mussamut herself; and that the plaintiffs have clearly no right to do so as her transferees.

We think, therefore, that the suit must be dismissed, and that as there is no sufficient reason for departing from the ordinary rule as to costs, the plaintiffs must pay the defendant's costs in both Courts.

Appeal allowed.

NOTES.

[TRANSFER OF OFFICE OF MUTWALI—

See also 13 Bom. 555; 24 Cal. 77 (90, 92); 1 Mad. 285 P. C. as to invalidity of sale of trusteeship.]

[736] APPELLATE CRIMINAL.

The 24th April, 1882.

PRESENT :

MR. JUSTICE McDONELL, AND MR. JUSTICE FIELD.

In the matter of the petition of Luddun Sahiba.

Luddun Sahiba

versus

Mirza Kamar Kudar.*

Maintenance—Mutta form of marriage—Criminal Procedure Code (Act X of 1872), s. 536—Mahomedan Law—Sheea Sect.

Under the Law of the Sheea sect of Mahomedans a *mutta* wife is not entitled to maintenance, but such a provision of the law does not interfere with the statutory right to maintenance given by s. 536† of the Code of Criminal Procedure.

The *mutta* form of marriage does not admit of repudiation under the law of the Sheea sect of Mahomedans.

Quere.—Whether the form of divorce called *Zihar* may be exercised in the *mutta* form of marriage.

ONE Luddun Sahiba applied to a Magistrate, under s. 536 † of the Code of Criminal Procedure, for maintenance, stating that she had been married to her husband, under the *mutta* form, for a period of fifty years, and that her husband had now refused to maintain her.

* Criminal Motion, No. 93 of 1882, against the order of Syed Amir Hussain Deputy Magistrate of the 24-Parganas, dated the 25th February 1882.

† [Sec. 536 :—If any person, having sufficient means, neglects or refuses to maintain his wife, or legitimate or illegitimate child unable to maintain himself, the Magistrate of the district, or a Magistrate of a division of a district, or a Magistrate of the first class may, upon due proof thereof by evidence, order such person to make a monthly allowance for the maintenance of his wife or such child at such monthly rate, not exceeding fifty rupees in the whole, as to such Magistrate seems reasonable.

Order for maintenance of wives and children. Such allowance shall be payable from the date of the order. If such person wilfully neglects to comply with this order, such Magistrate may, for every breach of the order by warrant, direct the amount due to be levied in the manner provided for levying fines; and may order such person to be imprisoned with or without hard labour for any term not exceeding one month for each month's allowance remaining unpaid :

Enforcement of order. Provided that, if such person offers to maintain his wife on condition of her living with him, and his wife refuses to live with him, such Magistrate may consider any grounds of refusal stated by such wife; and may make the order allowed by this section notwithstanding such offer, if he is satisfied that such person is living in adultery, or that he has habitually treated his wife with cruelty.

Proviso. No wife shall be entitled to receive an allowance from her husband under this section, if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by consent.]

The husband alleged that the *mutta* was contracted for one month and a half only, and that, after living with Luddun for a month, he gave up the remaining fifteen days on her going away to her own house without his consent.

The Deputy Magistrate held, that, according to the Sheea law, by which the parties were governed, the woman had no right to maintenance, she being a *mutta* wife to whom the section of the Criminal Procedure Code was inapplicable; and that the husband having given up a portion of the period of the *mutta* marriage, the woman was no longer his wife within the meaning of s. 536. He, therefore, dismissed the application.

The case came up to the High Court under s. 294 of Act X of 1872.

[737] Mr. *Amir Ali* and *Moonshi Serajul Islam*, for the petitioner, contended, that the provisions of the Sheea law could not interfere with the statutory right to maintenance given by s. 536.

Mr. *Abdool Rahman*, *contra*, contended, that the effect of giving up part of the period for which the contract of marriage has been made, was to put an end to the relationship of husband and wife.

The **Order** of the Court (MCDONELL and FIELD, JJ.) was as follows :—

The petitioner in this case made an application under s. 536 of the Code of Criminal Procedure for the purpose of obtaining an order for maintenance of herself as the wife of Prince Mirza Kamar Kudar. It is admitted on all hands that the parties are Shecas, and that she was a wife by the *mutta* form of marriage contract. She alleges that the period of the contract made between herself and the defendant was fifty years. The defendant, on the other hand, alleges that the period was one month and-a-half only.

The Deputy Magistrate, before whom the case came for disposal, was of opinion,—*first*, that inasmuch as, under the Sheea law, a *mutta* wife has no right to maintenance, the petitioner was not entitled to obtain an order for maintenance under the provisions of s. 536 of the Code of Criminal Procedure; and, *secondly*, that as the defendant had given up the remaining term of the period of the *mutta* marriage, the petitioner was no longer a wife within the meaning of s. 536.

As to the first point there is no dispute that, according to the Sheea law, a *mutta* wife is not entitled to maintenance. But it is contended by Mr. *Amir Ali* that this provision of the Sheea law cannot interfere with the statutory right to maintenance given by s. 536 of the Code of Criminal Procedure.

We think that this contention is correct. A right to maintenance, depending upon the personal law of the individual, is a right capable of being enforced, and properly forms the subject of a suit in a Civil Court. But we think that this right, depending upon the personal law of the individual, is altogether different from the statutory right to maintenance given by [738] s. 536 in every case in which a person, having sufficient means, neglects or refuses to maintain his wife.

As to the second point, it is admitted by both sides that the husband can give up the remaining portion of the period for which the contract of *mutta* marriage is made. For the defendant it is contended, that the effect of giving up the rest of the period is to put an end to the relationship of husband and wife. No authority has been shown to us in support of this contention, and as at present advised, we are unable to concur in the argument, that the giving up of the remainder of the term terminates the relationship of husband and wife. According to the Sheea law the *mutta* form of marriage does not admit of repudiation, and if the giving up of the remainder of the term had the effect

contended for, this would practically destroy the provision of the law which forbids repudiation in this form of marriage.

We think, therefore, that the Deputy Magistrate was not right in dismissing the petition on either of the grounds on which he has proceeded. We must, therefore, set aside his order and remand the case in order that he may determine whether the period of the *mutta* contract was fifty years, as alleged by the petitioner, or one month and-a-half only, as alleged by the defendant—determine, in other words, whether the petitioner is still the wife of the defendant.

In the course of the argument a question was raised before us, upon which we pronounce no opinion, because it was not a point which was raised before the Deputy Magistrate. We refer to the question whether the form of divorce known as *zihar* may be exercised in the *mutta* form of marriage. Mr. Baillie says, that there is some difference of opinion on this point, but that, according to the opinion which is founded on traditional authority, it may be exercised. The defendant contended before the Deputy Magistrate that he had given up the remainder of the term, and that this had the effect of terminating the relationship of husband and wife. He made no allegation that he had exercised and had a right to exercise *zihar*.

Order set aside.

NOTES.

[I. MAHOMEDAN LAW—' MUTTA ' MARRIAGE—

The point as to divorce, which was left undetermined in this case, came up in (1886) 14 Cal. 276, where it was held that the husband can validly 'give up the unexpired term, by a *hiba-a-muddat*, even without the wife's consent or acceptance, he being in the position of a debtor.

II. MAINTENANCE—CRIMINAL PROCEDURE CODE—

This is independent of civil rights or nationality of the party :—(1882) 5 All. 226 ; (1895) 19 Mad. 461—2 Weir 623.]

[=12 C. L. R. 233—6 Ind. Jur. 639]

[739] APPELLATE CRIMINAL.

The 28th April, 1882.

PRESENT :

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

In the matter of the Petition of Jhubboo Mahton and others.

The Empress

versus

Jhubboo Mahton and others.*

Evidence—Writing to refresh memory—Right of Counsel to inspect the writing—Neglect to exercise such right—Deposition of medical witness—Criminal Procedure Code (Act X of 1872), ss. 240, 323—Duty of a Judge when charging a Jury—Constructive murder under s. 34 of Penal Code (Act XLV of 1860)—Effect on others charged under s. 149—Irregularities in procedure and admission of evidence.

Per FIELD, J.—The grounds upon which the opposite party is permitted to inspect a writing, and to refresh the memory of a witness, are threefold : (i) to secure the full benefit

* Criminal Appeal, No. 146 of 1882, against the order of H. Beveridge, Esq., Sessions Judge of Patna, dated the 22nd February 1882.

of the witness's recollection as to the whole of the fact; (ii) to check the use of improper documents; (iii) to compare his oral testimony with his written statement.

Per FIELD, J.—The opposite party has a right to look at any particular writing before or at the moment when the witness uses it to refresh his memory in order to answer a particular question; but if he then neglects to exercise his right, he cannot continue to retain the right throughout the whole of the subsequent examination of the witness.

Per FIELD, J.—Under the provisions of s. 323 of the Code of Criminal Procedure, the examination of a medical witness taken and duly attested may be given in evidence in any criminal trial; but in order that such evidence may be admissible against any individual accused person, the examination must have been taken in the presence of the accused person.

Per FIELD, J.—It is the duty of a Judge to give a direction upon the law to the jury so far as to make them understand the law as bearing upon the fact; and if he does not give them an explanation of the law sufficiently comprehensive to enable them to decide the particular issue, it is a misdirection.

Per FIELD, J.—Where a prisoner is constructively guilty of murder under s. 34 of the Penal Code, it is doubtful if he can be said to have committed the offence of murder within the meaning of s. 149, so as to make other prisoners, by a double construction, guilty of murder.

Per FIELD, J.—Irregularities under s. 240 of the Criminal Procedure Code in the selection of the jurors, and in the admission of the deposition of a medical witness treated, it not being shown that the prisoners had been thereby prejudiced, as being objections which ought not to be entertained for the [740] purpose of interfering with the verdict, regard being had to the provisions of s. 283 of the Criminal Procedure Code and s. 167 of the Evidence Act.

THIS was an appeal from an order of the Sessions Judge of Patna.

The facts of the case are fully set out in the judgment of FIELD, J.

Mr. Branson, Mr. Huda and Mr. Sandel for the Appellants.

The Officiating Advocate-General (Mr. Phillips) and Mr. M. Ghose for the Crown.

The following **Judgments** were delivered:—

Field, J.—In this case eight persons have been tried and convicted under s. 302 read with s. 142 of the Penal Code, and have been sentenced to transportation for life. The circumstance out of which the case arose was a dispute concerning a piece of land and the crop which, at the time of the occurrence, was upon this land.

The first prisoner Jhubboo was originally charged under ss. 302, 326, 396 and 148 of the Penal Code. In the course of the trial two further charges were added, *viz.*, that he, Jhubboo, was a member of an unlawful assembly in the prosecution of the common object of which, namely taking possession of certain crops by force, one of the members committed murder by causing the death of one Ibrahim Hossein, and that he was thereby guilty under s. 302 read with s. 149 of the Penal Code; and *secondly*, that he was a member of an unlawful assembly in the prosecution of the common object of which, namely, in taking possession of the crops by force, one or more of the members caused grievous hurt to one Torab Ali, and that he had thereby committed an offence punishable under s. 325 read with s. 149 of the Penal Code.

Against the next two prisoners, Lukshman Mahton and Umrao Mahton, there were charges under s. 302 read with s. 149, s. 326 read with s. 149 and s. 396 of the Penal Code. The charge under s. 302 runs thus: "That you were members of an unlawful assembly, by a member of which, to wit, Jhubboo, an offence, the murder of Ibrahim Hossein, was committed [741], such as you knew to be likely to be committed, in the prosecution of the common object, to wit, the taking possession of the crops by force." Lukshman is also charged with rioting armed with a deadly weapon, under s. 148.

Against the remaining five prisoners,—Harihur Mahton, Randeהל Mahton, Sajwan Mahton, Mahabir Mahton, and Ramjiwan Mahton,—there are charges under s. 302 read with s. 149, s. 326 read with s. 149, and s. 396 of the Penal Code; and in these charges the common object is indefinitely stated to be "the taking possession of the crops by force." And the charges as to murder and grievous hurt allege that the accused persons knew these offences to be likely to be committed in the prosecution of the common object. There was also against Harihur Mahton an additional charge under s. 148.

Two observations may be made in respect of the prisoners other than Jhubboo: *first*, the charges against them did not allege that the offences of murder and grievous hurt were committed in the prosecution of the common object of the unlawful assembly, and yet the jury have found that these prisoners are guilty on the ground that the offence of murder was committed in prosecution of the common object of the unlawful assembly. The Judge gave no direction upon the matter of the charge as framed,—*viz.*, that murder was such an offence as the members of the unlawful assembly knew to be likely to be committed in the prosecution of the common object; he summed up as if the charge alleged, which it did not, that murder had been committed in prosecution of the common object. It is reasonable to suppose that the Judge's misdirection led the jury into error. *Secondly*, the charges allege that the offences of murder and grievous hurt were committed by Jhubboo Mahton. These charges were not amended by the insertion of any such words as the following:—"or some other person unknown who was a member of the unlawful assembly." The jury have found as a fact that Jhubboo Mahton did not commit the murder; and if Jhubboo did not commit the murder, it is not easy to understand how the prisoners other than Jhubboo could be constructively convicted of murder on the ground that murder had been committed by Jhubboo in prosecution of the common object of the unlawful assembly.

[742] Five persons are said to have been injured in the course of the riot,—namely, Ibrahim Hossein, Imdad Ali, Gohur Ali, Torab Ali, and Abdul Karim. Of these, Ibrahim Hossein has since died in consequence, as is alleged by the prosecution, of the injuries which he received on the occasion of the riot.

In the petition of appeal, which has been presented to this Court, a number of points have been taken; but as they have not all been pressed upon us, I shall, before proceeding to deal with the Judge's charge to the jury, notice those only which formed the subject of the arguments addressed to us.

The first point is, that the jurors who tried the case were not, as they should have been, chosen by lot from the persons summoned to act as jurors. Section 239 of the Code of Criminal Procedure directs that assessors shall be chosen by the Judge. Section 240 directs that the jurors shall be chosen by lot from the persons summoned to act as jurors. If, as is alleged in the petition

of appeal, the Judge himself selected the jurors instead of choosing them by lot, he acted contrary to the provisions of s. 240. But as there is no serious contention that the appellants were in any way prejudiced by what the Judge is said to have done in this matter, I think the objection is not one which ought to be entertained for the purpose of interfering with the verdict, regard being had to the provisions of S. 283 of the Code of Criminal Procedure.

The next point is, that although the police-officer, Ram Surrun Lal, was allowed to refresh his memory by looking at his diary, the Sessions Judge improperly refused to allow the counsel for the defence to see this diary. What really happened was this: The police-officer Ram Surrun Lal, when under examination, was asked whether he took down the statement made by the witness Leakat, and he replied that he did. He then read, or refreshed his memory, by looking at the original statement so taken down by him. This was, as I understand it, a statement taken down under the provisions of s. 119 of the Code of Criminal Procedure, and was not necessarily a part of the diary which a police-officer is required to keep by s. 126. The particulars which s. 126 requires to be recorded in a police-diary do not include any written statement [743] taken down under s. 119, and from the papers produced before us it would appear that, as a matter of fact, the written statement was not an integral portion of the diary. Having looked at Leakat's statement the police-officer said in answer to a question put by the prisoner's counsel that it contained nothing about Jhubboo jumping on Ibrahim. The object of asking this question was to show that Leakat in his first statement to the police had said nothing about the prisoner Jhubboo jumping on the deceased Ibrahim. The medical evidence showed that Ibrahim had received internal injuries, and the theory of the defence was, that, after these injuries were discovered upon a *post-mortem* examination, the witness Leakat improved his testimony by adding a statement about Jhubboo jumping on Ibrahim with the object of accounting for the internal injuries discovered by the *post-Mortem* examination. As, however, the police-officer stated that Leakat had said nothing to him about Jhubboo jumping on Ibrahim, the object of the question was attained, and it was unnecessary for the prisoner's counsel to ask to look at the diary.

The police-officer then stated in answer to a further question that the statement taken by him did not record that Jhubboo had given orders. It appears from a note made lower down by the Sessions Judge that this question also was answered by the witness after looking at the written statements taken by him, when he questioned the persons afterwards called for the prosecution in the Court of Session. Here also as the answer of the witness was all that the prisoner's counsel could desire, there was no necessity for him to look at the original statement with which the witness refreshed his memory, and he did not ask to do so.

After this we have nearly a page and-a-half of the same witness's cross-examination, and then we find that the witness was asked—"Did Torab Ali say anything to you about his having seen Gohur Ali, Imdad Ali, and Abdul Karim being struck?" The answer was, "I do not remember." Before giving this answer it is not contended that the witness again looked at the original statements of the witnesses, and the Judge then makes this note—"The counsel for the defence wishes to see the diary [744] and to make the witness refresh his memory therewith. The Court declined to do this." It is now contended that because, before answering the two first questions above referred to, the witness had looked at the original statements in order to refresh his memory, the counsel was entitled to see the diary when at a later

stage of the examination, the witness gave the answer, "I do not remember." I think that this contention is untenable. I have first to observe that although the term 'diary' has been used, I take it that what the Judge and the counsel were really alluding to, was the statement taken down by the police-officer under s. 119. Having regard to s. 161 of the Evidence Act, the prisoners' counsel was entitled to see the writing with which the police-officer refreshed his memory in order to answer the first two questions. This writing was, as to the first question, the original statement of Leakat. What the writing was with respect to the second question is not very clear.

Now the writing which the prisoners' counsel desired to see when the witness said "I do not remember," was not the statement of Leakat, but the statement of Torab Ali. I think that, as the prisoners' counsel did not exercise his right to look at the writing when the first or when the second question was answered, but allowed the examination to proceed, he lost his opportunity of claiming to look at the writing to which the witness referred before answering the first and the second questions. I do not assent to the argument that because counsel was entitled to see the writing which contained the statement of Leakat, he was, therefore, entitled to see other writings which contained the statements of persons other than Leakat and which had no connection with Leakat's statement except that they were taken in the course of the same enquiry by the police. Nor can I assent to the argument that counsel, having a right to look at a particular writing before or at the moment when the witness used it to refresh his memory in order to answer a particular question, and not then exercising this right, continued to retain it through the whole of the subsequent examination of the witness.

The grounds upon which the opposite party is permitted to inspect a writing and to refresh the memory of a witness are [745] three-fold: (i) to secure the full benefit of the witness's recollection as to the whole of the facts; (ii) to check the use of improper documents; and (iii) to compare his oral testimony with his written statement. The opposite party may look at the writing to see what kind of writing it is in order to check the use of improper documents; but I doubt whether he is entitled, except for this particular purpose, to question the witness as to other and independent matters contained in the same series of writings. I think, therefore, that, at the particular stage at which the prisoners' counsel asked to see what he called the diary, by which I presume he meant the whole series of writings containing the statements of all the persons examined by the police-officer, he was not entitled to exercise the right claimed in the particular way claimed by him. I further think that the Sessions Judge was not bound to compel the witness to look at the so-called diary in order to refresh his memory; and that it was wholly within his discretion whether he should do so or not.

The third point is, that the deposition of the medical officer was taken by the Magistrate when only three prisoners,—namely, Jhubboo, Lukshman, and Umrao,—were before him and that, as regards the remaining five prisoners, this examination of the medical officer was improperly used as evidence in the Court of Sessions, inasmuch as it was not taken by the Magistrate in their presence.

Under the provisions of s. 323 of the Code of Criminal Procedure, "the examination of a Civil Surgeon or other medical witness, taken and duly attested by a Magistrate, may be given in evidence in any criminal trial, although the person examined is not called as a witness, but the Court may summon such Civil Surgeon or other medical witness if it sees sufficient cause for doing

so." I take it that in order to be admissible under this section as evidence against any individual accused, the examination must have been taken by the Magistrate in his presence. In the present case, I think it exceedingly probable that the examination of the medical witness was not taken in the presence of the five prisoners other than Jhubboo, Lukshman, and Umrao. At the same time I cannot say that this is a point upon which there is no possible doubt. No specific objection to [746] the admissibility of the medical officer's examination was taken upon this ground in the Court of Session. If such objection had been taken, 'it is just possible that matter might have been forthcoming to show that the other five accused were present in person or by agent (s. 191,† Criminal Procedure Code) when the medical officer was examined by the Magistrate.

The medical officer was called in the Court of Session, and it has been contended before us, that, as he was called, his deposition taken by the Magistrate was absolutely inadmissible. I do not assent to this argument. I think that a deposition, properly taken, may be put in, and that the medical officer may then be called and further interrogated upon any points upon which there had not been a sufficient examination by the Magistrate. In the present case the medical officer was called and was cross-examined by the prisoners' counsel. It is true that this cross-examination was expressly, stated to be on behalf of one of the prisoners only, but it is equally true that counsel had an opportunity of cross-examining on behalf of all the prisoners. One important reason why a deposition not taken in the presence of a person sought to be affected by it is inadmissible is, that such person had no opportunity of cross-examining the witness. In this case all the accused were afforded this opportunity in the Court of Session. Then, further, it has not been contended, that if the medical officer had been examined again in chief in the Court of Session, any advantage would have accrued to the appellants which they could not have obtained by cross-examining him when he was called by the Sessions Judge.

Under these circumstances, I think it has not been shown to us that the prisoners were prejudiced by the irregularity, if committed; and, with reference to s. 283 of the Code of Criminal Procedure and s. 167 of the Evidence Act, I think that this objection would not justify us in interfering with the verdict.

Having disposed of these preliminary questions, I now come to consider the Judge's charge to the jury, and as the conclusion to which I feel myself constrained to come is, that this charge is radically defective in at least two essential particulars, I shall set out the essential portions of the charge and state somewhat fully the grounds upon which I am led to this conclusion.

[747] After some preliminary observations the Judge preceeds to say :—
 "The first question which you have to decide is—Was there a disturbance in the village of Sopowan and plot called Jhikitia Kunda on the morning of Monday the 28th November last and were Ibrahim and four others wounded there? There can be no doubt that Ibrahim is dead, and I do not think that there can be any reasonable doubt that he was killed. The medical evidence shows that he had a severe and dangerous wound on the left arm. The ulnar artery had been cut and the ulnar bone broken and comminuted, and this wound appeared to have been inflicted with a sword. The medical evidence shows that death was the result of hæmorrhage and shock."

†[Sec. 191 :—The complainant and the witnesses for the prosecution shall be examined in the presence of the accused person, or of his agent, when his

Examination to be in presence of accused.

personal attendance is dispensed with and he appears by agent.

Accused may cross-examine. The accused person or his agent shall be permitted to examine and re-examine his own witnesses and to cross-examine the complainant and his witnesses.]

He then proceeds to remark upon the injuries said to have been caused to Torab Ali, Imdad Ali, Gohur Ali, and Abdul Carim; and after this he says:—The next questions which you have to decide are: Were the prisoners present at that disturbance? Did they take part in it? Was that disturbance a riot? Did the prisoners take part in the riot? Was the common object of the rioters to take possession by force of a crop of paddy, and were the killing of Ibrahim Hossein and the wounding of the other four men done in prosecution of the common object of the rioters? The question of the presence of the prisoners and of their participation in the riot must be considered by you separately for each prisoner. You must consider if the evidence shows that each of the prisoners was present and took part in the riot. If you have any doubt as to the presence or participation of any one of the prisoners, you will give him the benefit of it. If you find that there was a riot and that the prisoners took part in it, then you have to consider under what circumstances the riot was committed. It is evident that the dispute was about the cutting of a crop of paddy. A most important question here arises,—namely who cultivated the land and sowed the paddy?"

After this he discusses the question as to who sowed the paddy; and he then continues:—

"You will ask yourselves who sowed the land? Was it Jhubboo or Leaket? If you find that Leaket sowed the lands, [748] then Jhubboo's right of private defence is gone (1) whether the land was really his or not. For if he allowed (2) Leaket to take possession in Assar, he had no right to resist the cutting in Aghran. If Leaket sowed the land in Assar even though wrongfully, his cutting the crop in Aghran was not theft, &c., so as to give Jhubboo a right of private defence (3). If you find that Leaket sowed the crops, and that the prisoners were present and took part in the riot, I think that you must find them guilty (4).

"If again you find that the crop was sown by Jhubboo, then the question which you have to ask yourselves is, if he and his party exceeded their right of private defence. The 4th exception to s. 99 declares that the right of private defence in no case extends to the inflicting more harm than it is necessary to inflict for the purpose of defence. Did the prisoners or any of them exceed this limit? The evidence shows that there were some 200 Kurmis armed with swords and lathies, while there were only four or five Mahomedans, and that they were unarmed. I do not think that it can be said that they needed to wound three persons and kill a fourth in order to preserve the paddy (5). The case is rather one of killing and wounding under grave and sudden provocation (6), and therefore punishable under ss. 304, 334, and 335. Here it will be necessary for you to consider the evidence against each prisoner."

(1) The soundness of this direction is very questionable. Note by FIELD, J.

(2) It is said that there is no evidence that he allowed him; that no such case was made; that the prisoners did not rely upon the right of private defence, but denied the transaction as stated by the prosecution; & that the Judge, assuming for the prisoners a defence based on the exercise of the right of private defence misled the jury with supposing that they admitted the facts and sought to explain away their criminality. Note by FIELD, J.

(3) This also is questionable. It can scarcely be said that if A wrongfully sows a crop on

B's land A is entitled to reap this crop, and B has no right to prevent him. Note by FIELD, J.

(4) Of murder. Note by FIELD, J.

(5) It might with equal truth have been pointed out that two hundred men did not need to wound three persons and kill a fourth in order to achieve the common object of getting possession of the crop. Note by FIELD, J.

(6) The Judge does not say, and it is not easy to understand, what constituted the grave and sudden provocation here referred to. Note by FIELD, J.

[749] The Sessions Judge then discusses the part which Jhubboo took in the occurrence, and adverts to the fact that the witnesses in their statements before the police, and the deceased Ibrahim in his dying declaration, said nothing about Jhubboo giving orders or jumping upon Ibrahim when down. The direction of the Judge upon this part of the evidence was particularly favourable to the prisoner Jhubboo. In order to enable the jury to consider the effect of the evidence against each of the other accused, the learned Judge says that he here 'summarized' the evidence of each witness; but the charge does not contain this summary. The Judge then proceeds:—"If you find that the crop was sown by Jhubboo and that he and the other prisoners had a right of protecting the crop from being cut and carried away by Torab and Leakat's party, but that the limits of the right of private defence were exceeded, you shall consider what, in your opinion, each prisoner did. Jhubboo is said to have ordered the killing of Ibrahim, and to have aided in doing so by stamping on his chest, etc. He is also said to have wounded Torab, an old and feeble man. It could scarcely have been necessary for him to do this in order to defend * his property. Lukshman is said to have wounded Gohur Ali with a sword and Harihur to have wounded Abdul Karim with a sword. The other five are all said to have used their latties. If you believe that they did, and that they exceeded their right of private defence by doing so, then you can find them guilty of causing hurt. You will also remember that if all the prisoners joined together in assaulting the other side, and if they were not justified by the law of private defence in doing so, or if they exceeded that right by striking the other party, then they were an unlawful assembly, and each is liable for the acts done by the assembly or any member thereof. You will also remember the law that an assembly not originally unlawful may become unlawful afterwards. If the crop was Jhubboo's, and he and the other prisoners went to protect it, they did not commit a riot by assembly; but if they went on and attacked [750] the other party, and in doing so exceeded the limits of their right of private defence, they became an unlawful assembly."

Now there are parts of this charge, and particularly of this last passage, more especially the words "if they exceeded that right by striking the other party, then they were an unlawful assembly, and each is liable for the acts done by the assembly, or any member thereof," which appear to me wholly defective and misleading, but I do not propose to comment upon every portion of this charge which appears to me open to observation. I shall notice only two defects, which appear to me so serious that I feel constrained to express my opinion that the appellants have not had a fair trial upon the grave charge upon which they have been convicted. These defects are: (i) No explanation of, or direction as to, the law relating to murder was given by the Sessions Judge to the jury; (ii) the jury were misdirected with respect to that portion of the charge which was concerned with s. 149 of the Penal Code.

It was properly pointed out by the Sessions Judge to the jury that the seven prisoners other than Jhubboo were not charged with having themselves done any act which could constitute the offence of murder. The charge against them was that Jhubboo had committed murder, and that inasmuch as they were, with Jhubboo, members of an unlawful assembly, and Jhubboo, while with them a member of that unlawful assembly, committed murder, they were, by virtue of the provisions of s. 149, guilty of murder, because they knew it to be likely that murder would be committed in prosecution of the common object

* The common object charged was not to defend or maintain possession, which would not come within the purview of cl. 4, s. 141 of the Penal Code, which says, "take or obtain possession." Note by FIELD, J.

of the unlawful assembly. Upon this charge, the first essential question was, whether murder had been committed by Jhubboo? There was no amendment charging in the alternative that the offence of murder had been committed by some person other than Jhubboo. The second essential question was, did the prisoners other than Jhubboo know it to be likely that the offence of murder would be committed in the prosecution of the common object of the unlawful assembly?

As to the first point, the jury found that the murder was not committed by Jhubboo, and this being so, it is not easy to understand how, upon the charge as drawn, the other seven 751 prisoners could have been convicted under s. 302 read with s. 149. The Sessions Judge appears to have assumed throughout the whole of his charge that the act by which Ibrahim lost his life was murder. As to what constitutes murder, I find no direction whatever. It is the duty of a Judge to give a direction upon the law to the jury so far as to make them understand the law as bearing upon the facts, and if he does not give them an explanation of the law sufficiently comprehensive to enable them to decide the particular issue, it is a misdirection. In this case the medical evidence goes to show injuries of three kinds:—(i) there were injuries about the head and congestion of the brain—on this point nothing whatever was said to the jury; (ii) there were injuries to the small intestines; and (iii) there was a sword-cut on the arm. The opinion of the medical officer as to the cause of death was, that death was due to shock following the injuries of the small intestines and to hæmorrhage from a wound in the arm. He gave no opinion, and apparently was not asked his opinion, as to whether death did, or could, result from the injury to the arm alone. If the jury believed that Jhubboo inflicted the wound on the arm and also caused the injuries to the intestines, this was not very material. If, however, the jury did not believe that Jhubboo caused the injuries to the intestines, but believed that he inflicted the wound on the arm, this became very material. The jury appear to have disbelieved the evidence as to Jhubboo jumping upon the deceased and so causing the injuries to the intestines. If this were so, the question at once arose, whether a shock sufficient to cause death was, or could have been, the result of hæmorrhage from the wound in the arm.

If the wound on the arm alone did not or could not cause death, it is impossible to say that Jhubboo committed murder. If death were the result of the combined effect of the wound on the arm and the injuries to the intestines, and the jury believed that Jhubboo inflicted the wound on the arm and some other person unknown caused the internal injuries, Jhubboo might be liable for murder by reason of the provisions of s. 34 of the Penal Code, which provides that when a criminal act is done by several persons in furtherance of the common intention of all, each [752] of such persons is liable for that act in the same manner as if it were done by him alone. But it may be a question whether in this case Jhubboo, being thus constructively guilty of murder, could be said to have committed the offence of murder within the meaning of s. 149, so as to make the other prisoners by a double construction guilty of murder.

On these essential points no direction whatever was given to the jury.

Then in the next place, when the jury had made up their minds as to whether Jhubboo had inflicted both injuries or one of them or neither of them, if they believed that he inflicted one or both, they should have been directed to consider what offence was committed thereby; and to enable them to do so, the law relating to murder should have been explained to them. There is apparently nothing to suggest that the infliction of injury was, with reference to the first clause of s. 300, an act done with the intention of causing death. It

then became necessary to consider whether there was an intention of causing bodily injury ; and if so, whether Jhubboo knew this bodily injury to be likely to cause the death of Ibrahim (cl. 2, s. 300). If the jury found that Jhubboo intended to cause bodily injury, but did not know this bodily injury to be likely to cause death, they ought then to have considered whether this bodily injury was sufficient, in the ordinary course of nature, to cause death, and upon this point the opinion of the medical witness would have been very material. If the jury found that it was not so sufficient, they should further have considered, with reference to the fourth clause of s. 300, whether Jhubboo knew that his act was so imminently dangerous that it must in all probability cause death or such bodily injury, etc. (cl. 4, s. 300). As to whether the act was so imminently dangerous, the opinion of the medical officer would again have been material. If the jury found that the act of Jhubboo did not come within any of the four clauses of s. 300, they could not have found that Jhubboo committed murder.

But Jhubboo's act, though not falling within any of the clauses of s. 300, might, with reference to s. 299, have been done with the intention of causing such bodily injury as was likely to cause death, or with the knowledge that he was likely by such [753] act to cause death. As to whether the bodily injury was likely to cause death, the opinion of the medical witness would again have been material. If the jury found that Jhubboo's act came under the portion of s. 299 just referred to, this act would have been culpable homicide not amounting to murder.

The same observations are applicable if for Jhubboo some person or persons unknown had been substituted in the charge by alternative language or otherwise.

On all these essential points no remark or observation was made to the jury ; and I entertain no doubt that the appellants have been seriously prejudiced by this misdirection or want of direction. If the jury had been properly directed upon these points, it is quite possible that they would have found that the act by which Ibrahim lost his life was not murder, but the lesser offence of culpable homicide in the person who committed that act. They might even have found that this act did not amount to culpable homicide, but constituted grievous hurt only.

I may further here remark that although there were charges under ss. 326 and 396, no instruction whatever appears to have been given by the Sessions Judge as to these charges.

I now come to the second point. The Judge records the following note of what passed between him and the jury after they had retired to consider their verdict : " After about three-quarters of an hour the jury returned and stated, that four of them, including the foreman, found all the prisoners guilty. The fifth jurymen, Baboo Kesho Ram Bhuth, doubted the guilt of the prisoners and would acquit them. The foreman stated that they found the prisoners all guilty of the charges under s. 149. They did not find that Jhubboo himself killed Ibrahim Hossain, and that therefore he was not guilty under the charge under s. 302, which charged him with having personally murdered Ibrahim Hossain. But they found that Ibrahim Hossain was murdered by some member of the unlawful assembly, and that the murder was committed in prosecution of the common object of the assembly. They found that all eight prisoners were present and took part in the riot, and that all eight were therefore guilty, under ss. 149 and 302, of having murdered Ibrahim [734] Hossain. In reply to a question from the Court, four of them stated—i.e., the four who were unanimous stated—that they found that the crop was sown by Leakat Hossein.

The fifth jurymen, in reply to a question, said that he doubted who had sown the crop. The Court concurred with the verdict. The Court had not itself felt quite certain as to who had sown the crop. But that point having been once found by the majority in favour of Leakat, it followed that the crime of the accused was murder. The Court was not prepared to dissent from the opinion of the majority that Leakat had sown the crop. That was a point on which they were the best judges, and as the Court remarked in the charge, once it was held that Leakat sowed the crop, Jhubboo's plea of private defence was gone. As the jury did not find that Jhubboo personally murdered Ibrahim, the Court could not regard him as more guilty than the others, nor did it think that capital sentences should be passed on eight men."

The Court sentenced each of the eight prisoners under ss. 302 and 149 to transportation for life.

The Court did not pass any sentence under the other sections.

I may here observe that when the jury were not unanimous as to their verdict, the judge would properly have required them to retire for further consideration see s. 263, Code of Criminal Procedure. Again, this same section allows the Judge to ask the jury such questions as are necessary to ascertain what their verdict is, and directs that such questions and answers shall be recorded. The learned Sessions Judge has not complied with this direction of the law by recording the questions and answers, but has given the substance of them merely.

It will appear from the extracts above made from the Judge's charge, and from the above record of what took place between the Judge and the jury, that the jury were directed to consider whether the murder was committed in prosecution of the common object of the assembly, and that the jury found that the murder was committed in prosecution of the common object. Now the charge against the prisoners other than Jhubboo did not allege that murder was committed in prosecution of the common object of the unlawful assembly. What it did allege was that the prisoners knew it to be likely that murder would be committed in prosecution of that object, and upon this, the language of the charge, I find no direction. It appears to me that the jury were in consequence misled to find in the affirmative something which was not alleged in the charge.

The prisoners other than Jhubboo could not, upon the charges as drawn, have been convicted of murder, unless they knew that it was likely that murder would be committed in prosecution of the common object of taking possession of the crops by force. The circumstances from which the jury could infer that the prisoners knew this to be likely, were not placed before them. They were told to find that which was not in the charge, *viz.*, whether murder was committed in prosecution of the common object of taking possession of the crops by force.

Having regard to the law as laid down in the case of *The Queen v. bed Ali* 11 B. L. R., 347: s. c., 20 W. R., F. B. 111. I think the observations of the Judge upon this point, even assuming that the charge alleged murder to have been committed in prosecution of the common object, were meagre and defective, and not calculated to give the jury that assistance which they ought to have had in order to enable them to understand clearly the circumstance under which they would be justified in convicting the prisoners other than Jhubboo constructively of the serious offence of murder.

This case has, I observe, occupied no less than eight days of the Sessions Judge's time, and I should be extremely reluctant to send it back to be tried

again if I saw any other way in which the interests of justice could be satisfied. Having regard to the defects which I have pointed out, I cannot satisfy myself that these prisoners have had a fair trial. At the same time their absolute innocence is not so clearly doubtful or beyond doubt that I feel justified in saying that the body of evidence which is to be found in the case should not again be submitted to a jury.

I am, therefore, of opinion that the only proper course is to set aside the conviction and sentence and direct a new trial, and I think that before the new trial is commenced, the charges ought to be redrawn more exactly with reference to the facts which have appeared in evidence.

[756] As to whether the prisoners should be admitted to bail pending the second trial, we express no opinion, this being a matter for the discretion of the Sessions Judge.

McDonell, J.—I concur in the decision arrived at by my learned brother. I hold that the misdirections to the jury are such as to compel us, in the interest of justice, not only to set aside the conviction and sentence, but to direct a new trial. The Judge appears to have assumed throughout the whole trial that the act by which Ibrahim lost his life was murder, unless the accused could establish the plea of right of private defence.

The difference between murder and culpable homicide was apparently never explained to the jury, and even if one of the unlawful assembly committed culpable homicide amounting to murder, I do not think that the jury were instructed sufficiently as to the circumstances under which they would be justified in convicting the accused other than the one who committed the act constructively of the offence of murder.

Conviction set aside and new trial directed.

NOTES.

[I. CHOOSING JURORS—IRREGULARITY—

Not choosing by lot, held incurable, (1902) 7 C.W.N. 188; See also 13 C.W.N. cxi; 26 All. 211.

II. JUDGE'S CHARGE TO JURY—MISDIRECTION WHEN LAW NOT EXPLAINED—

See also 15 Bom. 369; 25 Cal. 711; 736; 14 Cal. 164; 36 Cal. 531; 6 Bom. L.R. 258; Ratn Lal 736 (Jury should take the law from the Judge).

III. DEPOSITION OF MEDICAL WITNESS BEFORE THE ACCUSED—

See also 9 All. 720; 18 Cal. 129.

IV. STATEMENTS TO POLICE OFFICER :—

See also (1906) 33 Cal. 1023; 10 C. W. N. 890; 4 Cr. L. J. 79; (1877) 19 All. 390; 17 A. W. N. 174.]

[8 Cal. 756]

ORIGINAL CIVIL.

The 20th April, and 1st May, 1882.

PRESENT:

MR. JUSTICE WILSON.

Hicks

versus

Hicks.

Practice—Divorce Act (IV of 1869), s. 16—Decree absolute—Service of decree on respondent.

It is not necessary, in order that a decree *nisi* for dissolution of marriage may be made absolute, that the decree should be served upon the respondent. (See *Warden v. Warden*, 9 B. L. R., Ap., 39; and *Willis v. Willis*, B. L. R., O. C., 52.)

IN this case a decree *nisi* for dissolution of marriage on the ground of the wife's adultery had been made. The decree had not been served on the wife.

[757] Mr. *Fergusson* now moved to make the decree absolute. It is not necessary, under the Divorce Act, that the respondent should be served with the decree. The practice in England of requiring such service is based on the principle that the Queen's Proctor should have notice in order to intervene, if necessary.

Cur. ad. vult.

Wilson, J.—I am satisfied that the practice does not require the decree to be served; and there will, therefore, be a decree absolute.

Decree absolute.

Attorneys for the Petitioner: Messrs. *Barrow* and *Orr*.

NOTES.

[DIVORCE—DECREE 'NISI'—

See also 18 Cal., 443.]

[8 Cal. 757=41 C. L. R. 95]
CIVIL REFERENCE.

The 1st May, 1882.

PRESENT :

SIR RICHARD GARTH, KT, CHIEF JUSTICE.

Kirty Churn Mitter.....Plaintiff

versus

Aunath Nath Deb.....Defendant.*

Court-Fees Act (VII of 1870), art. vi, cl. 17, sched. ii—Stamp on memorandum of appeal in partition-suits—Valuation of suit.

The stamp-fee payable on appeals to the High Court in suits asking for "partition, the separation of a share, and for khas possession of that share after separation," is that leviable under art. vi, cl. 17,† sched. ii, of the Court-Fees Act.

For the purpose of jurisdiction the Court should be guided by the value of the property in suit, but the amount of the stamp-fee should be governed by a different principle.

THE suit in which the present reference arose was brought for partition and possession of the share allotted by the partition; and the suit was valued at Rs. 31,000, and an *ad valorem* fee on that sum was duly paid.

The case came up on appeal to the High Court, and was valued for the purpose of jurisdiction at the same amount, but a court-[758] fee stamp of 10 rupees only was affixed on the memorandum of appeal, on the ground that the suit being one for partition only, and it being impossible to estimate the value of the right to partition in money, the fee of Rs. 10 was correct under art. vi, cl. 17, sched. ii of Act VII of 1870.

The Deputy Registrar was of opinion, that art. vi of cl. 17, sched. ii, was provided for cases of a very different description to the present, and thought that an *ad valorem* fee of Rs. 995 was leviable under cl. iv (b) of s. 7 of the Court-Fees Act.

The matter was referred to the Taxing Master, who was of opinion that the Deputy Registrar was wrong in applying cl. iv (b), s. 7, because the suit was not brought to "enforce the right to share in any property on the ground that it was joint family property," but the plaintiff was in actual possession of his share in the joint estate, and merely sought for the partition of the estate, the separation of his share, and for khas possession of such share when separated; and he, therefore, was of opinion that the stamp of 10 rupees affixed was correct.

He, however, referred the matter to the Chief Justice under s. 5 of the Court-Fees Act.

* Reference under section 5 of the Court-Fees Act, VII of 1870, in Regular Appeal No. 97 of 1882.

† [Art. VI, cl. 17 :—

Number.		Proper Fee.
Plaint or memorandum of appeal in each of the following suits :—		Ten Rupees.]
VI. Every other suit where it is not possible to estimate at a money-value the subject-matter in dispute, and which is not otherwise provided for by this Act.		

Baboo Amarendro Nath Chatterjee for the Appellant.

The Opinion of the Chief Justice was as follows :—

Garth, C.J.—I think the Taxing Master is quite right. If the plaintiff's suit had been to recover possession of, or establish his title to, the share which he claims in the property, he must have paid an *ad valorem* stamp-fee upon the value of that share. But, as I understand, he is already in possession of his share, and all that he wants is, to obtain a partition, which is merely, as explained by the learned Judges in the case of *Rajendro Lall Gossami v. Shama Churn Lahoory* (4 C. L. R., 418), to "change the form of his enjoyment" of the property, or, in other words, to obtain a divided, instead of an undivided, share.

It seems to me impossible to say what will be the value to the plaintiff of this change in the nature of his property, and I, therefore, think a stamp-fee of Rs. 10 is sufficient.

[739] The view of the Judges in the above case seems quite in accordance with this conclusion.

It was quite right of course, for the purpose of jurisdiction, to be guided by the value of the property in suit, but the amount of the stamp-fee is governed by a different principle.

NOTES.

[I. LATER STAGES OF THE CASE—HEARING FEE—

The hearing fee at this appeal came up for decision in (1883) 13 C.L.R., 253, and it was held that the Court ought to fix the amount in each case.

II. VALUATION OF PARTITION SUIT—

When this case came up again with reference to the hearing fee, GARTH, C.J. and MAC-PHERSON, J., said (1883), 13 C.L.R., 253—

"It is clear that, in suits where the sole object of the plaintiff is to obtain a partition, the proper value of the suit is not the value of the property sought to be partitioned. The value of the suit, generally speaking, would be the difference between the value of the plaintiff's share which he requires to be partitioned, and the value of the same share not partitioned."

III. PARTITION SUIT—COURT FEES—

Where the suit is for partition without any claim for possession by one in joint possession this case has been followed by the Calcutta High Court, and approved by MOOKERJEE J., in (1907) 6 C.L.J., 651, 12 C.W.N. 37, in a learned judgment where all the previous cases are reviewed. Also in cases where one co-owner's possession is constructively the joint possession of all :—(1893) 20 Cal., 762.

In (1894) 4 M.L.J. 110, the Madras High Court held art. 17 to be inapplicable, and this has been affirmed in the Full Bench case of (1910) 8 I.C. 512 : 21 M.L.J. 21 : 9 M.L.T. 3 : 1 M.W.N. 755, where the previous cases including MOOKERJEE, J.'s judgment in 6 C.L.J. 655, reviewed at great length by KRISHNASWAMI AYYAR. For the Bombay view, see 33 Bom. 658 : 10 Bom. L.R. 1074 : 4 I.C. 242 ; which differed from (1896) 22 Bom. 315. See also (1893) 18 Bom. 209. In (1895) P.R. 104 the Punjab Chief Court required an *ad valorem* fee on the value of the share. See also (1902) 15 C.P.L.R. 81 ; 120. Where the suit prays for recovery of possession also, an *ad valorem* has been levied :—(1906) 28 All. 340 : 3 A.L.J. 181 : (1906) A.W.N. 38 (39) ; (1893) 18 Bom. 209. Where the suit is for declaration and injunction, the plaintiff can put his own valuation, sec. 7 (4) c and d, (1905) 32 Cal. 734 (739) : 9 C.W.N. 690.

IV. JURISDICTIONAL VALUE—SUITS VALUATION ACT, 1887, SEC. 8—PARTITION SUIT.

Madras.—The plaintiff's valuation of his share :—(1896) 20 Mad. 289 ; 21 Mad. 234-236, unless it be for general partition, then the value of the whole (1895) 20 Mad. 289 at 292 ; see also (1910) 21 M.L.J. 21.

Bombay.—Plaintiff's valuation of his share, (1896) 22 Bom. 315 ; (1906) 31 Bom. 73 : 8 Bom. L.R. 885 ; 33 Bom. 658.

Allahabad.—The plaintiff's valuation of his share ; (1889) 12 All. 506 : 10 A.W.N. 128.

Calcutta.—Value of the plaintiff's share, sec. 8 being, according to this High Court inapplicable :—(1893) 17 Cal. 680-683. See also 6 C.L.J. 255.

The underlying principles are fully discussed by MOOKERJEE J., in (1907) 6 C.L.J. 255 ; (1907) 6 C.L.J. 651 ; 13 C.W.N. 815 ; by KRISHNASWAMY AYYAR, J., in (1910) 8 I.C. 512 : 21 M. L. J. 21.]

[8 Cal. 759]

APPELLATE CIVIL.

The 2nd May, 1882.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Huri Ram and others.....Defendants

versus

Raj Coomar Opadhya.....Plaintiff.*

*Suit for possession—Land purchased benami by plaintiff for defendant—**Burden of proof—Evidence Act (1 of 1872), s. 110.*

The plaintiff sought to recover possession of certain lands, alleging that he had been dispossessed. The defendants, who were in possession, alleged that, at an auction-sale, the plaintiff had bought the lands benami for the defendants. *Held*, that the burden of proving a *prima facie* case that the land belonged to the plaintiff, was on him.

THIS was a suit to recover possession of five bighas seven cottas of land with wasilat.

The plaintiff stated that he held nineteen bighas twelve cottas of maurasi kashtkari land, and further purchased, at an auction-sale, two bighas fifteen cottas ; that, in 1285 (1878), one Harman, defendant No. 3 (who was the manager on behalf of defendants Nos. 1 & 2) took forcible possession of two bighas ten cottas in plaintiff's maurasi holding, and of ten cottas in the land he had purchased at the auction sale ; but subsequently gave up possession of these lands, finding them unfit for indigo purposes, and he, the plaintiff, remained in possession and occupation up to 1st December 1878; and that the defendants again wrongfully ousted him from possession from five bighas on the 2nd December 1878.

The defendants contended that the plaintiff had let out to the [760] defendants three bighas eleven cottas out of the maurasi land, for the purpose of growing indigo ; and that the plaintiff was a mere gurzidar of the defendants in the matter of the auction-purchase, the defendants being the real purchasers.

The Munsif found that the onus of proving that the plaintiff sublet to the defendants for the purpose of indigo cultivation lay upon the defendants, and that they had failed to establish the fact ; and further found that the real purchasers at the auction-sale were the defendants, the plaintiff being their gurzidar, but found that the plaintiff was entitled to a decree for possession of a portion of the lands in dispute, the amount of wasilat to be determined in execution, and that the claim as to the remaining portion of the lands should be dismissed.

The defendants appealed to the District Judge, who held, that the defendants having alleged that the plaintiff bought at the auction-sale benami for them, the burden of proof lay upon the defendants to show they were the real purchasers and allowed the appeal.

The defendants appealed to the High Court.

* Appeal from Appellate Decree, No. 119 of 1881, against the decree of J. F. Stevens, Esq., District Judge of Sarun, dated the 16th September 1880, reversing the decree Baboo Tara Prosunno Banerjee, Sudder Munsif of that district, dated the 23 September 1877.

Moonshi Mahomed Yusuf for the Appellants.

Baboo Rajender Nath Bose for the Respondent.

The Judgment of the Court (MITTER and MACLEAN, JJ.) was delivered by

Mitter, J.—We are of opinion that the District Judge is in error in holding that, as regards plot 13, the burden of proof lay upon the defendants, and not upon the plaintiff. He says, "I think that the finding of the lower Court on this point might be defended, if the burden of proof lay upon the plaintiff to show that he was the real purchaser, but it lies upon the defendants to prove that he was not." The plaintiff in this case sought to recover possession of this plot alleging that he was dispossessed. Therefore, as an ordinary case, the burden of proof lay upon the plaintiff to establish a *prima facie* case. There is no reason why any difference should be made in this case because the defendants say that the property was purchased benami by the plaintiff. Under s. 110 of the Evidence Act it [761] is for the person who says that the party who is in possession of a disputed property is not the owner of it, to prove that he is not the owner of it. The section says—"when the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner." In this case there is no dispute between the parties that the defendants are in possession. The defendants say they are the owners of the plot in dispute, and it is for the plaintiff to prove that they are not the owners thereof. The burden of proof is on the plaintiff, and as the District Judge has not come to the conclusion in favour of the plaintiff upon the evidence adduced by him, we send back the record to him for a finding upon this point.

As regards the other plot, and in all other respects, we do not think that there is any ground for interference with the decision of the lower Appellate Court.

The case will be finally disposed of when the finding of the lower Appellate Court upon the point stated above comes up. We reserve the costs of this hearing.

Case remanded.

[8 Cal. 761]

ORIGINAL CIVIL.

The 9th March, and 9th and 23rd May, 1882.

PRESENT :

MR. JUSTICE WILSON.

Bhujendro Bhusan Chatterjee

versus

Trigunanath Mookerjee and others.

Declaratory decree—Sepecific Relief Act (I of 1877), s. 42.

Certain trusts of a house were declared in favour of *A* and *B* for life, subject to forfeiture upon the happening of particular events, and further trusts in favour of the issue of *A* and *B* were also declared. The settlor died leaving a will under which *C* took an estate for his life

with remainder to the settlor's son *E* absolutely. *E* assigned his interest in the trust premises to the plaintiff, who now sued the *cestuis que trustent* and *C*, praying that, in the event which had happened, it might be declared that the life-estates of *A* and *B* had been forfeited. He also asked for various declarations as to his rights.

Held, that no declaratory decree could be made.

On the 6th June 1868, one Prosunno Coomar Tagore conveyed [762] a house to trustees, upon trust for the defendants Trigunanath Mookerjee and Tridosnath Mookerjee for life; and after their respective deaths, upon certain other trusts for their issue. Prosunno Coomar Tagore died on the 30th August 1868, leaving a will, which was disputed, and ultimately it was decided, that the defendant Jotendro Mohun Tagore was beneficially entitled to a life-estate in the testator's property, and that, on the failure or determination of his estate, the testator's only son, Ganendro Mohun Tagore, was entitled as his heir-at-law to the beneficial enjoyment of the testator's estate.

On the 12th of May 1879, Ganendro Mohun Tagore, according to his estate and interest if any in the trust premises, and so far only as he could or lawfully might, and not by way of covenant of warranty, granted the house to the plaintiff, his heirs, representatives and assigns, for his and their absolute benefit, subject to the trusts and provisions of the indenture of the 6th June 1868.

The plaintiff contended that, in the events which had happened, and which it is not necessary to state for the purposes of this report, the interests of the defendants Trigunanath Mookerjee and Tridosnath Mookerjee had become forfeited, and he prayed (*a*) that the trust-deed might be construed; (*b*) that it might be declared that the trusts to take effect upon the death of the tenants-for-life were invalid; and (*c*) that it might be declared that he was entitled to the interest of Ganendro Mohun Tagore in the house. He also prayed—

“(d) That, should this Honourable Court be of opinion that the instrument aforesaid does amount to an assignment, charge, or incumbrance within the meaning of the said indenture of the 6th day of June 1868, then such order may be made for the possession of the said house and for the enjoyment of the rents, issues, and profits thereof by the person or persons entitled thereto as to this Honourable Court may seem meet:

“(e) That, should this Honourable Court not be of the opinion aforesaid, then a new trustee or trustees of the said indenture of the 6th day of June 1868 may be appointed to carry out so many of the trusts thereof as are valid and still subsisting;

“(f) That, for all or any of the purposes aforesaid, such directions may be given and accounts taken as may be expedient;

[763] “(g) That the plaintiff may have such further or other relief as the nature of the case may require.”

Mr. Bonnerjee and Mr. Mookerjee for the Plaintiff.

Mr. Evans and Mr. Palit for the Defendants Trigunanath Mookerjee and Tridosnath Mookerjee.

The Advocate-General, Offg. (Mr. Phillips), Mr. Allen, and Mr. O'Kinealy for other Defendants.

Mr. Bonnerjee contended, that this was a suit in which a declaratory decree ought to be made, and referred to *Lady Langdale v. Briggs* (8 DeGex. M. and G., 391), and *Ram Lall Mookerjee v. The Secretary of State for India* (L. R., 8 I. A., 46; s.c., I. L. R., 7 Cal., 304). [WILSON, J., referred to *Kathama Natchiar v. Dora Singa Tevar* (L. R., 2 I. A., 169; s.c., 15 B. L. R., 83)].

For the defendants it was contended, that the present was not such a suit as is contemplated by s. 42 of the Specific Relief Act.

Wilson, J.—This suit came on for settlement of issues, when it appeared that several issues of fact and several issues of law arose on the pleadings. But before the other issues could be usefully tried, it became necessary to determine whether, on the plaint, any case was shown entitling the plaintiff to a decree.

The plaint shows that, on the 6th of June 1868, the late Prosunno Coomar Tagore executed a deed, by which he conveyed a house, upon certain trusts, for the benefit of the first two defendants and their issue, all of which trusts, the plaintiff contends, are invalid, except those which give life-estates to the first two defendants.

The plaint then shows that, under the will of Prosunno Coomar Tagore, the defendant, Moharaja Jotendro Mohun Tagore, takes a life-estate in the residuary estate of the testator, the remission in fee being in the testator's son Ganendro Mohun Tagore; and that, in 1879, the plaintiff, for a nominal money-consideration, and in further consideration of some covenant, the nature of which [764] does not appear, obtained a conveyance from Ganendro Mohun, of his interest, if any, in the house, without any warranty of title.

The plaintiff shows also that the first two defendants have dealt with the house in question in a way which he alleges marks a forfeiture of their life-interests under the terms of the trust-deed.

On these allegations he asks for various declarations as to his rights. He also asks: [His Lordship read the prayers of the plaint (*d*), (*e*), (*f*), and (*g*) as above, and continued].

The first question is, whether the plaint shows any title to relief other than a mere declaration.

The only such relief specifically asked for is the appointment of a new trustee of the trust-deed. But the plaintiff is a total stranger to the trust, and has, therefore, no right to ask for this.

It was further urged, though not very strenuously, that the plaint shows the property to have been in some way endangered by the acts of the present tenants-for-life, so as to entitle the plaintiff as reversioners to some relief. But I fail to see any such injury or danger disclosed.

The main question remains, whether, on the facts alleged in the plaint, the plaintiff shows that he ought to have a declaratory decree apart from any right to other relief.

Prior to the Specific Relief Act it was the law in this country, as in England, that a declaratory decree could not be made unless a right to consequential relief were shown. Any doubt upon this point was set at rest by the decision of the Privy Council in *Kathama Natchiar v. Dora Singa Tevar* (L. R., 2 I. A., 169; s.c., 15 B. L. R., 83). But the Specific Relief Act (I of 1877), s. 42, contains provisions different from those previously in force. It enacts that—"Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may, in its discretion, make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief. Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so."

[765] I am not aware that there has been any authoritative determination of the principles upon which the discretion of the Court under this section ought to be exercised : and I do not propose to attempt to lay down any general rule, beyond this, that I think the discretion ought to be exercised with great caution. I have no doubt, however, that the present case is not one in which a declaratory decree ought to be given. To hold otherwise would be to lay down that any one who claims any interest in property, present or future, ought to be allowed to ask the Court to give him an opinion on his title, and it cannot, I think, have been the intention of the Legislature to lay down any such rule. Beyond the fact that he obtained a conveyance of a reversionary interest, the plaintiff shows no single circumstance which ought, in my judgment, to lead the Court to interfere. On the other hand, to give a declaratory decree in such a case would be to offer direct encouragement to speculative purchasers of doubtful titles.

One other point I notice, because stress was laid upon it in argument. It was said that, in respect of the alleged forfeiture of the first two defendants' life-estates, some decree might be given. I cannot agree with this. Even assuming that the plaintiff's contention is correct, and that the ultimate reversioner can enforce a forfeiture which the immediate reversioner does not insist upon, (a proposition which it would require stronger reasons than I have yet heard to convince me of), still the most that could be given now would be a mere declaration on the subject, and in addition to the general reasons I have given, for not giving a declaratory decree in the case, there is as to this point the additional reason that the question is one in which the plaintiff can have no interest except in the one contingency of the Moharaja Jotendro Mohun Tagore dying before the first life-tenants. The suit is dismissed with costs.

Suit dismissed.

Attorneys for the Plaintiff : Messrs. *Remfry and Remfry*.

Attorneys for the Defendants : Messrs. *Swinhoe & Co.*, Baboo *Kalidoss Bhunjo*, Messrs. *Sanderson & Co.*, and Baboo *Ukhoy Chunder Chowdhry*.

NOTES.

[DECLARATORY DECREE—DISCRETION OF COURT—

This case was distinguished in the circumstances in (1894) 22 Cal. 354 (359). See also (1994) P. L. R. 76.]

[==6 Ind. Jur. 635]

[766] ORIGINAL CIVIL.

The 10th April, and 23rd May, 1882.

PRESENT :

MR. JUSTICE WILSON.

Hurro Coomaree Dossee

versus

Tarini Churn Bysack and others.

Express trust—Limitation Act (XV of 1877), s. 10.

A suit against trustees for the purpose of charging certain property with the trusts declared by the author of the trust in respect of that property and for an account, is a suit to follow property, and, as such, is not barred by any lapse of time.

THIS was a suit for an account of trust-moneys, praying that the suit might be taken as supplemental to certain other suits for the same purpose.

The plaintiff was one of the grand-daughters of one Bhuggobutty Dossee, who died in the year 1841, leaving a will, of which she appointed one Udoichand Bysack, since deceased, sole executor, and by which she directed that the incomes of certain houses should be applied towards the performance of the worship of an idol, and that the balance should be divided in equal shares between the defendant Manmohini Dossee and two persons named Golapmoni Dossee and Radhakanto Sett, both of whom were dead at the time of the institution of the suit. Udoichand Bysack died leaving a will, of which he appointed two executors, Romanath Tagore and Modan Mohun Chatterjee, since deceased, who acted in the trusts of the will of Bhoggobutty Dossee.

Radhakanto Sett died in 1846, leaving the defendants, Preonath Sett and Romanath Sett, his sons, him surviving. Golapmoni Dossee died in 1851, leaving two daughters, the plaintiff and one Chandkumari Dossee, since deceased, her surviving.

By the decree, dated the 14th of December 1857, made by the Supreme Court of Calcutta in two causes, in the first of which Golapmoni was the plaintiff and Romanath Tagore and others were the defendants, and in the second, of which the present plaintiff and Chandkumari Dossee were the plaintiffs and Romanath Tagore and others were defendants, it was declared that one Sreemutty Shibosoondery Dossee was a fit and [767] proper person to execute the trusts mentioned in Bhuggobutty Dossee's will, and that of the surplus income of the trust-property, one-third should be paid to the representatives of Radhakanto Sett, one-third to the representatives of Golapmoni Dossee, and one-third to the defendant Manmohini Dossee during her lifetime, and after her death, to her representatives; and a reference was directed to the Master to enquire and report what would be a sufficient sum to be set apart out of the produce of the trust-property for the performance of the worship of the idol, but no enquiry was ever made.

By an order made in these last-mentioned causes on the 17th of June 1859, it was declared, that the defendants, Tarini Churn Bysack and Nirmul Chand Bysack, who were the grandsons in the male line of a contemporary wife with Bhuggobutty Dossee, were fit and proper persons to perform the trusts.

In the present suit the plaintiff charged the trustee-defendants, Tarini Churn Bysack and Nirmul Chand Bysack, with various breaches of trust, and prayed (among other things) (a) that the suit might be taken as supplemental to the abovementioned causes, (b) for an account, and (c) that the surviving trustees might be decreed to pay to the plaintiff what, upon taking the account, might be found to be due to her in respect of the surplus produce of the two houses.

Mr. Bonnerjee and Mr. Hyde for the Plaintiff.

Mr. Palit and Mr. Haldar for the Defendant Tarini Churn Bysack.

Mr. Mookerjee for the Defendant, Manmohini Dossee.

Mr. Mitter for the Defendant, Romanath Sett.

Mr. Apcar for the Defendant, Preonath Sett.

Wilson, J.—This case came before me for settlement of issues, and several questions of law were argued which I do not deal with, because the view which I take of the scope of the suit makes it unnecessary to do so. This is a suit to revive and give effect to a former suit, and all that is asked for

might have been obtained by orders in the former suit (which would [768] have been made almost as a matter of course) if the time for applying for such orders had not long since expired. I took time to consider my judgment, because it was contended that this suit also was barred by limitation, at any rate as to some portion of the accounts asked for.

The original suit was, and this suit is, brought to enforce express trusts, and the plaintiff's case is that, under s. 10 of the Limitation Act (XV of 1877), no length of time is a bar. That section is as follows:—"Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property, shall be barred by any length of time."

I was referred by the defendants' counsel to the case of *Saroda Persad Chatteerjee v. Brojonath Bhattacharjee* (I. L. R., 5 Cal., 910). In that case it was held, that a suit against a trustee, not to recover any trust-property in specie, but only for an account, was not within the protection of s. 10. Sitting as a Court of First Instance, I should have felt bound to follow this ruling had it been expressly in point. But I am not inclined to extend it, and the case is not expressly in point. The primary object of the original suit, and therefore of this suit, is to charge two houses with the trusts of the will of the testatrix. It is, therefore, a suit to follow property, and as such a suit is saved from the bar of limitation by s. 10. I think the plaintiff is entitled to all relief ordinarily given in such a suit without limitation.

There will be a decree in terms of prayers (a), (b) and (c) of the plaint. Costs and all other questions are reserved.

Suit decreed.

Attorney for the Plaintiff: Mr. Hart.

Attorneys for the Defendants: Messrs. Remfry and Remfry, Messrs. Beeby and Rutter, and Messrs. Swinhoe and Co.

NOTES.

[LIMITATION ACT—TRUSTS—

See 30 Cal. 369—7 C. W. N. 353; 13 C. W. N. 557 (577) —9 C. L. J. 383.]

[=9 I.A. 53 : 11 C.L.R. 149 : 6 Ind. Jur. 328 : 4 Sar.P.C.J. 316]

[769] PRIVY COUNCIL.

The 23rd, 25th, 26th and 29th November, 1881, and 21st January 1882.

PRESENT :

SIR B. PEACOCK, SIR M. E. SMITH, SIR R. P. COLLIER,
SIR R. COUCH, AND SIR A. HOBHOUSE.

Ramanand Kuar.....Plaintiff

versus

Raghunath Kuar and another.....Defendants.

[On Appeal from the Court of the Judicial Commissioner of Oudh.]

Anant Bahadur Singh.....Plaintiff

versus

Raghunath Kuar and others.....Defendants.

[On Appeal from the Court of the Commissioner of the Faizabad Division.]

*Oudh Estates Act (I of 1869), ss. 8, 9, and 10—Recognition of trust—
Specific Relief Act (I of 1877), s. 42.*

Notwithstanding the confiscation of land in Oudh, followed by its restoration under the Government Order of 11th March 1858, affirming the absolute title of those with whom summary settlements had been made, and the granting of sanads to the latter persons, with full power of alienation, confirmed by "The Oudh Estates Act, 1869," the legal owner may, either by express agreement, or by his conduct, constitute himself a trustee for others as to the whole or part of the beneficial interest in the land, the subject of such restoration, settlement, and sanad.

A taluqdar, deceased before annexation, had provided by will for the succession of his five widows, one at a time, to his estate, with remainder to a son of his nephew. Settlement was made with the senior widow after the mutiny; a sanad granted to her as taluqdar, with full power of alienation, and her name was afterwards entered in the lists prepared under s. 8 of "The Oudh Estates Act, 1869." But certain of her acts were not explicable except on the understanding that she was abiding by the will.

Held, in a suit by the widow next in order, that such senior widow had undertaken the trust of carrying out the provisions of the will, and that a deed of gift made by her transferred only her interest, which was an estate for life.

Held also, in a suit by the remainderman for a declaration of the invalidity of the transfer by the widow as against him, that although declaratory relief might have been, at the Court's discretion, refused to him, on the ground of his remoteness in remainder, and the identity of the object of his suit with that of the other, yet he was entitled on this appeal to the decree which he sought, because his suit had been wrongly decided against him on the merits.

[770] APPEAL from a decree of the Additional Judicial Commissioner of Oudh (17th July 1878), affirming a decree of the Commissioner of the Faizabad Division (17th November 1877), which reversed a decree of the Deputy Commissioner of the Faizabad District (2nd July 1877).

Appeal from a decree of the Commissioner of the Faizabad Division (17th November 1877), affirming, save as to costs, a decree of the Deputy Commissioner of the Faizabad District (2nd July 1877).

These two appeals related to the succession to the taluq Sihipore, of which the lands were situate partly in the District of Faizabad and partly in that of Sultanpore in Oudh. It was formerly held by Nihal Singh, who died without issue in 1832, leaving five widows, of whom two died before 1858.

The widow then senior was Thakurain Raghunath Kuar, the first defendant in both these suits. The widow next in order was Thakurain Ramanand Kuar, the plaintiff in the first suit and one of the defendants in the second. The last surviving widow was Thakurain Sheonath Kuar, also one of the defendants in the second suit. By his will, dated 30th June 1831, which is set forth in their Lordships' judgment, Nihal Singh had provided for the succession of each of these widows to the taluqdari for her life, one at a time, with remainder to Sheombar Singh, the grandson of his brother, now represented by the plaintiff in the second suit, the Appellant Anant Bahadur Singh.

The question was—what, with reference to the will, were the rights of the senior widow, Raghunath Kuar, the settlement having been made with her as taluqdar, followed by other proceedings, and by "The Oudh Estates Act, 1869," confirmatory of her title: and it was raised by these two suits brought under "The Specific Relief Act, 1877," one by the widow next in order, the other by the remainderman. Both sought a declaration that a deed of gift made on the 27th February 1877, by Raghunath Kuar in favour of her nephew Bisheshur Baksh, was invalid.

The taluq of Sihipore was not within the exceptions made in the order issued by the Governor-General in Council on the [771] 15th of March 1858, whereby the proprietary right in the land of Oudh was generally confiscated. On the 2nd December 1858, the summary settlement of the taluq was made with Raghunath Kuar, and the Circular Order of Government confirmed the title of the grantees of summary settlements on the 10th October 1859. The sanad which followed on the 15th March 1861 was to this effect:—"The Government confers on Raghunath Kuar the full proprietary right, title, and possession of the estate of Sihipore, bearing a jama of Rs. 33,018, and gives her the power to alienate the estate during her lifetime, either wholly or in part, by sale, mortgage, gift, or bequest, as she pleases, or to declare her successor, and make him proprietor of the estate." Her name was afterwards entered as taluqdar in the lists prepared under "The Oudh Estates Act, 1869."

The suit of Anant Bahadur Singh, son of Ramsorup Singh, who represented the remainderman, was dismissed by the Deputy Commissioner of the Faizabad District (Colonel J. Parkins), on the ground that the will having given the taluqdari right to Raghunath Kuar for life, the settlement and sanad had enlarged this estate to absolute ownership, confirmed by "The Oudh Estates Act, 1869," and that no trust had been established. Ramanund Kuar's suit was decreed by the same officer, who held that, in reference to the rights of this and the other widows, Raghunath Kuar had admitted that her exercise of the 'thakurait' or lordship did not extend beyond her own life.

The Commissioner of the Faizabad Division, Mr. Capper, [772] disposing of both appeals in one judgment, to the effect that the widow's title was

* This was to "define the rights of taluqdars and others in certain estates in Oudh, and to regulate the succession thereto." Sections 3 and 4.—Taluqdars with whom (a) a summary settlement was made between 1st April 1858 and 10th October 1859, or to whom (b) a taluqdari sanad was granted between 1st April 1858 and the passing of the Act, to be deemed to have acquired a permanent, heritable, and transferable right in the estate comprising the villages and lands named in the list attached to the agreement, or kabuliati, executed by such taluqdar, etc., etc. Sections 8, 9, and 10 provide for the preparation of lists of the taluqdars and grantees of sanads, and that none but persons therein named are to be deemed taluqdars or grantees.

absolute under "The Oudh Estates Act, 1869," confirmed the dismissal of Anant Bahadur's suit, and dismissed Ramanand's, with the order as to costs that both parties should pay their own. No further appeal in India was open to Anant Bahadur Singh under Act XXXII of 1871 ("The Oudh Courts Act, 1871"), s. 17 : and the Additional Judicial Commissioner, Colonel Reid, on Ramanand's appeal, concurred with the Commissioner.

In both appeals

Mr. J. F. Leith, Q.C., and Mr. J. W. H. Arathoon appeared for the Appellants.

Mr. T. H. Cowie, Q.C., and Mr. J. T. Woodrose for the Respondents.

The argument for both the appellants was, that to this case the ruling in *Mussanut Thukrain Sookraj Koonwar v. The Government of India* (14 Moore's I. A., 112) was applicable. An absolute title was given to the person who was settled with as taluqdar with full power of alienation; but this was as against the State and as against claimants adverse to the taluqdar. The taluqdar was not relieved from equitable obligations and trust to which he might be subject. Raghunath Kuar had obtained the rights conferred upon her by the effect of the settlement, the sanad, and "The Oudh Estates Act, 1869"; but her acts showed that she had recognized her own position, under the will of Nihal Singh, in regard to the rights of others. There had been admissions on her part, both before and after the summary settlement of 1858, to the effect that the other widows were also entitled. The Deputy Commissioner had correctly held that, in the agreement of 14th November 1858, Raghunath implied that her exercise of powers did not extend beyond her own lifetime. Her letter also, of the 6th of January 1861, to the Government, showed that she had Nihal Singh's will in her mind. The appellant Ramanand was to the registered taluqdar, Raghunath, in the position of a *cestui que trust*. Cor-[773]rect in regard to her, the judgment of the Deputy Commissioner had incorrectly disallowed the claim of the remainderman to a declaratory decree. Reference was made to *The Widow of Shunker Sahai v. Raja Kashi Persad* (L. R., 4 I. A., 198; s.c., L. R., I. A., Sup. Vol., 220), *Hardeo Buksh v. Jowahir Singh* (I. L. R., 3 Cal., 522; s.c., L. R., 4 I. A., 178), *Thakoor Hurdeo Bux v. Thakoor Jowahir Singh* (L. R. 6 I. A. 161), *Brijindur Bahadur Singh v. Rancee Jankee Kuar* (L. R., 5 I. A., 1), *Thakur Shere Bahadur Singh v. Thakurain Dariao Kuar* (I. L. R., 3 Cal., 645), *Seth Jaidial v. Seth Sita Ram* (L. R., 8 I. A., 215), and *Hurpurshad v. Sheo Dyal* (L. R., 3 I. A., 259). i

For the respondents it was contended that the case of the claimants under the will of Nihal Singh was distinguishable from that of *Thukrain Sookraj Koonwar* (14 Moore's I. A., 112), in which the respondent had given rise to an equitable right against himself, as taluqdar, by undertaking to protect the interests of others, on the understanding that they would not interfere with his taking the kabuliati at settlement. Again, in *Hurpurshad v. Sheo Dyal* (L. R., 3 I. A., 259), all the lands in the kabuliati, which had previously been part of the family estate, were exempted from confiscation. Neither the latter case, nor that of *The Widow of Shunker Sahai* (L. R., 4 I. A., 198; s.c., L. R., I. A., Sup. Vol., 220), could be cited as precedents in the present case, being those of estates excepted from the general confiscation, and falling under a different head of the "Oudh Estates Act, 1869."

The effect of the confiscation of 1858 had been to leave nothing upon which the will of Nihal Singh could operate : there having been no re-grant by the Government restoring expectant estates of persons interested in remainder, as were all the devisees under the will of Nihal Singh, except Raghunath. The

latter alone had been recognized in the settlement proceedings. It had rested with the Government to restore, and the restoration had been made direct to those with whom the summary settlement had been made, as was shown by the terms used. Then "The Oudh Estates Act, 1869," had confirmed an absolute title in those taluqdars who were in the position of the taluqdar of Sihipore, viz., Raghunath.

[774] The expressions said, or the argument for the appellants, to have recognized a trust, did not go so far, but only indicated the widow's intention of disposing of her property, according to what she knew to be the testator's wish. She did not relinquish, but asserted, the power to control the devolution of the estate.

Again, neither of the appellants were entitled to declaratory decrees—*Thakoor Deen Tewarry v. Nawab Syed Ali Hossein Khan* (13 B. L. R., 427). The claim for declaratory relief by persons in the position of guardians of the inheritance through whom it should descend, was distinguishable from the claims for declaratory decrees made by reversioners who could enforce their rights; if well founded, when they accrued; and this distinction might call for the exercise of the discretion to withhold the assistance of the Court. Reference was made to the *Shivayanga case* (L. R., 2 I. A., 169; s.c., 15 B. L. R., 83), *Garlick v. Lawson* (10 Hare, App., xiv), *Lady Langdale v. Briggs* (8 DeGex. M. and G., 391; s.c. 26 L. J., Ch., 27), *Pranputtee Koer v. Lalla Futteh Bahadur* (2 Hay's Rep., 608). *Ranee Anand Kunwar v. The Court of Wards* (I. L. R., 6 Cal., 764; s.c., L. R., 8 I. A., 14), Act I of 1877 (The Specific Relief Act), s. 42, cl. (d).

Mr. J. F. Leith, Q.C., replied.

The **Judgments**, of their Lordships in both appeals were delivered on a subsequent day (January 21st, 1882) by

Sir R. P. Collier.—*First Appeal.*—This suit is brought by Ramanand Kuar, one of the widows of Nihal Singh, taluqdar of Sihipore, against Raghunath Kuar, another of his widows, and Bisheshur Baksh Singh, to whom the latter widow had made a gift of the taluq.

The suit is described as a suit for a declaratory decree under the 6th chapter of The Specific Relief Act, and the plaintiff prays for a declaration "that the plaintiff is reversioner and is entitled to succeed to the estate of Sihipore after the [775] death of the first defendant, who holds only a life-interest and is a trustee, anything contained in Act I of 1869 notwithstanding."

Then follows a short statement of facts, viz., that Nihal Singh was taluqdar and owner of Sihipore; that he died in the year 1832, leaving him surviving five widows, of whom the first defendant is the third, and the plaintiff the fourth: that the first widow succeeded her husband in the possession of the taluq, and that, upon her death, the second widow having predeceased her, the first defendant succeeded in pursuance of a will of Nihal Singh, and that the first defendant has acknowledged that she holds a life-estate only under the will: and that the said defendant made a gift of the estate to the second defendant on the 27th February 1877. The plaintiff concludes thus:—

"The plaintiff submits that, as the first defendant is only a holder of a life-interest and is a trustee, the gift is invalid. The plaintiff, therefore, prays that she is entitled as a reversioner aforesaid."

It was not contested that, by virtue of Act I of 1877, s. 42, such a suit is maintainable. The case of the defendants was, in substance, that Raghunath Kuar had, by virtue of a summary settlement made with her on the 2nd December 1858, and of a sanad on the 15th of March 1861, followed by the

entry of her name on the first and third lists, prepared by the Chief Commissioner of Oudh under s. 8 of Act I of 1869, as published in the *Gazette of India* under s. 9 of that Act, an absolute estate, which she had power to alienate to whom she chose.

The case of the plaintiff was, that, granting the legal title thus conferred upon the first defendant, she has so conducted herself that she must be deemed in equity to be bound to hold the estate in trust, for the purpose of carrying into effect the provisions of her husband's will.

Whether or not she has so conducted herself is the question in the cause.

The Deputy Commissioner gave judgment for the plaintiff, the Commissioner and the Additional Judicial Commissioner for the defendants. Against the judgment of the latter this appeal is preferred.

[776] The will of Nihal Singh is in these terms:—

"I, Nihal Singh, taluqdar of Sihpore, do hereby declare in writing that I have married five wives, and therefore I execute this deed, and deliver it into the custody of Baldi Ram Pandit. After my death, my first wife should become the proprietor of the taluqa and all the goods and chattels that may be in my house, and she shall support the other four wives by supplying them with food and raiment, and they shall not claim a share in the estate. After the death of my first wife, my second wife shall become the proprietor of the estate; on the death of the 2nd wife, my third wife shall become the proprietor; on her death, my fourth wife; and on her death, the fifth wife shall become proprietor. After the death of all the five wives Sheoamber Singh (may he live long) shall become proprietor of my estate, goods, and chattels.

"I have reduced the above into writing in order to maintain the integrity of the Sihpore estate, and to perpetuate its name and memory. Every one in my house is interdicted by oath of my person to do any act contrary to the terms hereof. I pray God that any one contravening it may be visited with calamity, similar to what befell the people of Chittour. The Hindus are bound by oath of the Ganges, and the Mahomedans by the Koran, to act in consonance with the terms hereof. I have no issue, and therefore I have executed this deed. But if I get a child, it shall succeed to my estate, and manage all the affairs.

"Dated this 5th day of Asarh Badi, 1238 Fasli (30th June 1831).

"(Sd.) SHEO DYAL MAHAJAN,

"Resident of Sahibganj.

"Witnessed by—

"Gurdial Kaeth of Hirdepore, and

"Ram Ghulam Lal of Katra."

With respect to the devolution of the estate after the death of the testator, their Lordships adopt the view expressed by the Commissioner in his judgment of 17th November 1877. "Whoever may have been considered 'malik,' or real owner, of the estate, it seems certain that none of the widows engaged for it as revenue-payers with Government subsequent to the death of Nihal Singh. Till after the death of Harpal Singh, shortly before Annexation, the present holder being the senior **[777]** surviving widow, perhaps took an engagement, and was found in possession at Annexation."

Had the taluqdar left no will, each of the widows would, by the ordinary Hindu law, have been entitled to an equal share of the estate; and, after the death of Harpal (who would seem to have taken unauthorized possession

of it), the three surviving widows—viz., the defendant, the plaintiff, and Sheonath the fifth widow (who has not joined in this suit), would have been entitled to share it. What was the effect of the sanad granted to the defendant by the Native Government, if a sanad was granted to her, we do not know; but it may not be unfairly presumed to have been in accordance with her husband's will.

The first material piece of evidence in the case is a letter (marked C) from Raghunath to Ramanand, dated 9th April 1856, about two months after the annexation of Oudh, in these terms:—

"Accept my good wishes and prayers for you. May God bless us both. Now the partition deed has been written, but considering your expenses to be heavy, I will pay you Rs. 500 per annum, separate from Sheonath Kuar. But mind, you have to maintain our position; and, after my death, all the burden will fall upon you."

In the absence of any information relating to the 'partition' referred to, it is difficult fully to understand the meaning of this letter. It has been argued, with some force, that the payment for expenses, together with the intimation that the burden of the inheritance will fall on Ramanand after the death of the writer, is a recognition that she holds under the terms of her husband's will.

The next document relied on by the appellants is a deed of compromise (as it is termed) dated 14th November 1858, by which it would appear that certain disputes between the widows were for a time settled. This transaction took place some eight months after the confiscation of Oudh (15th March 1858), and before anything had been done to reinstate the landowners. The instrument is in two parts, one executed by Raghunath, the other by the other widows.

The latter document (marked D) is as follows:—

"Both of us, Ramanand Kuar and Sheonath Kuar, co-widows of [778] Thakur Nihal Singh, taluqdar of Sihipore, etc., do hereby agree with our free will and consent and bind ourselves in writing to Thakurain Raghunath Kuar, that so long as she lives she may manage the affairs of the ilaka, etc., and out of the allowance of Rs. 400 per annum fixed by her to enable us to pay for the expenses of our winter clothing, raiment, and charity, and other necessities of life, we will defray our expenses and will not indulge in extravagance. We will all three take our food, nice or coarse, whatever is cooked, together, and live in harmony with each other. We will not interfere with the management of the estate. We will try to maintain and guard what was earned by Thakur Nihal Singh, and will not waste it by extravagance. If perchance any expenses are required for the protection of life, property, or zamindari, they shall not be incurred without the sanction of Raghunath Kuar.

"As long as the said Raghunath Kuar lives and pays both of us according to the agreement herein recorded, we will not complain to the brotherhood or to the authorities; and if we do so, we shall render ourselves liable to blame before God, the brotherhood, and the authorities. If God preserves the ilaka in its present condition, we will continue to receive the allowance mentioned above; but if perchance the estate is increased or decreased, we will of course receive the allowance at an increased or decreased rate, as the case may be. Our parents, brothers, and relations will be allowed to visit us according to the universal custom of the country."

Though no express mention is therein made of the will, their Lordships regard this document, which recognizes the right of Raghunath to a life-estate in the entire property to which she was only entitled under the will, and her

duty to pay an allowance to the other widows, which was only prescribed by the will, as an affirmance by both parties of its binding effect upon them. Shortly after this—*viz.*, on the 2nd December 1858, a summary settlement of a number of villages was made with the defendant for three years.

The principal difficulty in this case arises from the conduct of the plaintiff.

Subsequent disputes arose, in the course of which the plaintiff repudiated this agreement or compromise, and indeed denied its existence; while, on the other hand, the defendant in the most explicit terms set up the will, and claimed her rights under it.

[779] On the 30th March 1859, the plaintiff presented a petition to the Revenue authorities, praying that she might be recorded as owner of one-third of the estate—a claim in direct opposition to the will. On the question being referred to the tahsildar, the defendant again set up the will, defended her exclusive possession under it, succeeded in her defence, and retained possession of the whole estate.

The litigation seems to have been ended by the following *sulehnama*, or deed of compromise, on the 9th December 1859:—

“We, Musst. Kawal Jhari Kuar, plaintiff, and Raghunath Kuar, defendant, widows of Nihal Singh, deceased, taluqdar of Sihipore, Pargana Sultanpore, declare herein that:—

“Whereas there has been going on a dispute between both of us about the share of inheritance, and the case was pending in the Court, the Deputy Commissioner of Faizabad personally came to Khapradih and disposed of the dispute with our mutual consent in the following manner;—that residing in Gaura or in Sihipore Khas, Kawal Jhari, plaintiff, shall get from Raghunath Kuar, defendant, Rs. 450 in cash per annum for her expenses. Consequently we, the plaintiff and the defendant, having compromised, have recorded these few words as a deed of compromise (*sulehnama*), that it may serve as a document for the future. And if ever we bring a claim in this matter we shall render ourselves amenable to Government.

“Dated this 9th day of December 1859, corresponding with the 14th of Aghan Sudi.”

In January 1861, a letter, probably a circular letter, was sent to the defendant, no copy of which is, unfortunately, to be found in the record, and whose purport can only be collected from her answer, which is in these terms (it is called document B):—

“Sir,—I have the honour to acknowledge the receipt of your *parwana* (lotter), dated 7th December 1860, inquiring as to whom I wish to bequeath my estate after my death and what relationship he bears to me.

“Sir, so long as I live I shall continue to be the proprietor and mistress of my estate. After my death my rival widows Musst. Sheonath Kuar and Ramanand Kuar, shall succeed to my heritage and the estate. But I must note that none of my two rival widows shall have power to alienate by gift, transfer, or grant to any of their [780] relatives, or to any stranger after my death, except Ram Sarup Singh and Balbhadar Singh, taluqdars of Khapradih. After my death and after the death of the two rival widows, Ram Sarup Singh and Balbhadar Singh, taluqdars of Khapradih, shall inherit the estate and all our legacy. The said taluqdars are my great grandsons as described below.

“My husband, Thakur Nihal Singh, had an elder brother, Ganga Parshad Singh. My husband was killed and left no issue. Ganga Parshad Singh had three sons, Shoo Sowak Singh, Hubdar Singh, and Harpal Singh. Harpal

Singh also was killed and left no issue. Hubdar Singh had a son, by name Bhairon Singh, who died during the lifetime of his father; soon after Hubdar Singh was also killed. Sheo Sewak Singh had a son, by name Sheoambar Singh. The latter has left two sons, Ram Sarup Singh and Balbhadar Singh, taluqdars of Khapradih, who shall succeed us and inherit all property.

"Petition of Raghunath Kuar, taluqdar of Sihipore, etc., Pargana Sultanpore.

"Dated this 6th day of January 1861."

It should be mentioned that another translation of this letter represents the inquiry to have been "whom she wished to appoint as her successor."

On the 15th of March following the defendant received a sanad, whereby an estate of inheritance according to the law of primogeniture, together with full power of alienation was granted to her.

The letter of the 6th January is treated by the two Appellate Courts as simply a will, revocable by the testatrix and revoked by her when she made the gift to her nephew, the second defendant, who, it may be stated, is not a member of her husband's family. If it had stood alone it might have been so treated, according to the view of this Committee in the case of *Hurpurshad v. Sheo Dyal* (L. R. 3 I. A., 259) with reference to a somewhat similar document, but which, having been acted upon, was there treated as amounting to a conveyance *inter vivos*. But looking at the document in connection with the will of Nihal Singh, the other documents, and the conduct of the defendant in the suit before the Revenue authorities, their Lordships regard it [781] rather as a declaration that on her death the estate would devolve according to the directions of the will.

The doctrine that, notwithstanding the confiscation of the land in Oudh by the proclamation of Lord Canning, its restoration by his Circular letter of 10th October 1859, affirming the absolute title of the grantees of summary settlements, and the granting a sanad with full power of alienation confirmed by the Oudh Estates Act of 1869, the legal owner may, either by express agreement or by his conduct, constitute himself in equity a trustee for others as to the whole or part of the beneficial interest, has been affirmed by many decisions of this Board.

This doctrine was first laid down in these terms in the judgment delivered by Lord Justice JAMES in the case of *Thukrain Sookraj Koonwar v. The Government* (14 Moore's I. A., 112):—

"It (the Government letter of 10th October 1859) gave the registered taluqdar the absolutely legal title as against the State and against adverse claimants of the taluqdari, but it did not relieve the taluqdar from any equitable rights to which, with a view to the completion of the settlement, he might have subjected himself by his own valid agreement. In this case the appellant was the acknowledged *cestui que trust* of the registered taluqdar, who bound himself expressly in writing that he would respect her rights if she would permit him to be alone so registered."

In the case of *The Widow of Shunkar Sahai v. Raja Kashi Persad* (L. R., 4 I. A., 198; s.c., L. R., I. A., Sup. Vol., 220) it was held that, with respect to a one-third share of seven villages in the taluq, the Raja had, though no formal deed or writing was produced, by his admissions at the time of the summary settlement, constituted himself a trustee for the plaintiff so as to be bound to account to her for a one-third share of the rents and profits.

The doctrine was further illustrated by the case of *Thakoor Hurdeo Bux v. Thakoor Jawahir Singh* (L. R., 6 I. A., 161). The evidence being unsatis-

factory, the case was remitted for retrial on the following issue,—*viz.*, “Whether the respondent has, in any or what manner, agreed, or become bound, to hold the villages comprised in the [782] summary settlement and sanad, or any or what part thereof, in trust for the appellant.”

On the case again coming before this Board, their Lordships observe,—“The actual relation of the appellant, respondent, and Parbut Singh (who was no party to the appeal) remained that of a joint and undivided Hindu family from the date of Lord Canning’s proclamation up to the quarrel and removal of the respondent to Kaswara in 1865. The Commissioner also found, and correctly in their Lordships’ opinion, that the evidence proved that, during that period, there had been a joint interest in and common management of the property. Such an interest could not have existed unless the defendant had consented that the villages should be held as the joint property of the family. Their Lordships are of opinion that the facts so found, coupled with the statement of the defendant in his application for a summary settlement, to the effect that Hardeo Bux was his partner, and with his deposition on the 8th July 1859, in which he stated that the custom prevailing in his family was that, if his cousins, meaning the plaintiff and Parbut Singh, who were his partners, should claim, they would get them divided, afford sufficient grounds to justify their Lordships in presuming that, up to the time of the quarrel in 1865, it was the intention of the defendant that the villages included in the summary settlement and sanad should be held by him in trust for the joint family and as a joint family estate, subject to the law of the Mitakshara.”

The principles of equity laid down in these cases (to which others might be added) appear to their Lordships to apply to the facts of the present case.

The defendant Raghunath all along, certainly from April 1856 to the time when she obtained the sanad, held herself out as claiming the estate under the terms of her husband’s will.

At the time of the summary settlement with her, on the 2nd December 1858, the agreement or compromise of the 14th of November previous, which their Lordships interpret as a recognition by all the three widows of that will, seems to have been in force. Although the junior widows soon after repudiated that compromise, and the plaintiff claimed in a suit one-third [783] of the property, the defendant succeeded in defeating her by setting up the will, and the suit ended in a second compromise of the 9th December 1859, which, though not clearly expressed, their Lordships regard as in effect recognizing the position of the defendant which she claimed. This compromise, as far as appears, remained in effect until January 1861, when the defendant executed document B, which has been before referred to, and which, coupled with the surrounding and preceding circumstances, their Lordships regard as a declaration by Raghunath that she held the estate in trust—a trust which would bind her heirs—to carry into effect the provisions of her husband’s will. It is said that nothing was done by Ramanand in consequence of Raghunath’s affirmance of the will, and that she was in no way damnified thereby. But their Lordships think it very difficult to maintain that position. It is true that Ramanand’s former claims are quite inconsistent with her present claim. But then she has been defeated, and Raghunath has succeeded. Without the will the two would have been ordinary Hindu widows, and Raghunath would not have been in a position to claim the sole benefit of the two settlements and of the sanad which were granted to her. Document D is dated eighteen days before the summary settlement. Document E is dated about ten weeks before the sanad. At two critical points of time we find Raghunath the author of formal and important documents, which, though they do not expressly mention the will,

are not explicable except on the supposition that she was abiding by the will, which, on other occasions, she expressly set up and successfully used as a defence to her possession. They are, therefore, of opinion that the plaintiff is entitled to the relief she prays for, *viz.*, that it may be declared that she is entitled to succeed to the estate after the death of the first defendant. It follows that the deed of gift to the second defendant could confer no more than the life-interest of the first defendant. There is no prayer to set that deed aside, and if there had been, it could not have been effectual, inasmuch as the deed is not wholly void but operative to convey a life-estate.

Their Lordships will humbly advise her Majesty that the [784] judgment appealed against be reversed, that a declaration to the effect abovementioned be made, and the costs of both parties be paid out of the estate.

2nd Appeal.—This suit was brought by Ram Sarup Singh, who was a son of Sheoambar Singh, to whom the estate was given in remainder after the life-estates of the widows, by the will of Nihal Singh, which has been before set out. Ram Sarup having died, leaving the plaintiff, his son, and Ram Sarup's brother, Balbhadar, having also died without issue, the present plaintiff succeeds to all the rights of Sheoambar.

He brings his suit against the defendants in the former suit, with whom he has joined the two junior widows, for a declaratory decree under the Specific Relief Act, and prays to have it declared "that the deed of gift, dated the 27th day of February 1877, is invalid against the plaintiff, who is a reversioner, because the donor, the first defendant, held only a life-interest, and is a trustee, anything contained in Act I of 1869 notwithstanding."

In their Lordships' opinion, the plaintiff, having, in terms of the English law, a vested remainder immediately after the life-estates, is entitled, under the Specific Relief Act, to maintain this suit.

The question is, whether the first defendant is to be declared, *quoad* the plaintiff, to hold the estate in trust for carrying into effect the provisions of her husband's will.

The evidence in this case differs in some respect from that in the former case. The exhibits C and D (of the dates 9th April 1856 and 14th November 1858 respectively) are not in evidence.

The proceedings in the suit which has been referred to, of Ramanath against Raghunath, are in evidence.

Exhibit E (the letter of 6th January 1861) is in evidence.

In addition to these, two documents of some importance were tendered, one being a letter of defendant to the present plaintiff, of the 18th January 1870, marked 'Bé'; another letter of the same date, marked 'Alif,' written (as alleged) by her agent, and referred to in the first letter. With respect to [786] these documents, the Deputy Commissioner thus express himself:—

"The letters Alif and Bé remain for consideration as to the alleged admissions of trust. Alif was put in, it was said, only because it was referred to in Bé, so it will suffice to consider the value and effect of the latter. The defendant, Raghunath Kuar, if she wrote this, informed the plaintiff that she would do nothing contrary to the writing of the Thakoor; that he had been falsely informed that she meant to write a deed in favour of Bisheshur Buksh (defendant 4). A witness, Kunj Behari Lal, deposes that he wrote Bé for the defendant, being at the time in her service; other witnesses depose that the signature to this letter is defendant's. The letter is denied. It is pointed out that Alif and Bé were not filed with the plaint, nor alluded to in any way. This fact, a very important one, certainly renders the genuineness of these papers doubtful; whether genuine or not, Bé contains only a promise, and does

not create any fiduciary relations, if none previously existed between the plaintiff and defendant. There is nothing in the promise which gives it any legal force."

He dismissed the suit.

The Commissioner, who affirmed this judgment, makes no distinct allusion to these letters.

The judgment of the Deputy Commissioner and the Commissioner being concurrent, no appeal lay to the Judicial Commissioner. The present appeal is brought from the judgment of the Commissioner.

Although the Deputy Commissioner throws some doubt on the genuineness of the two letters—chiefly, it would appear, on the ground that they were not filed with the plaint (they seem to have been filed before the settlement of the issues),—he does not reject them, but considers their effect. As several witnesses testify to the signature of the defendant to 'Bè,' and there is no contradiction of their testimony, and as Janki Lal, the writer of 'Alif,' testifies to his own handwriting, their Lordships do not deem themselves justified, in the absence of a finding by the Court below that the witnesses were not to be believed, in rejecting the letters. 'Bè,' is in these terms :—

"May God assist us. You will know the particulars from this letter and from that of Janki Ram.

[786] "From Thakurain Raghunath Kuar to Ram Sarup Singh :

"My dear Ram Sarup Singh. After my good wishes to you, I pray God to keep us in good health.

"I have received your letter, have become acquainted with its contents, and have been satisfied. Bhagwant Singh, Lalla Gurparshad, Pandit Gurdyal Ram, and Chandka Singh paid a visit to me in person, and related all the particulars to me verbally. The report that you have received from the second wife to the effect that I wish to make a bequest in favour of Bisheshur is altogether false ; she wishes to incite a quarrel between you and me. I do not wish to contravene the instructions given by my husband, either by thought, word, or deed. I am surprised that, although I have twice represented to the Government authorities my intention to comply with the instruction imparted by my husband in favour of your father, you are not satisfied, and are easily led away by others. I beg to assure you that nothing will be done contrary to the will of my husband.

"You will learn the other particulars from Janki Lal's letter. The rest is all right.

"Dated Asarh-Badi 5th, 1277 E. 18th June 1870."

'Alif' is in these terms :—

"From Janki Lal to Thakoor Ram Sarup Singh :

"Sir,—After compliments, I beg to state that may it please God to keep you in good health, which is advantageous to me. Having taken leave of you, I arrived at Sihipore yesterday, and related all the particulars to Thakurain Sahab. Lala Gurparshad, Chandka Singh, Bhagwant Singh and Gurdyal Ram came to-day to the Thakurain with your letter to her, who is going to send you a reply. Lala Gurparshad and Gurdyal Ram will give you all the particulars verbally. Thakurain Sahab takes thousands of oaths to the effect that nothing will ever be done contrary to the written wishes of Thakur Nihal Singh, and that the second wife to Thakur Nihal Singh is trying to instigate a false quarrel between you and her, Thakurain Sahab. You may, therefore, rest assured that no other plan is set on foot. The Thakurain wishes to make over one or two villages to Bisheshur from the estate lying on the west, with

your sanction, which, she says, will be obtained, so that there may be no dispute or litigation hereafter. The rest is all right.

"Dated Asarh-Badi 5th, 1277 Falsi."

The proceedings in the suit of *Ramanath v. Raghunath* referred to the Tehsildar, wherein Raghunath insisted, and successfully, that she held under her husband's will, could not [787] have been unknown to the rest of the family. The present plaintiff, the remainderman, may well have relied on the expressed intention of Raghunath to observe that will, and may have therefore thought it unnecessary to dispute her claims to a sanad. Their Lordships have already intimated their view of her letter of the 6th January 1861, viz., that it was a declaration of trust on behalf of those interested under Nihal Singh's will, including the remainderman. But it must be here noticed that the present plaintiff, on the 9th of March 1862, presented a petition, wherein he ignored the will of Nihal Singh, and impugned as invalid this very declaration of trust, contending that he had a present right to the estate, or at the least was next in reversion to Raghunath.

If his case had rested here, their Lordships would not have been disposed to make in his favour a declaration of a trust which he had expressly repudiated. But the letters 'Alif' and 'Bè' give a different aspect to the case. The order made after his petition is, that he be directed to apply to Raghunath. What correspondence upon this took place between them can only be conjectured from these two letters. It would seem from them that the plaintiff no longer disputed the life-interest of Raghunath or the will of Nihal Singh, but had received some information that she intended to make an absolute gift of the estate, whereupon Raghunath refers to her representation to the Government of the 6th January 1861, and to some subsequent representation to the same effect, for the purpose of reassuring him of her intention to comply with her husband's will, and quitting his suspicions that she intended to avail herself of the full powers contained by her sanad. According, then, to the evidence in this suit, Raghunath has herself given a significance to her declaration of the 6th of January 1861, which still more clearly fastens upon her the obligation to abide by it. She treats it as a wrong done to her that she should be suspected of any intention of departing from her husband's directions. And this places it beyond doubt that the declaration in question, which, as before observed, does not expressly mention Nihal's will, is really founded upon it, and treats it as a direction obligatory in conscience if not in law.

[788] Their Lordships, however, think that two concurrent declaratory suits were unnecessary at the present time, and that it would not have been unreasonable if the first Court had, as a matter of discretion, declined, under the circumstances, to grant declaratory relief to the more remote remainderman. That, however, was not done. Ram Sarup's suit has been decided on the merits, and decided against him, as their Lordships think, wrongly. They will, therefore, humbly advise Her Majesty that the appellant is entitled to the decree he asks, but without costs, nor do they give any costs of this appeal.

Both appeals allowed.

Solicitors for the Appellants in both appeals : Messrs. *Watkins and Lattey*.
Solicitor for the Respondents in both appeals : Mr. *T. L. Wilson*.

NOTES.

[DECLARATORY DECREE—SUIT BY REVERSIONER—

See the Notes to *Rani Anand Kuar v. The Court of Wards*, 6 Cal. 764 in the **Law Reports Reprints**, Cal. Vol III; also 13 Mad., 195 (197); 32 Cal., 62 (70); 9 C. W. N. 25; 10 Mad., 1 (9); 5 O.C. 360 (365); 29 Mad., 390; 1 M. L. T. 183; 16 M. L. J. 307; 8 O.C., 124.]

[8 Cal. 788 : 11 C. L. R. 370 : 7 Ind. Jur. 17]
APPELLATE CIVIL.

The 30th February, 1882.

PRESENT :

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

Hemangini Dasi.....Plaintiff

versus

Nobin Chand Ghose and others.....Defendants.*

Trustee and Cestui que trust—Limitation—Will—Void gift—Residue—Gift of interest—Share of rents and profits—Corpus of estate.

A by his last will and testament gave his property to trustees, partly in trust for religious and other purposes, and partly to pay thereout to certain persons and their heirs for ever certain annuities, being fixed portions of the net profits of a certain estate called the Hurro estate, which amounted to Rs. 3,150. A died in November 1863. On the 11th of August 1879, the heir of one of the annuitants instituted suit claiming a share under the will, and asking for a partition of that share. The plaintiff alleged besides, that certain of the trusts and provisions in the will were invalid in law ; that, consequently, a large portion of the testator's property remained undisposed of at his death, and she claimed a share of this residue as one of the heirs of the testator.

[789] Held that, under the circumstances, the gift of the share of the rents and profits amounted to a gift of a share in the corpus of the estate ; and that, in respect of that portion of the plaintiff's claim, the suit was not barred by limitation.

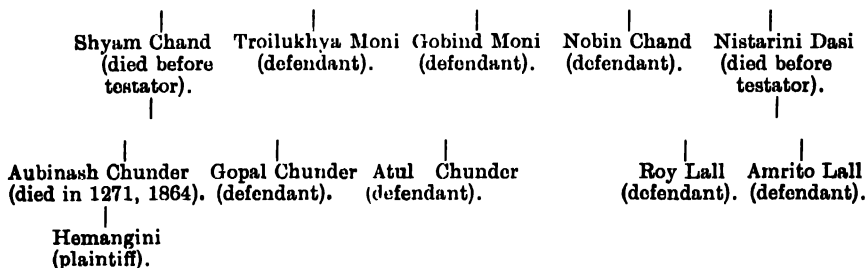
Kherodemoney Dossee v. Doorgamoney Dossee (2 C. L. R., 112 ; s.c., on appeal, I. L. R. 5 Cal., 455), *Greender Chunder Ghose v. Mackintosh* (I. L. R., 4 Cal., 897), *Amund Moye Dabi v. Grish Chunder Myti* (I. L. R., 7 Cal., 772) *Mannor v. Greener* (L. R. 14 Eq., 456), and *Sookmoy Chunder Dass v. Monohari Dossee* (I. L. R., 7 Cal., 269) cited.

Where an estate is given by will to trustees for religious and other purposes some of which are invalid or fail, the heirs of the testator may be barred by limitation from recovering the portion undisposed of, though they might still bring a suit against the trustees to compel them to properly administer the trusts which had not failed.

THIS was a suit for the interpretation of the will of Hurro Mohun Ghose, for a declaration of the rights of the several parties to the suit thereunder, for a declaration as to the plaintiff's share in the property left by Hurro Mohun, and for possession of her share. The facts of the case and the will of the testator are sufficiently set out in the judgment of Mr. Justice FIELD. The following is a genealogical table of the parties :—

HURRO MOHUN GHOSE

(died in Aughran 1270. November-December 1863).



* Appeal from Original Decree, No. 332 of 1880, against the decree of Baboo Bhoobun Chunder Mookerjee, First Subordinate Judge of the 24-Parganas, dated the 27th September 1880.

The judgment of the Court of First Instance was confined to the following issues:—(i) Is any portion of the relief claimed by the plaintiff barred by the law of limitation? (ii) Is any and what portion of the will of Hurro Mohun Ghose illegal or invalid? The second issue was argued first. In respect of the Muddunpore property, the Judge said: "The intention of the testator was, no doubt, to create Muddunpore a debuttur [790] property, and the arguments of the defendants' pleader were adduced in support of this view. Looking to the entire will and to all the purposes for which the profits were to be spent, and to the authorities noticed below, I come to the conclusion, that the profits of Muddunpore being intended to be spent for religious, charitable, and secular purposes, it must be considered as a secular property subject to the religious and charitable bequests as specified by the testator and not purely dedicated for religious and charitable purposes." On this point the learned Judge cited *Ram Gopal Banerji v. Sib Kissen Banerji* (Montriau on Hindu Wills, p. 178), *Sonatun Bysack v. Sreemutty Juggut Soondure Dossee* (8 Moore's I. A., 66), *Promotho Dossee v. Radhica Persaud Dutt* (14 B. L. R., 175), *Ashutosh Dutt v. Doorga Churn Chatterjee* (I. L. R., 5 Cal., 438), *Joy Naram Mitter v. Colevin* (unreported, referred to in Montriau on Hindu Wills, p. 185), and *Dwarka Nath Bysack v. Burroda Persaud Bysack* (I. L. R., 4 Cal., 443).

As to the Hurro estate, the learned Judge said on the second issue: "The next ground of attack relates to the Hurro estate, the net profits whereof, Rs. 3,150, were to be enjoyed as annuities by the heirs-at-law and others, and their descendants, and to meet collection charges, etc., (in the following manner):—

	Rs.	A.	G.	C.	K.	Rs.	A.	P.
Aubinash Chunder Ghose, plaintiff's father	...	366	10	13	1	1		
Gopal Chunder Ghose	...	366	10	13	1	1		
Atul Chunder Ghose	...	366	10	13	1	1		
	1,100	0	0	0	0	1,100	0	0
Nobin Chunder Ghose, testator's second son and executor	...					1,100	0	0
Nistarini and her sons	...					300	0	0
Charges of embankment, inclusive of collection of rents	...					500	0	0
Annual pay of Nobin Chand Ghose on account of supervision	...					150	0	0
Total	...					3,150	0	0

"The testator provided that the said annuities should be given to the said annuitants and their heirs for ever for their maintenance; that they shall not partition the said Hurro estate, nor sell, mortgage, or make a gift of it; if they do, that shall be null and void to all intents and purposes." On this part of the [791] case, the learned Judge cited *Krishnaramani Dasi v. Ananda Krishna Bose* (4 B. L. R., O. C., 231), *Tagore v. Tagore* (I. L. R., I. A., Sup. Vol., 47; 9 B. L. R., 377), *Roymoney Dossee v. Ruggonath Sein* (1 I. J., N. S., 14), *Nitai Charan Pyne v. Gunga Dasi* (4 B. L. R., O. C., 265), *Kumara Asima Krishna Deb v. Kumara Kumara Krishna Deb* (2 B. L. R., O. C., 11), *Nobo Krishna Mitter v. Hurish Chunder Mitter* (Macnaghten's Cons., on Hindu Law, p. 323), and *Ellokasse Dossee v. Durponarain Bysack* (I. L. R., 5 Cal., 59), and held, that the restraint on alienation was void, and that the surplus should go to the testator's heirs-at-law.

On the issue of limitation, the learned Judge held, that the plaintiff's suit was barred, citing *Kherodemoney Dossee v. Doorgamoney Dossee* (2 C. L. R., 112; s.c. on appeal, I. L. R., 4 Cal., 455), *Greender Chunder Ghose v. Mackintosh* (I. L. R., 4 Cal., 897), *Chundrabullee Debia v. Luckkee Debia Chowdhraanee* (1 Suth. P. C. Cas., 602), Act XV of 1877, Sched. D, Arts. 123, 127, 144,

and *Appovier v. Ram Subhu Ayyan* (11 Moore's I. A., 75). The plaintiff appealed to the High Court.

Mr. *Branson*, Baboo Nil Madhub Bose, and Baboo Jadub Chunder Seal for the Appellant.

Mr. *Evans*, Baboo Mohiny Mohun Roy, Baboo Troilakhyanath Mitter, and Baboo Debendro Chunder Ghose for the Respondents.

Mr. *Branson*.—The learned Judge is in error in applying the law of limitation to this case. Nobin Chand Ghose, as executor, takes no interest in the estate; the estate is in the beneficiaries—*Kherodemoney Dossee v. Doorgamoney Dossee* (2 C. L. R., 112: s.c., on appeal, I. L. R., 4 Cal., 455); and they are entitled to the whole estate subject to the charge in favour of the idols—*Ashutosh Dutt v. Doorga Churn Chatterjee* (I. L. R., 5 Cal., 438). The gift of the income to the plaintiff is equivalent to the grant of a share—*Sonatum Bysack v. Juggut Soonduree Dossee* (8 Moore's I. A., 66) and *Dowling v. Dowling* (L. R., 1 Eq., 442: s.c., on appeal, 1 Chan., 612). The Judge has misconstrued *Kherodemoney's case* (2 C. L. R. 112: s.c., on appeal, I. L. R. 4 Cal. 455). Here we are claiming under the trust whereas in *Kherodemoney's case* (2 C. L. R., 112: s.c., on appeal, I. L. R., 4 Cal., 455), the plaintiff's claim was [792] altogether *dehors* the will. In *Kherodemoney's case* (2 C. L. R., 112: s.c., on appeal, I. L. R. 4 Cal., 455), the husband had provided for the wife. There the executor had nothing in trust for the widow. The property was to be held on a trust with which she had nothing to do. Here we have been paid our share up to suit, and *Kherodemoney's case* (2 C. L. R. 112: s.c., on appeal, I. L. R., 4 Cal. 455) does not apply. There is nothing adverse in the circumstances of the case at present before the Court. [FIELD, J.—What is the trust in this case? Are you suing to enforce that trust? I sue to have my share allotted to me. FIELD, J.—That is not suing to enforce the trust. How can you claim the benefit of s. 10 of the Limitation Act? I don't claim the benefit of s. 10. *Kherodemoney's case* (2 C. L. R., 112: s.c., on appeal, I. L. R., 4 Cal., 455) does not apply to me. I have a right to a share under the will, and claim to have that share allotted to me. I am suing to enforce the trust which is for my own benefit. In *Sookmoy Chunder Dass v. Monohari Dossee* (I. L. R., 7 Cal., 269), no question of limitation was raised, and that case was similar to the present. [Mr. *Evans*.—So far as I recollect, the question of limitation did not arise there, as some of the parties were minors at the death of the testator.]

Mr. *Evans* for the Respondents.—The main claim of the plaintiff is *dehors* the will, and is really a claim for possession, and is, therefore, barred. She only asks for the will to be construed as incidental to her main claim. Even supposing her main object was to get the will construed, she would be barred, because all suits are included within the Limitation Act, s. 4, and in that case, cl. 118 of the second schedule would govern this suit.

The **Judgment** of the Court (McDONELL and FIELD, JJ.), was delivered by

Field, J.—The position of the parties in this case will appear from the genealogical tree to be found at page 4 of the paper-book. Hurro Mohun Ghose, the testator, died in Aghran 1270, that is, November 1863. He left a will executed on the 4th Assar 1268 (17th June 1861). As to the *factum* of this will there is no dispute before us, and the present case is concerned solely with the construction to be put upon the paragraphs of this [793] instrument. Hurro Mohun had two sons, Shyam Chand and Nobin Chand, and three daughters, named Troilukhya Moni, Gobind Moni, and Nistarini,

Of the two sons, Shyam Chand died in 1257 (1850), during his father's lifetime, and left three sons,—*viz.*, Aubinash Chunder, Gopal Chunder, and Atul Chunder, all three of whom are mentioned and provided for in the will. Aubinash Chunder died in 1271 (1864), about a year after his grandfather, and the plaintiff in the present case, Hemangini, is his only daughter and heiress. Nobin Chand survived his father Hurro Mohun, and is defendant No. 1 in the present case. Troilukhya Moni and Gobind Moni, defendants Nos. 4 and 5, were widows, residing in their father's house. Nistarini, the third daughter, died in 1269 (1862), before her father's death, but after the execution of the will; and left two sons, Roy Lall and Amrito Lall, who are defendants Nos. 2 and 3. The remaining defendants, Nos. 6 and 7, are the other two grandsons of Hurro Mohun, or sons of Shyam Chand,—namely, Gopal Chunder and Atul Chunder.

The will is to be found at page 13 and following pages of the paper-book. After the usual recital that the testator is old, suffering from disease, and likely to die, the will contains the following passage :—" My youngest son and heir Nobin Chand Ghose, and Aubinash Chunder, Gopal Chunder, and Atul Chunder Ghose, three sons of my late eldest son Shyam Chand Ghose, or their heirs, shall not be competent to act contrary to the provisions of this will." Then we have a recital of the property belonging to the testator; and after this recital, in the first paragraph, the will provides as follows :—" My self-acquired first Abad, Mouza Muddunpore, Parganna Medanmulla, now fetches an annual profit of Rs. 2,000, after paying the rent due to its zamindar. Out of which, after paying Rs. 500 for the salaries of the karpurdazes and the expenses of erecting dams, there remains a balance of Rs. 1,500 (one thousand and five hundred rupees), which—that is, the said Muddunpore Abad,—I do set apart for the better performance of my usual turn of service of the deity Gobind Ji for four months, for the feeding of mendicants and travellers, for the celebration of the annual festivals of Durgutshab and Dole Jatra, for the repair of the [794] road in front of the house and the outer apartment of the house, together with the dalan, for the celebration of the daily and occasional rites and ceremonies, and for the distribution of alms and other virtuous acts. My heirs shall have no right to the same. Besides the above property, the second Abad, Mouza Hadul, Mouza Sonegohalia, and Mouza Malunga, etc., Parganna Medanmulla, acquired by me, as well as my ancestral and self-acquired khoraj and lakheraj lands, fetch an annual profit of Rs. 3,150 exclusive of the zamindar's rent. I allot all those properties for the maintenance of my family. None of my heirs shall be entitled at any time to get any partition of the said properties effected, nor shall he be competent to transfer the same by sale or gift, or pledge the same in security for any person. If any one of them does the same at any time, the same shall be null and void. Out of the said amount of Rs. 3,150, I do sanction Rs. 500 a year for the construction of the embankments on my second Abad, Mouza Hadul, etc., for the payment of the salaries of gomasta, paik, bildar, and other agents, and for the repair, &c. of the cutcheri-house. The balance, Rs. 2,650, will be apportioned among the members of my family by way of annual allowance in the amounts specified below,—that is, the three brothers Aubinash Chunder, Gopal Chunder, and Atul Chunder Ghose, sons of my deceased elder son Shyam Chand Ghose, shall get an allowance of Rs. 366-10-13-1-1 each; total Rs. 1,100 a year; and my younger son, Nobin Chand Ghose, shall get a yearly allowance of Rs. 1,100. My younger daughter, Srimoti Nistarini Dasi, and her sons, Roy Lall and Amrito Lall, born of her, and any other son who may hereafter be born of her, shall all of them get a yearly allowance of Rs. 300. On the demise of any of the legatees, his or her heirs shall get the said allowance as sanctioned by me.

In case of any of them becoming a childless widow, she shall get the said allowance, no matter whether she lives under the roof of my family dwelling-house or at any holy place. But if she turns to be an unchaste woman and lives elsewhere, she shall get no allowance; her allowance shall be stopped and forfeited to my estate, and then whoever shall prove under the Hindu law to be her heir, shall get the allowance fixed on her. If my [793] youngest daughter, Srimoti Nistarini Dasi, and her sons, Roy Lall Bose and another born of her, do not live in the family dwelling-house or in this village, they shall forfeit the allowance fixed on them; if any one of them so live, he shall get the said allowance. If Nistarini Dasi is removed elsewhere by her husband, she shall get the said allowance for life. If none of her sons live in my family dwelling-house or in this village, then the allowance due to them shall be stopped and will be equally shared by my heirs. The legatees or their heirs shall not be competent to make any other claim (than the allowance sanctioned by me). If in any year the amount of money cannot, owing to any pestilence breaking out, be realized in full, then the allowance shall be paid in proportion to the amount of money realized, and the allowance shall be duly paid off as soon as the arrears shall have been realized from the tenants."

Paragraph 2 then provides for the management of the property of the testator, and it is here directed that, upon the testator's decease, his youngest son, Nobin Chand Ghose, shall be manager for the term of his life; that he is to be remunerated by an annual stipend of Rs. 300, one moiety of this stipend to be payable out of the rents and profits of Muddunpore, and the other moiety to be similarly payable out of the rents and profits of Hadul. Then follows a provision for the appointment of a manager upon the death of Nobin Chand Ghose, and for the appointment of successive managers for all future times. To these provisions it is unnecessary to refer further at large. We then come to paragraph 3, which disposes of Government paper of the value of Rs. 12,900. Of this the following disposition is made:—Rupees 3,000 is to be invested and kept as a reserve fund for the purposes of paying Government revenue in seasons of dearth or scarcity when the rents are not collected from tenants. It is directed that this amount of Government paper shall never be divided between the testator's heirs. A further sum of Rs. 3,000 is given to Nobin Chand Ghose. Then in respect of Rs. 4,900, there is a direction that this amount be invested as part of the estate and held in trust by the manager, one moiety of the interest thereon to be paid to Aubinash Chunder Ghose and his two brothers, and the other moiety to Nobin Chand Ghose. Of [796] the remaining Rs. 2,000, Rs. 500 is given to the testator's grandson, Gopal Chunder Ghose, for his marriage expenses; and Rs. 1,500 are allotted for the excavation of the bed of the Ganges and the Nundun Tank.

Then paragraph 4 contains directions as to the manner in which the family dwelling-house is to be occupied. Certain rooms are allotted for the separate occupation of different members of the family, and other portions of the house are directed to remain common for the use of all the members of the family. There are further directions contained in the will, but for the purposes of the present suit it is not necessary to refer to them specifically.

Now it will be borne in mind that Aubinash, the plaintiff's father, survived the testator for about one year, and there is no doubt that he acquiesced in the provisions of the will and in what was done by Nobin Chand as manager appointed under the provisions already referred to. The plaintiff brings the present suit more than twelve years after the death of the testator, and more than twelve years after her own father's death, and in her plaint she avers, *first*, that Muddunpore has not been *bonâ fide* and properly dedicated as a debuttur

property, and that, since the death of the testator, all the profits of this estate have been considerably increased; while no provision is made in the will disposing of such increase; *secondly*, that the provisions of the will as to the second estate, Hadul, are opposed to law, and are therefore invalid; *thirdly*, that Nobin Chand, the manager, has not paid the allowances directed by the will, and that he is using the profits of the estate and the cash in hand wrongly and fraudulently, and that he has otherwise conducted himself in a manner opposed to the express directions of the will; *fourthly*, that he has not complied with the directions of the will as to the Government paper; *fifthly*, that the will is invalid and cannot be supported; and that the plaintiff is entitled to a one-sixth share of the whole property left by her father.

The plaintiff, therefore, asks, *first*, that the Court will construe the will according to the true intent thereof—that so far as the will or any portion thereof is found to be valid, will determine [797] the respective rights of the plaintiff and the defendants to the testator's estate in accordance therewith; *secondly*, that if the whole will or any portion of it be held to be invalid, the Court will determine and declare the extent of the plaintiff's right in the property so left undisposed of by Hurro Mohun; *thirdly*, that the Court will determine what properties, moveable and immoveable, existed at the time of the death of Hurro Mohun, and also what properties have been subsequently acquired and added to the *corpus*, and in order to do this, will compel defendant No. 1 to render an account; *fourthly*, that the Court, after determining these matters, will direct a partition of the whole estate, moveable and immoveable; *fifthly*, that Nobin Chand may be directed to submit an account of all the expenses incurred for the purposes connected with the Muddunpore property; *sixthly*, that, in order to prevent further waste, Nobin Chand Ghose may be removed from the management of the estate, and the Court may be pleased to appoint a receiver in his place; and *seventhly*, there is a prayer for general relief.

The Subordinate Judge of the 24-Parganas, who tried the case, decided—*first*, that Muddunpore was not *bona fide* dedicated to religious purposes; that it must be held to be secular property subject to the religious and charitable trusts mentioned in the first paragraph of the will: and he was, therefore, of opinion, that if the plaintiff can be held entitled to succeed to the Muddunpore estate, she must take it subject to the several charitable and religious bequests of the testator; *secondly*, he decided that the directions of the will in respect of the Hadul estate, prohibiting alienation and partition, are invalid: but he was of opinion that the annuities given by the testator (i) to his son, (ii) to his three grandsons, and (iii) to his daughter Nistarini, and her sons, may be enjoyed by them during their lives, but cannot descend to their heirs who are not born during the lifetime of the testator. He, therefore, held, that the plaintiff, who was born in Magh 1271 (January 1865), that is, after the death of the testator, is not entitled to the annuity enjoyed by her father, but as the defendants did not object to pay her this annuity, she might be held entitled thereto according to [798] the defendants' admission, and not by virtue of any right. In respect of the profits of the Hadul estate in excess of the annual amount stated in the will, the Subordinate Judge was of opinion, that this surplus must go among the heirs-at-law. In respect of the three thousand rupees Company's paper, which was directed to be formed into a reserve fund, the Subordinate Judge was of opinion, that the prohibition against partition could not stand good in law. As to Rs. 4,900, the Subordinate Judge held, that inasmuch as the will disposed of the interest only, and contained no disposition of the *corpus*, this *corpus* must go to the heirs-at-law. Then as

to the family dwelling, the Subordinate Judge was of opinion, that such portions as were not allotted to separate occupation according to the provisions of the will are liable to partition.

Having thus dealt with the questions raised in the plaint, the Subordinate Judge proceeded to consider the further and important question of limitation, and he decided upon the authority of the cases of *Kherodemoney Dossee v. Doorgamoney Dossee* (2 C. L. R., 112: S.C. on appeal, I. L. R., 4 Cal., 455) and *Greender Chander Ghose v. Mackintosh* (I.L.R., 4 Cal., 897), that s. 10 of the Limitation Act, XV of 1877, does not apply to this case, inasmuch as the plaintiff is seeking by her plaint not to enforce the specific trusts created by the will, but really to defeat those trusts. Then, assuming art. 127 of the second schedule of the Limitation Act, XV of 1877 to be applicable, the Subordinate Judge was of opinion, that time began to run from the testator's death, and that, inasmuch as the plaintiff's father, Aubinash, was at the time of the testator's death a major, and entitled to sue if he wished to dispute the will, the plaintiff, who was a minor at the time of her father's death, cannot have any benefit from such minority in the calculation of the time under art. 127. He was, therefore, of opinion, that the plaintiff's claim is barred by limitation in respect of Muddunpore. As to the three thousand rupees Company's paper directed to constitute the reserve fund, and the four thousand nine hundred rupees, the interest of which was disposed of, but in respect of the *corpus* of which the will contained no disposition, he held, that [799] art. 127 of the second schedule of the Limitation Act is applicable and bars plaintiff's suit. Then further, in respect of this sum of Rs. 7,900 Company's paper—that is, the two items of Rs. 3,000 and Rs. 4,900 just referred to, in respect of the profits of Muddunpore exceeding the annual sum of Rs. 2,000 disposed of by the will, and in respect of all the moveables, he held that the plaintiff's claim is barred by art. 123. As to the Hadul estate he says, after referring to art. 123 of the present Limitation Act, XV of 1877 :—"The corresponding art. 122* of Act IX of 1871 has been enlarged in its scope in art. 123† of Act XV of 1877, by omitting the word 'moveable' of art. 122, and by the additional provision 'or for a distributive share of the property of an intestate;' so the substituted art. 123 includes both moveable and immoveable property, and the period of limitation prescribed is twelve years, to be computed "when the legacy or share becomes payable or deliverable." Ordinarily they become payable or deliverable from the testator's death, unless the testator wishes expressly that the payment of the legacy shall be postponed to some future period after his death, as in the case of *Tagore v. Tagore* (9 B. L. R., 377). But in suits for a distributive share of the property of an intestate, the share

* [Art. 122 :—

Description of suit.	Period of limitation.	Time when period begins to run.
For a legacy or for a distributive share of the movable property of a testator or intestate.	Twelve years...	When the legacy or share becomes payable or deliverable.]

† [Art. 123 :—

For a legacy or for a share of a residue bequeathed by a testator, or for a distributive share of the property of an intestate.	Twelve years.	When the legacy or share becomes payable or deliverable.]
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becomes deliverable immediately on the testator's death, as held by Mr. Justice MARKBY both in cases where he has actually left some property undisposed of by the will, and where he has made an illegal disposition of property which must go to the heir-at-law. "That being the case, the Hurro estate being illegally disposed of by the will, it immediately vested in the heirs-at-law—i.e., the plaintiff's father—on the testator's death; and as the invalidity of the will must be first declared before relief can be granted, a suit to set aside a will, on the ground of illegality, to declare that the testator died intestate, whereby the heirs-at-law became entitled to his property so illegally disposed of, and to seek consequential relief by decreeing possession, must be brought within twelve years from the death of the testator under art. 123, as the property became deliverable on the testator's death." The Subordinate Judge was further of opinion, that Nobin Chand cannot be regarded [800] as the karta or manager of a Hindu family; and he, therefore, considered, that the possession of Nobin cannot be regarded as possession on behalf of all the members by the manager of a joint Hindu family. The legacies of Rs. 5,000 Company's paper to persons designated by the will, he held to be good, and the result of his decision upon the points raised before him is thus summed up:—"For reasons stated above, with the exception of the claim of the rooms enjoyed by the plaintiff's father and mother in succession, as well as the moveable property held by them, of the ornaments belonging to the plaintiff's mother and the annuity enjoyed by the plaintiff, the remaining portion of the plaintiff's claim is barred by limitation. The latter refers both to the Muddunpore and Hurro estates, to the *corpus* of Company's papers for Rs. 7,900 not disposed of by the will, as well as to all the accounts claimed by the plaintiff."

From this decree an appeal has been preferred by the plaintiff, and a cross-appeal by the defendants. On the appeal it has been contended, that limitation has no application to this suit; that if arts. 123 and 127* of the second schedule of the present Limitation Act can be held to be applicable, still s. 10† of the same Act applies, so as to save the plaintiff's claim from the operation of limitation. As to s. 10 Mr. *Branson* contended, that there is a general trust to manage. He relies upon the following provisions of the will:—"I allot all those properties for the maintenance of my family. None of my heirs shall be entitled at any time to get any partition of the said properties effected, nor shall be competent to transfer the same by sale or gift, or pledge the same in security for any person;" and he argues that this general trust is in its substance sufficiently specific to bring it within the provisions of s. 10. We are not able to concur in this argument. The plaintiff is not seeking to enforce this general trust in accordance with, and in pursuance of, the directions contained in the will. If there is any express trust, it is to pay to the plaintiff, as heir of her father, an annual allowance of Rs. 366, and the plaintiff is

*[Art. 127:—

Description of suit.	Period of limitation.	Time from which period begins to run.
By a person excluded from joint-family property to enforce a right to share therein.	Twelve years...	When the exclusion becomes known to the plaintiff.]

†[Sec. 10:—Notwithstanding anything hereinbefore contained, no suit against a person

Suits against express trustees and their representatives,

in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration) for the purpose of following in his or their hands such property, shall be barred by any length of time.]

not asking to have this direction specifically enforced. On the contrary, her contention is, that this disposition fails, inasmuch as it is not a valid disposition according to law. The case is then not the case of a valid [801] disposition creating a specific trust, and a suit by a person beneficially interested to enforce such specific trust. It has been held that the section is not applicable to an implied or resulting trust; and, under these circumstances, we are of opinion that s. 10 is not applicable to the plaintiff's claim as put forward by her in her plaint. This decision is in accordance with the cases of *Kherodemonoy Dossee v. Doorgamonoy Dossee* (2 C. L. R., 112; s.c., on appeal I. L. R., 4 Cal., 455), *Greender Chunder Ghose v. Mackintosh* (I. L. R., 4 Cal., 897), and *Anund Moye Deby v. Girish Chunder Myti* (I. L. R., 7 Cal., 772). But then the question arises, is the plaintiff's suit barred by any other provisions of the law of limitation? and this question it will be convenient to consider (i) in respect of the Hadul estate, and (ii) in respect of the Muddunpore estate.

First then as to the Hadul estate. If the plaintiff's claim is barred, it must be barred by one of the following articles, viz., 123, 127, and 144* of the second schedule of the Limitation Act. Now, the view which we take of the case is this: We think that the general intention of the testator to be gathered from the will was to leave his property to the persons who would have been entitled as heirs under the Hindu law, and also to create an additional heir in the person of his daughter Nistarini and her sons. In carrying out this intention, he has, no doubt, inserted in the will certain provisions which must be rejected as invalid—the provisions, viz., against alienation and partition: but we think that what he has substantially done is this: Having created an additional heir, he has divided the Hadul estate between this heir and the persons who would have been heirs under the Hindu law. We think that, in giving to these heirs a specific share of the rents and profits, he must be held, according to the principle laid down in *Mannox v. Greener* (L. R., 14 Eq., 456) (see also Illustration (c) to s. 159† of the Indian Succession Act), to have given to each of these persons a share in this estate corresponding with the share of the profits which is specifically inserted in the second paragraph of the will. The case of *Sookmoy Chunder Dass v. Monohuri Dossee* (I. L. R., 7 Cal., 269), which was [802] decided by this Bench, has been referred to in the course of the argument; but it appears to us that that case is distinguishable from the present one. In that case, the prohibition against alienation was stronger than the prohibition in the will now before us. There was an express direction that the estate should remain intact, and the testator there further attempted to create an estate-in-tail-male—that is, an estate not known to Hindu law. We there held, that it was impossible to say that an intention, by giving the rents

*[Art. 144 :—

Description of suit.	Period of limitation.	Time from which period begins to run.
For possession of immovable property or any interest therein not hereby otherwise specially provided for.	Twelve years...	When the possession of the defendant becomes adverse to the plaintiff.]

†[Sec. 159 :—Where the interest or produce of a fund is bequeathed to any person, and the will affords no indication of an intention that the enjoyment of the bequest should be of limited duration, the principal as well as the interest shall belong to the legatee.

(c) A bequeathes to B the rents of his lands at X. B is entitled to the lands.]

and profits of the property, to give thereby the *corpus* itself was in conformity with the general intention to be gathered from the whole of the will taken together. In the case now before us it appears to us, that the intention to give the *corpus* by giving a share of the rents and profits is not in conflict with the general intention to be gathered from the whole will. It is true that there is a restraint on alienation and partition; but it appears to us that this direction can be set aside without destroying the essential disposition contained in the will. There being then, by a gift of a specific share of the rents and profits, a good gift of a share in the Hadul property, is it possible to say that the plaintiff's claim in respect of this share is barred by limitation? We think that it is not. Admittedly, Nobin Chand, the manager, has been paying the annual allowance given to Aubinash and his children by the will within twelve years before the institution of this suit, and it is, therefore, not possible to say with reference to art. 127, that, in respect of this share, there has been any exclusion of the plaintiff. Similarly, we think it cannot be said with reference to art. 144, that, in respect of this share, the possession of Nobin has been adverse to the plaintiff. Then with reference to art. 123, if the annual allowance made to Aubinash and his children be regarded as a legacy, there is no denial that the plaintiff has been admitted to the enjoyment of this legacy; and the object of the present suit is not to recover the legacy, but to have it defined what that legacy really is. We are, therefore, of opinion that, in respect of the share of the Hadul property, the plaintiff's claim is not barred by limitation.

Then, applying the same principle of construction to the share given to Nistarini and her children (for in respect of the [803] shares given to the other persons mentioned in the will there is no dispute), it appears to us, that the possession of Nobin Chand Ghose as trustee for Nistarini's children must be held to have been adverse to the plaintiff from the date of the death of the testator; and we think, therefore, that, in so far as the plaintiff seeks to enforce a claim to the share given to Nistarini's children, the present suit is barred. This is in accordance with the decision in *Rherode-money's case* (2 C. L. R., 112; s. c. on appeal, I. L. R., 4 Cal., 455) [see also the observations of the Privy Council in the case of *Pirthee Singh v. Raj Koor* (12 B. L. R., 238; s. c., 20 W. R., 25)]. We may observe that it has not been very strongly pressed upon us, that Nistarini's children ought not to have their annual allowance for the period of their lifetime, and all that we were asked to say was, that, upon their death, the share given to them would be divisible as part of the general estate of Hurro Mohun. We think, however, that this share has been given absolutely; and that, in respect thereof, the plaintiff is barred by limitation for the reasons already stated. Then, in connection with the Hadul property, there remains another question to be dealt with, and that is the question concerned with the increase in the annual profits over and above the sum of Rs. 3,150 set down in the second paragraph of the will. Now, the will does contain a specific provision that if the rents and profits of the estate shall in any year fall below the amount so set down, the persons entitled to shares in these profits under the will shall be subjected to a ratable and proportionate deduction; but there is no corresponding provision in respect of a possible increase. It appears to us, however, that the reasonable construction to put upon the will, all its provisions being taken together, is, that the increase ought to be dealt with in the same manner as the decrease; in other words, that any surplus profits above the sum of Rs. 3,150 specifically mentioned in the will must be divided between the legatees in the proportion of their shares.

We shall next deal with the sums of Rs. 500 allotted for the construction of embankments, the payments of salaries of gomastas, etc., and the sum of Rs. 150, which is a moiety of [304] the remuneration directed to be paid to the manager for the time being. Now, if these were bequests for specific purposes in which the plaintiff has no beneficial interest, we think that the possession of Nobin Chand would have been adverse to the plaintiff; and if these sums were disposed of for a purpose that had failed, we think that they must have fallen into the residue, and as the will contains no valid residuary bequest, the plaintiff would have been barred under the provisions of art. 123. But we think that it is impossible to say that the bequest of those two shares of the profits can be considered apart from the bequest of the remaining portions of the profits of the Hadul estate. The purposes for which the sum of Rs. 500 was bequeathed are construction of embankments, payment of salaries of gomastas, paiks, bildar, and other agents and repairs of the cutcheri. These are purposes essentially connected with the estate itself and its management, and the same observation is applicable to the sum of Rs. 150, which is a moiety of the manager's remuneration. The plaintiff asks for a partition, and upon that partition she will, of course, have to bear all expenses such as those which have been just specified in respect of her own share. We think, therefore, that these two sums of Rs. 500 and Rs. 150 must be regarded as an integral portion of the Hadul property. The result will be that the share of that property to which the plaintiff will be entitled will be ascertained in the following manner:—As Rs. 2,650 is to Rs. 366-10-13-1-1, so is the whole property to the plaintiff's share.

We have next to consider the question of limitation in connection with the Muddunpore estate. Now, the will directs that the profits of this estate, which are set down as Rs. 2,000 annually, shall be disposed of in the following manner,—*viz.*, Rs. 500 for karpurdazes and expenses of erecting dams, and the remaining Rs. 1,500 for the following seven purposes:—

- (1) Turn of service of the idol Gobind Ji.
- (2) Feeding of mendicants and travellers.
- (3) Durgutshab and Dole Jatra.
- (4) Repair of the road in front of the house.
- (5) Repair of the outer house, dalan, &c.
- [803] (6) Daily and occasional rites and ceremonies.
- (7) Alms and other necessary acts.

Now we think there can be no doubt that the plaintiff has a certain interest in Nos. 3, 4, 5, and 6 of the above objects; and in respect of these objects we think it may be held, that the property has been vested in Nobin in trust for specific purposes within the meaning of s. 10 of the Limitation Act already referred to; but we are of opinion that the plaintiff's interest in these purposes, although it may entitle her to compel the trustee for the time being to perform the Dole Jatra, to repair the road in front of the house, to repair the outer house, dalan, etc., and to perform the daily and occasional rites and ceremonies, is not such an interest as will entitle her to say, that she is not barred by the law of limitation from asserting her right to a share in the Muddunpore estate as one of the heirs of Hurro Mohun? In respect of this estate, the possession of Nobin is adverse to the plaintiff in so far as concerns the object of the present suit, although s. 10 would save from the operation of the law of limitation a suit having for its direct object the effectuation of the purposes to which the profits of the Muddunpore estate have been directed by the will to be appropriated. Then if any of these purposes fails, the estate, so far as concerns the

purposes which fail, becomes part of the residue not disposed of by the will; and in respect of this residue, Hurro Mohun died intestate. In this view, the plaintiff's claim to a share in the Muddunpore estate is barred by art. 123. We also think that the plaintiff (and before her, her father) has been excluded within the meaning of art. 127 since Hurro Mohun's death; and further, that since the same event, the possession of Nobin has been adverse within the meaning of art. 144. We think, however, that although the plaintiff is barred from asserting a title to a share in the Muddunpore estate, she has a right to ask that purposes 3, 4, 5, and 6, already referred to, be effectually performed out of the annual sum of Rs. 1,500 set apart by the will for these and the other purposes already mentioned; and we direct that a declaration to this effect be inserted in the decree.

We now come to the disposition of the Company's paper, [806] Rs. 12,900 : *First*, as to the sum of Rs. 3,000 set apart as a reserve fund, the prohibition against alienation is, of course, invalid; and, in consequence, this sum of Rs. 3,000 fails to be disposed of as on an intestacy, and the plaintiff's claim in respect of any part of this sum is barred by the provisions of art. 123. Then, *secondly*, as to the bequest of Rs. 3,000 to Nobin Chand; this is a good bequest and cannot be interfered with. *Thirdly*, as to Rs. 4,900, there is no specific bequest of the *corpus*; but we think that the bequest of the interest must be taken to carry with it the right to the *corpus*, and in this view the plaintiff will be entitled to a life-interest in one-third of Rs. 2,450. *Fourthly*, the bequest of Rs. 500 to Gopal Chunder Ghose is a good bequest, and cannot be interfered with. *Fifthly*, as to Rs. 500 set aside for the excavation of the bed of the Ganges and the Nundun Tank, it is admitted that the testator, who lived for some time after the execution of the will, spent this money for the purposes just mentioned; and there is no question concerned with this money with which we have now to deal. *Sixthly*, the claim to a share in the moveable property other than that above specifically mentioned is barred by art. 123. Then, lastly, we are informed that there is no desire on the part of appellant to interfere with the separate occupation of the family dwelling-house, in so far as that occupation has been directed and regulated by the provisions of the will. But the decree of the Subordinate Judge, in so far as it declares the undivided portion of the family dwelling liable to partition cannot be interfered with.

The result then will be, that, as to the Muddunpore property, there will be a declaration that the plaintiff is entitled to have the Durgutshab, repairs of the road in front of the house, the repairs of the outer house, dalan, etc., as specified in paragraph 4 of the will, and the daily and occasional rites and ceremonies properly performed out of the annual sum of Rs. 1,500 set apart for these and other purposes in the will. Next, as to the Hadul property, the plaintiff will be entitled to a share bearing to the whole property the same proportion that Rs. 366-10-13-1-1 bears to Rs. 2,650. It will be understood that in this share the appellant is only entitled to the estate of a Hindu daughter. [807] Then, as to the account asked in respect of the Hadul property, we think that the plaintiff is entitled to such account for six years only preceding the institution of the present suit, upon the authority of the case of *Baroda Pershad Chattopadhyaya v. Brojo Nath Bhattacharjee* (I. L. R., 5 Cal., 910). Upon taking that account, the manager, Nobin Chand, will be entitled to credit for all sums paid to the appellant in respect of the annual allowance of these six years; and she will be entitled to whatever balance of the profits of her share will remain after giving credit for these sums. The plaintiff will be further entitled to a life-interest in one-third of Rs. 2,450 Government paper;

and the plaintiff will further be entitled, if she insists upon it, to a partition of the undivided portions of the family dwelling-house. Having regard to the difficult questions which have arisen upon the construction of this will, we think that the whole of the costs of these proceedings should be paid out of the estate.

Decree varied.

NOTES.

[I. LIMITATION ACT—TRUSTS—

Only express trusts are contemplated in sec. 10.—7 Cal. 772; 6 Mad. 402; 9 C. L. J. 382; 13 C. W. N. 567; 4 All. 187; 7 All. 25; 4 Cal. 924; 10 Bom. 242; 32 Bom. 364; 10 Bom. L. R. 117.

II. ENFORCING TRUSTS—

Declaration of invalidity is not :—8 Cal. 788 (800); 20 Bom. 511; 16 All. 256; 7 Bom. L. R. 327. See also 19 Mad. 425.

III. GIFT OF INCOME—

When such gifts amount to gift of corpus, see 3 C. L. J. 515 (519); 8 C. L. J. 369 (409); 10 C. L. J. 355; 14 C. W. N. 18.]

[8 Cal. 807- 10 C.L.R. 439]

APPELLATE CIVIL.

The 15th March, 1882.

PRESENT :

MR. JUSTICE FIELD AND MR. JUSTICE O'KINEALY.

Gopeekishen Gossamy.....Defendant

versus

Thakoordass Gossamy.....Plaintiff.*

Limitation Act (XV of 1877), sched. ii, art. 131—Worship of idol—Turn of worship—Recurring right.

A suit for a *palla*, or right to worship an idol in turn, is a periodically recurring right within the meaning of Act XV of 1877, sched. ii, art. 131.†

Eshan Chunder Roy v. Momohani Dasi (I. L. R., 4 Cal., 683), followed.

THE judgment appealed from is as follows :—“The facts of the case are, that the plaintiff and his brothers, Ram Dass Gossamy and Pyari Mohun Gossamy, when they lived in commensality, used to worship Radhamadhubjee, the family idol of the Gossains, for forty-five days in the year; that, when they separated, it was arranged amongst themselves that each should worship the idol every third year for the whole term of [808] forty-five days, and that the said arrangement was being carried into effect, when, in the year 1283, (1876-7), which was the plaintiff's year, the defendant refused to make over to him the thakoor. The defendant, who has purchased Pyari Mohun's *palla* of the worship, raised numerous objections, questioning the jurisdiction of the Court and pleading that the plaintiff has no cause of action; that the case is

* Appeal from Appellate Decree, No. 1835 of 1880, against the decree of Baboo Trailokya Nath Mitter, Subordinate Judge of Hooghly, dated the 23rd August 1880, affirming the decree of Baboo Kodarnath Chatterjee, Munsif of Serampore, dated the 31st March 1879.

† [Art 131 :—

Description of Suit.	Period of limitation.	Time from which period begins to run.
To establish a periodically recurring right.	Twelve years	... When the plaintiff is first refused the enjoyment of the right.]

barred by limitation of one year ; and that there was never such an agreement as stated in the plaint. The Munsif gave the plaintiff a decree, overruling all the objections : hence the appeal on the following grounds :—(i) The Civil Court has no jurisdiction, and the plaintiff has no cause of action ; (ii) the case is barred by limitation ; (iii) the agreement stated in the plaint has not been proved, and the ikrars admitted by the plaintiff disprove it ; and (iv) the lower Court failed to construe some documents correctly."

The Judge found all the issues in favour of the respondent. On the point of limitation he relied on the case of *Eshan Chunder Roy v. Monmohini Dassi* (I. L. R., 4 Cal., 683) distinguishing *Gaur Mohun Chowdhry v. Madan Mohun Chowdhry* (6 B. L. R., 352). On the third issue he found the agreement proved ; and in this part of his judgment he stated that there was "sufficient evidence that the defendant refused the idol to the plaintiff in 1275 or 1277 (1868-9 or 1870)." The defendant appealed on the grounds (i) that the suit, which was instituted in 1878, was barred by limitation, it not having been instituted within six years from the time the defendant first refused to give the idol ; and (ii) that the right claimed was not a recurring right within the meaning of art. 131 of the second schedule to the Limitation Act, XV of 1877.

Baboo Mohiney Mohun Roy for the Appellant.

Baboo Bama Churn Banerjee for the Respondent.

The **Judgment** of the Court (FIELD and O'KINEALY, JJ.) was delivered by

Field, J.—The only point in this case is what period of limitation is applicable to a suit brought to enforce a *palla*, or turn of worshipping an idol.

[809] The lower Court have followed the decision of *Eshan Chunder Roy v. Monmohini Dassi* (I. L. R. 4 Cal. 683), which decided that a *palla*, or right to worship an idol in turn, is a periodically recurring right within the meaning of art. 131 of the second schedule of the present Limitation Act, XV of 1877.

It has been contended before us, that this article is not applicable, and that the article which ought to be applied to a case of this kind is art. 120, which provides six years' limitation for suits for which no period of limitation is provided elsewhere in the second schedule. We are unable to assent to this contention, and, as at present advised, we see no sufficient ground for differing from the decision in *Eshan Chunder Roy v. Monmohini Dassi* (I. L. R. 4 Cal. 683). The appeal will, therefore, be dismissed with costs.

Appeal dismissed.

[8 Cal. 809]

SMALL CAUSE COURT REFERENCE.

The 27th March, 1882.

PRESENT :

SIR RICHARD GARTH, KT, CHIEF JUSTICE, AND MR. JUSTICE WHITE.

Carlises, Nephews & Co.

versus

Ricknauth Bucktearmull.⁴

Contract—Condition precedent—Stipulation in restraint of trade—Contract Act IX of (1872), s. 27—Arbitration—Estoppel.

The plaintiffs, on the 4th August 1881, entered into a contract with the defendant, for the sale to the latter of a quantity of goods of a certain description "to be delivered up to the 31st December 1881." The plaintiffs stipulated that they would make no sales of goods

* Case stated for the opinion of the High Court, under s. 7 of Act XXVI of 1864, by G. C. Sconce, Esq., Fourth Judge of the Calcutta Small Cause Court.

of the same description to others before the 1st December 1881; and the contract contained an arbitration-clause to the effect, that, "if the buyers object to accept all or any of the goods offered to them by the sellers in fulfilment of the contract on the ground of any variance, difference from the sample or muster, inferiority in weight or quality or colour, or damage or defect or any other ground whatsoever," such objections should, in case of disagreement, be referred to two arbitrators, one to be named by the sellers, and the other by the buyers. Such arbitrators to decide "whether the buyers' objections were valid, and, if so, what allowance on the whole contract price will be a reasonably adequate compensation to the buyers for such variance, difference, inferiority, damage or [810] defect, if any, and such decision shall be final and binding on both parties." If either buyers or sellers failed "to name an arbitrator within two days after being requested by the other to do so, the decision of the arbitrators named by the buyers or sellers, as the case may be, shall be final and binding on both parties." The goods arrived in Calcutta between the 4th and 24th November 1881. On the 15th August the plaintiffs entered into other contracts with other buyers for the sale of the same description of goods at a lower price than that at which they had sold to the defendant: these contracts were on the terms that the goods were not to arrive in Calcutta until after the 31st December 1881. The defendant refused to accept the goods on the ground that the plaintiffs had committed a breach of the contract by entering into other agreements for sale of the same description of goods before the 1st December, and refused to pay the difference between the contract price and the market value which the plaintiffs demanded from him. The plaintiffs thereupon appointed an arbitrator, who (the defendant declining to appoint an arbitrator) proceeded to act in the matter, and finding that the plaintiffs had not committed a breach of the contract made an award in their favour for Rs. 850, the difference in price of the goods at the contract and market values. The plaintiffs sued to recover the amount due to them under the award, or in the alternative for Rs. 850 as damages for non-acceptance of the goods.

Held, that the defendant was not estopped by the award from setting up the breach of the stipulation not to sell other goods of the same description before the 1st December 1881 as a defence to the suit.

Per GARTH, C.J.—The question whether the plaintiffs, by making the other contracts, had committed a breach of the stipulation was not properly a subject of reference to the arbitrator under the arbitration-clause. The general words in that clause "or any other grounds whatsoever" mean any other grounds of a like character, and do not include a pure question of law.

Held also, that the stipulation itself amounted to a condition precedent to the defendant's obligation to accept the goods.

Held further, a stipulation in a contract prohibiting any sales of goods to others during a particular period, of a similar description to those bought under the contract, is not a stipulation in restraint of trade under s. 27* of Act IX of 1872.

ON the 4th August 1881, Carlisles, Nephews and Co. entered into a contract with Ricknauth Bucktearmull for the sale to the latter of 136,000 pairs of 'animal-bordered dhooties,' to be delivered up to the 31st December 1881: the important clauses of the contract were as follows:—The plaintiffs stipulated that they would make no sales of 'animal-bordered dhooties' to others before the 1st of Decem-[811]ber 1881; and that should any dispute arise between them as to certain matters, the question should

Agreement in restraint of trade void.

*[Sec. 27 :—Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.]

Exception 1.—One who sells the goodwill of a business may agree with the buyer to

Saving of agreement not to carry on business of which goodwill is sold.

refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein, provided that such limits appear to the Court reasonable, regard being had to the nature of the business.

Of agreement between partners prior to dissolution.

Exception 2.—Partners may, upon or in anticipation of a dissolution of the partnership, agree that some or all of them will not carry on a business, similar to that of the partnership, within such local limits as are referred to in the last preceding exception.

or during continuance of partnership.

Exception 3.—Partners may agree that some one or all of them will not carry on any business other than that of the partnership, during the continuance of the partnership.]

be referred to arbitration. The arbitration-clauses (cls. 9 and 10) of the contract were as follows :—(9) "If the buyers object to accept all or any of the goods offered to them by the sellers in fulfilment of the contract, on the ground of any variance, difference from the sample or muster, inferiority in weight or quality or colour, or damage or defect, or any other ground whatsoever, such objections shall (in case of disagreement) be referred to the arbitration of two English persons connected with any respectable firm of this city, one to be named by the sellers and the other by the buyers, with power to appoint an umpire, who shall decide whether or not the buyers' objection is valid; and if so, what allowance on the whole contract price will be a reasonably adequate compensation to the buyers for such variance, difference, inferiority, damages or defects, if any, and such decision shall be final and binding on both parties." (10) "In the event of either sellers or buyers failing to name an arbitrator within two days after being requested so to do by the other of them, the decision of the arbitrator named by the sellers or buyers, as the case may be, shall be final and binding on both parties."

The goods arrived in Calcutta between the 4th and 24th November 1881.

On the 15th August 1881, one of the members of Carlises, Nephews, and Co. entered into four other contracts with four other buyers for the sale, in all, of 64,000 pieces 'animal-bordered dhooties' at Rs. 1-6-6, a price lower than that at which they had sold to the defendant; these contracts were on the terms that the goods were not to arrive at Calcutta until after the 31st December 1881.

On the 10th November 1881 the defendant wrote to the plaintiffs, stating that as other sales had been made by the plaintiffs to persons other than himself, in direct contravention of their contract, he declined to accept the goods and considered the contract cancelled. On the 26th January 1882, the plaintiff wrote to the defendant, informing him, that as he had refused to pay to them Rs. 850, being the difference between [812] the price at which he, the defendant, bought 136,000 pairs of animal-bordered dhooties, and the market-value of the same, they appointed Mr. John Morrison to act in the matter as their arbitrator, and called upon the defendant to name an arbitrator within two days.

The defendant declined to appoint an arbitrator, and Mr. Morrison, on behalf of the plaintiffs, proceeded with the arbitration, and found that no time for arrival was specified in the contract, and that the arrival of the goods, which took place between the 4th and 24th November, was consonant with the terms of the contract, which allowed up to the 31st December, for delivery; that, as the objection that sales had been made to others, for delivery after the present contract had expired, he found that the practice and custom in Calcutta sanctioned such a proceeding, the object of such a stipulation, that no goods should be sold to other dealers during the currency of the contract, being that the buyer should have a monopoly for the time being; and he, therefore, gave his award in favour of the plaintiffs, giving them Rs. 850 as damages, together with Rs. 32, the cost of the reference.

The plaintiffs then sued the defendant in the Calcutta Court of Small Causes to recover the amount due to them under the award, or, in the alternative, they claimed Rs. 850 as damages for breach of contract, inasmuch as the defendant had failed to take delivery of 136,000 pairs of animal-bordered dhooties, that sum being the difference in the market-rate at the time of the breach of contract and the rate at the time they were sold.

Upon the facts of the case there was no contest save as to the market-rate, but the defendant contended that the stipulation "that no other sales

should be made to others before the 1st December 1881 " was a condition precedent to his being bound to accept the goods, and that, as the condition was broken by the plaintiffs, he was at liberty to rescind the contract and to refuse to take any of the dhooties.

The fourth Judge of the Small Cause Court was of opinion that the stipulation " no sales of animal-bordered dhooties to others before the 1st December 1881 " was a condition precedent, and [813] that the breach of the stipulation by the plaintiffs justified the defendant in rescinding the contract. He further was of opinion that the award was bad, the question submitted to arbitration not being one which it was contemplated by the parties should be submitted to arbitration : he therefore dismissed the plaintiffs' suit, making his judgment contingent on the opinion of the High Court on the questions of law raised, *viz.* : —(i) " Whether the defendant was estopped by the award from setting up the breach of the stipulation in question as a defence to this suit? (ii) whether the alleged breach affords a good answer to this suit, and whether the stipulation itself amounts to a condition precedent to the defendant's obligation to take the dhooties? (iii) whether such a stipulation as prohibits any sales of the same sort of goods being made by the plaintiffs to other persons during a particular time is a stipulation ' in restraint of trade ' within the meaning of s. 27 of the Contract Act."

Mr. Allen (Mr. Phillips with him, for the plaintiffs) contended, that the clause was not a condition precedent, and referred to Benjamin on Sales, chapter on ' Conditions,' Book 4, Part I; and *Cutter v. Powell* (Smith's L. C., 1). As to whether the stipulation prohibiting other sales was a stipulation in restraint of trade, he cited *Gravelly v. Barnard* (L., R., 18 Eq., 518), *Jones v. North* (L. R., 19 Eq., 426), *Altman v. Royal Aquarium Society* (L.R. 3 Ch. D., 228), *Jones v. Heavens* (L. R., 4 Ch. D., 636), *Rousillon v. Rousillon* (L.R., 14 Ch. D., 351), *Collins v. Locke* (L. R., 4 App. Cas., 674).

Mr. Hill for the defendant was not called upon.

The **Opinions** of the Court (GARTH, C.J., and WHITE, J.) were as follows :—

Garth, C.J.— I think that the Court below is quite right. The decision of the learned Judge appears to me to be what, I am very glad to say, his decisions almost invariably are, both good sense and sound law.

The suit is brought to recover damages from the defendant for not accepting a quantity of Manchester goods, called ' animal-bordered dhooties,' which were sold to him by the plaintiffs [814] upon certain terms, and to be delivered up to the 31st of December 1881.

The main defence to the claim is, that there was a stipulation in the contract that the plaintiffs were to make no sales ' of animal-bordered dhooties ' to others before the 1st of December 1881. It is admitted that the plaintiffs did, before the 1st of December, make sales of a large quantity of similar dhooties to other dealers, but upon the terms that the goods were not to arrive at Calcutta until after the 31st December.

The defendant contends that this stipulation was a condition precedent to his being bound to accept the goods ; and that as the condition was broken by the plaintiffs, he (the defendant) was at liberty to rescind the contract, and to refuse to take any portion of the dhooties.

The plaintiffs, on the other hand, say that the stipulation was not a condition precedent, but only a term of the contract, the breach of which (if any) might have been compensated in damages ; and they also say that there was an arbitration-clause in the contract, which provided for the settlement of questions of this kind, and that, under that clause, this question has been duly

referred to an arbitrator, who has decided it against the defendant. The arbitration clause referred to is contained in cls. 9 and 10 of the contract. (After reading cls. 9 and 10, his Lordship continued):—

The point raised by the defendant as to the stipulation in question was one which the plaintiffs thought was a proper subject of reference under this arbitration-clause; and they accordingly named an arbitrator to decide it. The defendant, taking a different view, and considering that the point was not one which could be so referred, declined to name an arbitrator, and consequently the arbitrator named by the plaintiffs proceeded to decide *ex parte*. The point referred to him, so far as it concerned the present question, he describes as this: "Whether the plaintiffs committed a breach of the contract by selling similar goods to other dealers during the currency of the contract, and against their express stipulation not to do so."

Upon this point the arbitrator in his award says as follows:—"As to the second objection taken by the buyers, the sellers [815] admit that they sold goods for delivery after the present contract had expired. They contend, however, that the practice and custom in Calcutta sanctions such a proceeding; and my own experience confirms that view. The object of the buyer in making the stipulation that no goods will be sold to other dealers during the currency of his contract is, that he may have a monopoly for the time being, but selling for subsequent delivery in no way harms him, and I have never heard it objected to. My award must, therefore, be against the buyer on this point."

The first question, therefore, that arose in this suit, and one which is now referred to this Court by the learned Judge, is, whether the defendant was estopped by that award of the arbitrator from setting up the breach of the stipulation in question as a defence to this suit?

I am of opinion that he was not. It seems to me, in the first place, that the question was not one which was intended to be the subject of reference, and was not properly referred under the arbitration-clause. That clause appears to me to apply to a class of objections which might be raised by the buyer, which would be more especially within the province of a mercantile arbitrator to decide; as for instance, whether there was any variance between the goods delivered and the goods sold, or between the goods delivered and the sample, or whether there was any inferiority in weight or quality or colour?

It is true that the general words "or any other grounds whatsoever" are added, but I agree with the learned Judge that these words mean "any other grounds of a like character," and are not intended to embrace a pure question of law, such as arises in this case, which would be quite out of the province of a merchant, and essentially a question for a Court of Justice to decide.

One very cogent reason which induces me to take this view consists in this: We find in the latter portion of the clause, that the arbitrators, in the event of the buyer's objection to the goods being considered to be valid, "are to enquire what allowance, on the whole contract-price, would be a reasonable compensation to the buyer for such variance, difference, inferiority, damage or defect." The objections, therefore, which are intended to be the [816] subject of reference are such as, if found valid, would empower the arbitrators to make to the buyer an allowance by way of compensation. But the objection which is here made by the defendant is not one which admits of compensation. The objection, if valid, would enable the defendant, in point of law, to rescind the contract altogether. I think, therefore, that it neither comes within the letter nor the spirit of the arbitration-clause, and was not, therefore, properly made

the subject of reference. But even if it had been so, I agree with the learned Judge that the arbitrator has given no decision upon the real point raised by the defendant. He says nothing as to whether the sale of the dhooties to other persons justified the defendant in rescinding the contract. He only deals with the question whether the usage of merchants in Calcutta justified the plaintiffs in making the sales, and whether the defendant was entitled to any allowance in respect of the plaintiffs' alleged breach of contract. He says that selling for subsequent delivery in no way harms the buyer, and that he never heard it objected to. But he does not decide the question, which is purely one of law, whether, what the plaintiffs did amounted to such a breach of the stipulation as enabled the latter to rescind the contract?

The defendant, therefore, not being precluded by the award from setting up the breach as a defence in this suit, we have now to consider the main point in the case,—namely, whether the alleged breach does afford a good answer to this suit; and whether the stipulation itself amounts to a condition precedent to the defendant's obligation to take the dhooties?

The learned Judge, as it seems to me, has dealt with this question very properly. The obvious meaning of the stipulation is, that the defendant, the buyer, was to have a monopoly up to certain time, so far as the plaintiffs could secure it to him, in the sale of these particular goods. In order to give him this monopoly, we must presume that the 1st of December was fixed upon by the parties as a reasonable limit within which the plaintiffs were to make no sales to other dealers; and whatever the limit was, I think it clear that the plaintiffs were bound by it. It is not a question of usage or custom in the Calcutta market; nor whether the defendant was or was not actually damaged by the [817] sales made by the plaintiffs. The question is, what do the words of the contract mean?

Mr. *Allen* has suggested, that the word 'sales' must mean "sales for delivery before the 1st of December"; and that a contract of sale for delivery in future is not a sale. But this is not so. A contract for the sale of goods is in itself a sale; we all know that a large proportion of such sales are for delivery in the future; and if in this instance it had been intended only to prohibit sales for delivery before the 1st of December, the contract should have said so. It seems obvious that if the plaintiffs, immediately after their contract with the defendant, had gone into the market and effected sales to other persons of a large quantity of the particular goods at a much lower price than that given by the defendant, although the delivery was not to be made until after the 1st of December, the natural result would have been, that the value of the goods would have been depreciated in the market. One can quite understand that a buyer, if he has, by a stipulation of this kind, secured a monopoly during the time that the contract is running, would be willing to give a higher price for the article than he would if he were subjected to competition; and hence we find that, in this instance, the sale to the defendant was effected at Rs. 1-7, whilst the subsequent sales to other persons were at Rs. 1-6-6.

Then, as to the question whether the stipulation made by the plaintiffs was a condition precedent to the performance of the contract by the defendant, there are certain rules laid down in the notes to *Cutter v. Powell* (2 Smith's L. C., at p. 13, 6th edition), which will, generally speaking, be found pretty sure guides in solving such questions. Where a promise made by one party to a contract goes to or affects the whole consideration moving to the other party, or to adopt the language of Justice BLACKBURN, "where it goes to the root of

the matter, so that a failure to perform it by the one party would render the performance of the rest of the contract by that party a thing different in substance from what the other party has stipulated for," then the promise by the one party is a condition precedent to the performance by the other party; but where it only partially affects it, and may be compensated in damages, [818] there it is not a condition precedent— see *Bellini v. Gipe* (L. R., 1 Q. B. D., 183), *Graves v. Stegg* (9 Exch., at p. 761), *per* Baron Parke.

Now applying that rule to the present case, is the breach of the stipulation in question one which affects the whole consideration moving to the defendant? It seems to me that it is. It does not affect the price of any particular bale or bales, or any particular part of the plaintiffs' contract. The stipulation is intended to protect the buyer's whole interest in the goods which he has bought, and the breach of it is calculated to affect the value to the buyer of the whole of those goods.

I was at first under the impression that a part of this contract had been fulfilled before the sales to other people had been made. But I find that this was not so. Even if it had been, the result would have been the same; because the breach of the condition would have had the effect of deteriorating the value of the whole of the goods which at the time of the breach remained undelivered.

An instance of this occurred in the case of *Withers v. Reynolds* (2 B. and Ad., 882), where the defendant had agreed to deliver to the plaintiff certain loads of straw every month upon condition that each load was to be paid for on delivery. Some of the loads had actually been delivered and paid for; but upon further loads being delivered, the plaintiff, the buyer, said that he would not pay for them on delivery; upon which the Court held, that the defendant was justified in rescinding the contract and refusing to deliver any more loads. The payment on delivery was a stipulation which affected the whole of the seller's interest in the contract, or, at any rate, his whole interest in the unfulfilled portion of it.

The only remaining point to be considered is one which was not taken by counsel for the plaintiffs in the Court below, but appears to have been suggested by the learned Judge himself. It arises under s. 27 of the Indian Contract Act (IX of 1872); and the question is, whether such a stipulation as this, which prohibits any sales being made by the plaintiffs of goods of this description to other persons during a particular time, is a [819] stipulation in restraint of trade within the meaning of that section. Mr. Allen has referred us to a case decided by the learned Chief Justice and Mr. Justice PONTIFEX—*Madhub Chunder Poramanick v. Raj Coomar Dass* (14 B. L. R., 76). This case was of a very peculiar character; but assuming that case to have been well decided, we think it has no application to the present. The language of s. 27 is no doubt somewhat general and unsatisfactory; but I am clearly of opinion that it was never intended to prohibit such a stipulation as that with which we are now dealing in contracts for the sale of goods. If we were to hold that it did, I think we should not only be stultifying ourselves, but the Legislature who passed the Act.

In my opinion, the learned Judge was quite right in dismissing the suit; and I think that the plaintiffs should pay the costs of this reference.

White, J.—I entirely agree with what has fallen from my Lord on all the three points which are raised in this reference. I also agree that the judgment of the Small Cause Court should be affirmed with costs.

Suit dismissed.

Attorneys for the Plaintiffs: Messrs. *Sanderson & Co.*

Attorney for the Defendants : *Mr. Hart.*

NOTES.

[AGREEMENTS IN RESTRAINT OF TRADE—

An agreement not to sell certain goods to others during a certain period is not in restraint of trade within the Indian Contract Act, sec. 27:—(1890) 13 Mad. 472 ; (1891) 15 Mad 79 ; but the person to whom it is to be sold should be under an obligation to buy a definite quantity :—(1909) 13 C. W. N. 388. Agreements not to sell below a certain price have been enforced :—(1897) 22 Bom. 861 ; (1905) 29 Bom. 109 ; (1912) 34 All. 587. Similarly, as regards agreement to render exclusive service :—(1898) 23 Bom. 103 (112) ; (1908) 36 Cal. 354 ; but not agreements which contemplate abstention from exercise of one's calling beyond the period of one's service :—(1912) 16 C. W. N. 534.]

[8 Cal. 819—10 C.L.R. 537]

APPELLATE CIVIL.

The 29th March, 1882.

PRESENT :

MR. JUSTICE WHITE AND MR. JUSTICE MACPHERSON.

Jibunti Nath Khan and others.....Defendants

versus

Shib Nath Chuckerbutty.....Plaintiff.*

Code of Civil Procedure (Act X of 1877), s. 43—Splitting remedies—

Suit for declaration of title and for possession—

Subsequent suit for possession.

Where a previous suit for a declaration of title and confirmation of possession of certain land has been dismissed on the ground that the plaintiff was not in possession at the time of filing the suit, a subsequent suit on the same [820] title for recovery of possession of the land is not barred under s. 43 of the Code of Civil Procedure.

Moonshee Buzloor Ruheem v. Shumsoonissa Begum (11 Moore's I. A., 551) discussed.

THIS was a suit brought by one Shib Nath Chuckerbutty through his mother and guardian, Mrinmoyi Debia, for the purpose of recovering possession of the estate of one Promotho Nath Sannyal, whose heir he claimed to be. His mother, Mrinmoyi, claims to be a step-sister of Prosunno Nath Sannyal who was the father of Promotho Nath Sannyal. It was not disputed that if Mrinmoyi was the step-sister of Promotho Nath's father, the infant plaintiff as her son was entitled to succeed. The disputed question on the merits was whether Mrinmoyi was in fact the step-sister of Prosunno Nath.

The plaint alleged that Mrinmoyi was the daughter of one Shibu Soondry, who was one of the five or six wives of Raghu Nath Sannyal, the father of Prosunno Nath. The defendants, on the other hand, alleged that she was the daughter of one Haradhono Sannyal who was the uewan or principal officer in the service of Raghu Nath Sannyal ; and that, having lost her own mother, she was taken charge of by Shibu Soondry and brought up as her foster-daughter.

It appeared from the evidence that, on the 25th January 1879, a previous suit against the same parties had been instituted by the minor, by his mother and next friend, in which he alleged that he was entitled to and had succeeded to the properties left by Prosunno Nath, as heir to the latter ; that he had always remained in possession of the said properties, and he had claimed a declaratory

* Appeal from Original Decree, No. 207 of 1880, against the decree of Baboo Gonesh Chunder Chowdhry, Subordinate Judge of Rajshahye, dated the 14th June 1880.

decree, with further and other relief. That previous suit was dismissed by the Subordinate Judge on the ground that the plaintiff not being in possession was not entitled to a declaratory decree, as he should have instituted a suit for the recovery of the land. The present suit was thereupon instituted, when the defendants contended that the suit was barred under s. 43 of the Code of Civil Procedure as *res judicata*. The Subordinate Judge overruled the objection and having found for the plaintiff on the merits, decreed the claim with costs. The defendants appealed.

[821] Mr. *Evans*, Mr. *P. O'Kinealy*, Baboo *Mohesh Chunder Chowdhry* and Baboo *Grija Sunker Mozoomdar* for the Appellants.

Mr. *Evans*.—This case is barred under s. 43 of the Code of Civil Procedure. The plaintiff sued previously for a declaratory decree only, when he should have sued not merely for a declaratory decree, but also for recovery of possession, for it was found by the Judge that he was not in possession, and never had been. The case of *Kalidhun Chuttapadhya v. Shiba Nath Chuttapadhya* (*ante*, p. 483) does not apply, as that was decided under Act VIII of 1859. At the time the previous suit was instituted, the plaintiff could have claimed and was entitled to all the remedies he claims at present, and he omitted to sue for them; he cannot, therefore, bring the present suit. Whether the omission was accidental or voluntary makes no difference—*Moonshee Buzloor Ruheem v. Shumsoonnissa Begum* (11 Moore's I. A., 551).

Mr. *H. Bell*, Baboo *Sreenath Dass*, and Baboo *Gurudass Banerjee* for the Respondent were not called upon.

The **Judgment** of the Court (WHITE and MACPHERSON, JJ.), was delivered by

White, J. (who, having stated the facts and reviewed the evidence, came to the conclusion that the plaintiff's case on the merits had been clearly proved. His Lordship then continued):—But it has been argued for the defendants that the suit is barred by the third clause of s. 43 of the Civil Procedure Code, which prohibits the splitting of remedies. This clause apparently introduces a new provision into the Code. It is not to be found in the Original Procedure Code of 1859, the 7th section of which prohibited the splitting of claims, but contains no provision, or at any rate no express provision, against the splitting of remedies. The circumstances under which it is sought to raise this defence are these:—On the 25th January 1879, the present plaintiff, through his mother, brought against the present defendants a suit, in which, claiming under the same title to succeed to Promotho Nath's property, he prayed only for a declaration that he was the heir to that property. The plaint alleged that [822] the property was then in the possession of the plaintiff. The Subordinate Judge took no evidence on the question of possession, but in consequence of certain proceedings that had been previously had between the parties under s. 530 of the Criminal Procedure Code, and under the Land Registration Act (Beng. Act VII of 1876), which he held to be conclusive as to the fact of possession, the Subordinate Judge decided that the plaintiff was not in possession, and that the possession was in certain parties under whom the defendants claimed. Accordingly, under s. 42 of the Specific Relief Act, which provides that no Court shall make a declaratory decree "where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so," the Subordinate Judge held, that he had no jurisdiction, or at all events no discretion, to grant the declaratory decree demanded, and dismissed the plaintiff's suit. The present suit is to recover the possession of the same lands as are mentioned in the former suit. In deciding the question whether this suit is barred by the former suit, we must see if the

cause of action is the same in both suits. A cause of action consists of the circumstances and facts, which are alleged by the plaintiff to exist and which, if proved, will entitle him to the relief, or to some part of the relief, prayed for, and is to be sought for within the four corners of the plaint. The allegations in the plaint in the former suit were the death of Promotho Nath, the alleged heirship of the plaintiff to his estate, the possession by the plaintiff of that estate, and the proceedings under the Criminal Code had in the Registration Court which threatened to result in a disturbance by the defendants of the rights enjoyed by the plaintiff. These constituted the cause of action in that suit, and the relief asked for was a decree declaring the plaintiff's title as heir, the effect of which would have been to quiet him in the possession of his estate. Upon such a cause of action a declaratory decree was the only remedy he could sue for. How then can it be said that he omitted to sue for any remedy in respect of that cause of action when he was entitled to no other?

In the present suit, although the plaintiff sets forth the same title, he complains that the defendants, and those through whom they claim, have, on the strength of the proceedings under the [823] Criminal Procedure Code and the Registration Act, sued and obtained decrees against some of the tenants of the estate, and that there has consequently been an active disturbance of his possession, which entitles him to pray for a decree which shall not only declare his title but also award him possession. The cause of action in the present suit is, in our opinion, distinct from that in the first suit. We have been referred by the defendants' counsel to the case of *Moonshee Buzloor Ruheem v. Shumsoonnissa Begum* (11 Moore's I. A., 551); but we think that case supports our view as to what is and what is not the same cause of action. The Privy Council were there dealing with s. 7 of the Code of 1859, which prohibited the splitting of claims. Their Lordships say, "the correct test in all cases of this kind is, whether the claim in the new suit is, in fact, founded on a cause of action distinct from that which was the foundation of the former suit, and they have accordingly considered whether the present suit can be maintained on that ground. But the cause of action in the former suit of the respondent seems to them to be the refusal by the husband to restore, or his misappropriation of, the wife's property, which she says he entrusted to him. There is nothing to distinguish the deposit of this particular Company's paper from the deposit of those which she deposited with it, and has recovered in the former suit. It was a mere item of her demand, and is admitted on the face of her present plaint to have been omitted from it for no other reason than the very insufficient one before mentioned. If she was justified in instituting a separate subsequent suit for this particular Company's paper for Rs. 10,000, she would have been equally justified in making each one of the Company's papers, which are comprised in the 'property suit,' successively the subject of an independent suit."

But Mr. *Evans* contends that the Court must not confine itself to the claim made in the two suits in judging whether the 43rd section of the Code has been infringed, but ought to travel outside the statements contained in the plaint and see how the facts stood upon the finding of the Court in the first suit. The argument is this, that, inasmuch as the cardinal allegation [824] was disproved upon which was grounded the plaintiff's title to the limited relief prayed in his first suit, and inasmuch as the Subordinate Judge held the plaintiff not to be in possession at that date, it follows that the plaintiff ought, in his first suit, to have brought a suit praying not only for a declaration of title but also for an award of possession, and that not having done so he has split his remedies. I cannot agree that this is the correct test. The question to be determined turns

not upon what was the proper suit for the plaintiff to have brought, or the proper remedies for him to have applied upon having regard to the facts as found upon the trial of the first suit, but upon whether the causes of action in the two suits are one and the same, or are distinct.

It is contended that, in the case of *Moonshee Buzloor Ruheem v. Shumsoon-nissa Begum* (11 Moore's I. A., 551), their Lordships, in deciding that the plaintiff had omitted in her first suit a portion of his claim, founded their judgment upon the evidence in the suits and not upon the facts alleged in the pleadings. But this does not appear to be so. The omission of a portion of the claim from the first suit became apparent from comparing together the complaints in the two suits. It was then perceived that the causes of action in the two suits were the same, and that the Government paper sought to be recovered in the second suit was merely an item omitted from the plaintiff's demand in the first suit. Furthermore, the fact of the omission was expressly stated in the body of the second complaint, but sought to be excused on a ground which was held to be untenable.

On the whole, we are of opinion that there has been no splitting of remedies in this case within the meaning of s. 43 of the new Code of Procedure, and that this suit is not barred in consequence.

I must say for myself that I am exceedingly glad that we are able to come to this conclusion. Possession is a question which from its nature would seem to be very easily determinable; but in practice it is found to be one of the most difficult issues to decide in this country where great facilities are afforded to litigants of procuring perjured testimony, and [825] where, in the case of lands under lease or in the occupation of ryots, it is a common occurrence for the lessees or ryots to become the partisans of one or other of the rival claimants, and sometimes to avail themselves of the dispute to combine and withhold their rents. In the case before us, if we had felt ourselves obliged to yield to the objection that this suit was barred, the infant plaintiff, whom upon the merits we find to be the heir and entitled to succeed to Promotho Nath Sannyal's property, would have been positively excluded from his inheritance without any judicial enquiry as to his title having been held; and I may also add, without any proper enquiry having been made in the first suit as to which of the rival claimants was at its date in possession of the estate. We affirm the decree of the lower Court and dismiss this appeal with costs.

Appeal dismissed.

NOTE.—This decision was followed in the case of *Komola Kaminj Debia v. Lokenath Kur* (appeal from appellate decree, No. 1867 of 1880), decided by CUNNINGHAM and TOTTENHAM, JJ., on the 2nd of May 1882. The judgment is as follows:—'The plaintiff in this case sues to establish his right to, and to be placed in possession of, a half share in a zamindari, of which he says that he has been dispossessed by the first defendant, who, on the ground that it belonged to his judgment-debtors, the second and third defendants, attached and put it up to sale and purchased it himself on the 15th March 1877. Learning of the intended sale a few days before it took place, the plaintiff objected, but his claim was disallowed as filed too late. The plaintiff then brought a suit, No. 138 of 1878, for confirmation of possession, but it being found that the first defendant had obtained possession from the Executing Court, the plaintiff's suit was dismissed on the 27th of August 1878.

The question raised in special appeal is, whether the plaintiff's present suit is barred by his former declaratory suit, No. 138 of 1878.

In that suit no decision on the merits was given. It was dismissed on the ground that the plaintiff was not in possession, and that, therefore, his action, in the form in which it was then brought, was not maintainable. It is now urged that as he was, when he brought his first suit, entitled to the remedy which he now seeks to enforce, and chose to omit to sue for it, he cannot now sue for it under s. 43 of the Civil Procedure Code. We concur in the view taken by the Courts below that the present case does not fall within s. 43 of the Code of Civil Procedure: there was not any intentional and voluntary [826] abandonment by the plaintiff of any portion of his claim or of any remedy to which he was entitled. He believed

himself to be in possession, and as to this the Court found against him, and, without considering the merits of the case, held, that it was precluded by s. 42 of the Specific Relief Act from entertaining the suit. That section enacts, that "no Court shall make a declaratory decree where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so"; and the Court, accordingly finding that the plaintiff might have asked to be put in possession of the property, refused to make a declaratory decree of his right. This refusal to allow the plaintiff to sue in the form in which his plaint was then couched, was not in any way such an adjudication as would, under s. 13, preclude a subsequent suit; nor do we consider that it could have the effect, under s. 43, of barring a subsequent suit for possession.

This view of the meaning of the section we find to be in accordance with that taken by a Division Bench of this Court in *Jibanti Nath Khan v. Shib Nath Chuckerbutty* (ante, p. 819), lately decided by WHITE and MACPHERSON, JJ. In the case of *Kalidhan Chuttapadhya v. Shib Nath Chuttapadhya* (ante, p. 483), the question was, whether a person who, being in a position to ask for a declaration of right and immediate consequential relief, asks for and obtains a declaration of right only, can afterwards sue for the consequential relief which he might have obtained in the former suit. This question cannot arise under the present law, as s. 42 of the Specific Relief Act forbids such a suit; but we cannot think that where a plaintiff, mistakenly believing himself to be in possession, sues merely for a declaratory decree, and where, in accordance with this rule, the Court finding him not to be in possession dismisses his suit on this ground, without any inquiry into his rights, he is precluded from subsequently suing for his entire cause of action. The appeal is dismissed with costs.

NOTES.

[SPLITTING CAUSES OF ACTION—

On the principle that there must be identity of causes of action, the bar of C. P. C. 1908, O. II, r. 2 (: C. P. C. 1882, s. 43) has not been applied in these cases :—(1911) 34 All. 172; (1892) 14 All. 512; 12 A. W. N. 80; (1893) 7 C. P. L. R. 63; (1890) 14 Mad. 23; (1892) 16 Mad. 274; (1906) 10 O. C. 44 (48); (1889) 14 Bom. 31.

As to what may be looked at to ascertain whether there was the bar, see (1891) 19 Cal. 159; (1885) 12 Cal. 291; *contra* (1910) 8 I. C. 9.

As to cases where there was an adjudication on the cause of action, see (1888) 3 C. P. L. R. 315;

Cases like (1900) 25 Bom. 189 (198); (1906) 10 O. C. 44 (48) should be distinguished.

As regards the cause of action in a declaratory suit, see (1914) 22 I. C. 883 and the cases therein cited.

Note that the ruling in (1910) 8 I. C. 9 is contrary to that given here, though the circumstances are similar.]

[= 10 C. L. R. 603]

[826] APPELLATE CIVIL.

The 4th April, 1882.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE O'KINEALY.

Hakim Khan.....Plaintiff

versus

Gool Khan and others.....Defendants.*

Mahomedan law—Joint Mahomedan family—Joint acquisition—Presumption.

When the members of a Mahomaden family live in commensality, they do not form a 'joint family' in the sense in which that expression is used with regard to Hindus; and in Mahomedan law there is not, as there is in Hindu law, [827] any presumption that the acquisitions of the several members are made for the benefit of the family jointly.

Abraham v. Abraham (9 Moore's I. A., 195) and *Jowala Buksh v. Dharum Sing* (10 Moore's I. A., 511) cited. *Rupchand Chowdhry v. Latu Chowdhry* (3 C. L. R., 97) doubted.

* Appeal from Appellate Decree, No. 1049 of 1880, against the decree of Baboo Kristo Mohun Mookerjee, Second Subordinate Judge of the 24-Parganas, dated the 22nd March 1880, affirming the decree of Baboo Dwarkanath Mitter, Munsif of Sealda, dated the 27th June 1879.

THE judgment appealed from was as follows:—"The plaintiff and the defendants are three brothers. The plaintiff brought this suit to recover possession of a one-third share of a house at Gora-bazar in Dum-Dum, and a tank in Italgacha, on the allegation that they were the joint property of the brothers. The defendant Kassim Khan supported the plaintiff's case. Gool Khan pleaded limitation, and contended that he acquired the properties with his own funds after separation from his brothers in 1260 (1853). The Court below has thrown out the case on the point of limitation and the question of title. Upon the evidence on the record, I am of opinion that the Court below is wrong in holding that the properties in suit were acquired by Gool Khan alone after separation from his brothers in 1260 (1853). In one part of its judgment the Court below was bound to opine 'that Hakim Khan and Kassim Khan were most likely connected with the karbar in early days.' If that were so, the land on which the house is situated was purchased soon after the commencement of the karbar, and the first storey was built thereon for carrying it on. This appeal has been transferred to this Court for the purpose of hearing it along with the original case of this Court (No. 118 of 1878). I have held in my decision of the original case that the brothers lived in the same mess up to 1271 (1864), and their mother died in 1268 (1861). Upon the evidence on the record of the appeal case, I cannot but come to the same conclusion. The Court below is wrong in holding that the parties being Mahomedans, the presumption of the Hindu law in favour of joint acquisition and joint family does not arise in this case. This opinion is in direct contravention with the Privy Council case of *Abraham v. Abraham* (9 Moore's L. A., 195), which has been followed by the High Court in the case of *Rupchand Chowdhry v. Latu Chowdhry* (3 C. L. R., 97). It is now settled law that when Mahomedans live in the Hindu country, [828] the presumption of joint family arising from commensality would, under the circumstances of the case, arise, and the *onus* of proof would lie upon the defendants to prove separate acquisition. It appears that the brothers lived in the same mess; they had some income of the ancestral joint property which served as a nucleus, and the karbar, which improved their position in life, was joint. Under such circumstances the plaintiff is under the cover of the presumption, and the *onus* lay on the defendants to rebut it; but to my mind they have not satisfactorily discharged it. There is no doubt in my mind that the first storey of the house was built during commensality with the joint funds. The second storey might have been erected by Gool Khan alone after separation. But this won't further his case. An addition made to a joint property partakes of the nature of a joint estate—*Vellai Mira Ravuttan v. Mira Mordin Ravuttan* (2 Mad. H. C. Rep., 414). For the above reasons I dissent from the finding arrived at by the Court below on the question of title. On the question of limitation, however, the defendants are entitled to succeed." The learned Judge, having discussed the latter question, dismissed the appeal with costs. The plaintiff appealed, and the defendants filed a cross-appeal under the provisions of s. 561 of the Code of Civil Procedure.

Mr. Bell (with him Baboo *Rashbehary (ghose)* for the Appellant.

Mr. *Ameer Ali* (with him *Moonshee Serajul Islam*) for the Respondents.

Mr. Bell.—The Subordinate Judge has clearly held that the properties in dispute were acquired with joint funds. A Mahomedan family living in commensality is subject to the same rules as a Hindu family—*Rupchand Chowdhry v. Latu Chowdhry* (3 C. L. R., 97). Limitation, therefore, does not bar the plaintiff's claim. The member of a joint family ought to be treated on the same basis as a partner under the English law—*Lindley on Partnership*, vol. i, p. 642.

[829] Mr. *Ameer Ali* for the respondents contended, that the case of *Rupchand Chowdhry v. Latu Chowdhry* (3 C.L. R., 97), being between mugs, had no application to Mahomedans. Besides, that case was decided on the basis of *Abraham v. Abraham* (9 Moore's I. A., 195); but *Abraham v. Abraham* (9 Moore's I. A., 195) certainly did not decide anything of the kind, and, *Jawala Buksh v. Dharum Singh* (10 Moore's I. A., 511) is a direct authority against it. This being so, and the Courts below, having concurrently held that the plaintiff was not in possession within twelve years, the suit is barred.

Baboo Rashbehary Ghose in reply.

The **Judgment** of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

O'Kinealy, J.—In this case the plaintiff, who is the appellant before us, sued for possession of property which he said formed part of a joint family property. The defendants denied the title of the plaintiff, and asserted that the plaintiff's claim was barred by the law of limitation. In the first Court, the Munsif, it seems to us, dealt with the case on a proper basis. He said:—"It must be borne in mind that the parties to the case are Mahomedans, and the presumption of Hindu law in favour of joint acquisition and joint family does not arise in this case." He, therefore, proceeded to deal with the case as a case of partnership between ordinary individuals not subject to Hindu laws and customs, and he dismissed the suit both in regard to the question of title and the point of limitation. In appeal the Subordinate Judge came to the conclusion that the lower Court was wrong, and applying the principles of Hindu law relating to joint families to the case, he decided that, inasmuch as the members of the family lived in commensality they formed a joint family, and the property which forms the subject of the present suit must be presumed to form a portion of the joint property.

Now it seems to us that the Subordinate Judge, in dealing with this question, was, undoubtedly, influenced by the case of [830] *Rupchand Chowdhry v. Latu Chowdhry* (3 C. L. R., 97), in which it has been laid down as settled law that, with Mahomedans living in a Hindu country, the presumption of joint family and commensality arises. In that case it does not appear that the Judges had their attention drawn to the case of *Jowala Buksh v. Dhara Sing* (10 Moore's I. A., 511, at p. 538), in which their Lordships of the Judicial Committee, referring to the case of *Abraham v. Abraham*, (9 Moore's I. A. 195), said:—"Whether it is competent for a family converted from the Hindu to the Mahomedan faith to retain for several generations Hindu usages and customs, and by virtue of that retention to set up for itself a special and customary law of inheritance, is a question, which so far as their Lordships are aware, has never been decided. It is not absolutely necessary for the determination of this appeal to decide this question in the negative, and their Lordships abstain from doing so. They must, however, observe that, to control the general law— if, indeed, the Mahomedan law admits of such control—much stronger proof of special usage would be required than has been given in this case." As in that case, so in this, it is not absolutely necessary for us to decide whether the Mahomedan law of inheritance can be controlled by the usages of the country in which the individual may happen to reside, but the present inclination of our minds is, that if it were necessary to decide that point, we should feel some difficulty in following the case of *Rupchand Chowdhry v. Latu Chowdhry* (3 C. L. R., 97).

The Mahomedan law of inheritance is based on Sura-i-Nissa in the Koran, which was revealed in order to abrogate the customs of the Arabs, and on the

Hadis or traditions of the Prophet. According to the principles of Mahomedan law any attempt to repudiate the law of the Koran would amount to a declaration of infidelity, such as would render the individual concerned liable to civil punishment by the Kazee in this world, and to eternal punishment in the next.

No custom opposed to the ordinary law of inheritance, which was created to destroy custom, would be recognized by the Doctors of the Mahomedan law, and in our opinion it follows [831] as a natural consequence, that no such custom should be recognized by our Courts which are bound by express enactment to administer Mahomedan law in questions of inheritance among Mahomedans.

In this case the Subordinate Judge has, we think, erred in deciding the question of title according to the principles of Hindu law, and so far as he has set aside the decision of the lower Court, we are compelled to reverse his judgment. On this point the decision of the first Court will stand. But in regard to the question of limitation there has been, we find, a concurrent finding of both Courts, and we see no reason to set it aside. We affirm the decision of the lower Appellate Court and dismiss the appeal with costs.

Appeal dismissed.

NOTE.—The question as to the presumption of joint family relations amongst Mahomedans was also raised in the case of *Jaker Ali Chowdhry v. Rajchunder Sen* (Reg. Ap., No. 261 of 1879) decided by McDONELL and FIELD, JJ., on the 27th of February 1882. In delivering the judgment of the Court, Mr. Justice FIELD made the following observation: "The appellant's vakeel, in one part of his argument, contended, that the brothers Mahomed Daim and Asmutoolah lived together in coparcenary; and he further contended that the presumption of the Hindu law, that all property acquired by members of a coparcenary must be presumed to have belonged to the family jointly, although such property may stand in the names of individual members of the family, ought to be held to apply to this case. In support of this contention the case of *Abraham v. Abraham* (9 Moore's L. A., 195) has been relied upon, and the appellant's vakeel has contended that the effect of that decision is, that persons of a different religion, while retaining such religion, may, by custom or by themselves adopting the Hindu law, be governed by that law in all its essential particulars. In the present case we think that there is not proof of any custom applicable either to the Mahomedans of Chittagong generally, or to this particular family. Then assuming, for argument's sake, that a Mahomedan can, without changing his religion, adopt that part of Hindu law which regulates the acquisition and enjoyment of property, we think there is no proof that this has been done in the present instance. We may further observe that the case of *Abraham v. Abraham* (9 Moore's L. A., 195) is not, in our opinion, an authority for the position contended for. In that case the individual concerned was formerly a Hindu, and the question was whether, in adopting the Christian religion, he had cast off so much of the Hindu law as applied to the acquisition and enjoyment of the property. In dealing with that question their Lordships of the Privy Council made certain general observations, the purport of those observations being that a Hindu may, while adopting a new religion, retain so much of the Hindu law as governs his temporal affairs; but we do not think that their Lordships of the Privy Council ever intended to give sanction to the other proposition, that an individual may, while retaining his own religion, adopt so much of a system of law governing another class as applies to temporal concerns only. In the present case we think that the general statement of witnesses that all the members of this particular family lived jointly and in commensality is not enough to introduce into a Mahomedan family a parcenership which, as their Lordships say in the case of *Abraham v. Abraham* (9 Moore's L. A., 195), "as expressing the rights and obligations growing out of the status of an undivided family, is the creature of, and must be governed by, the Hindu law." From the mere fact, if proved, of Mahomedans living in t c

same bari, or family-dwelling, and messing together, it appears to us that no presumption arises that property standing in the name or names of an individual member or members of that family is joint in the sense in which this term is used in Hindu law.

NOTES.

[MAHOMEDAN LAW—USAGE—

i. As to how far Mahomedan Law is permitted to be overridden by custom, *see* (1900) 23 All. 20; the criticism of Tyabji in his Mahomedan Law (1913) at p. 40 *et seq.*

ii. As regards the applicability of presumptions of Hindu law as to property, *see* (1907) 9 Bom. L. R. 274; 29 Bom. 85; 6 Bom. L. R. 874; (1914) 23 L. C. 195 (Bom.) where the previous cases are fully discussed.

iii. As to *onus*, *see* (1901) P. R. 85.]

[832] APPELLATE CIVIL.

The 13th April, 1882.

PRESENT :

MR. JUSTICE WHITE AND MR. JUSTICE MACPHERSON.

Aubinash Chunder Mookerjee.....Plaintiff

versus

Martin.....Defendant.*

Appeal—Second Appeal—Civil Procedure Code (Act X of 1877), ss. 588, 622.

After a decree had been made *ex parte*, the defendant applied to have it set aside. The Subordinate Judge refused the application, but his order was reversed by the District Judge.

Held, that the order of the District Judge was final under s. 588, and that no second appeal would lie: nor would the Court interfere under s. 622 of the Code.

Baboo Bhoirub Chunder Banerjee for the Appellant.

Mr. McNair for the Respondent.

THE facts of this case sufficiently appear from the **Judgment** of the Court (WHITE and MACPHERSON, JJ.), which was delivered by

White, J.—This is a second appeal against an order of the [833] Judge, reversing an order of the Subordinate Judge refusing to set aside an *ex parte* decree, which the latter Judge had passed against the respondent. The decree was, undoubtedly, made by the Subordinate Judge *ex parte* in the sense that he decided the case solely upon the evidence produced on the part of the plaintiff and without any cross-examination by the defendant. The fact that the defendant came into Court shortly before the case was closed and had some conversation with the Subordinate Judge, not indeed with reference to the merits of the case, but simply as to whether he was in time or not for putting in a defence, does not prevent the decree from being an *ex parte* one. The application by the defendant was made under s. 108 of the Code on the ground that he was prevented from appearing at the commencement of the trial by some sufficient cause. The Subordinate Judge, holding the cause to be insufficient, refused to set aside the decree, and dismissed the application.

* Appeal from Appellate Order, No. 311 of 1881, against the order of W. E. Ward, Esq., Judge of Assam Valley District, dated the 13th of August 1881, reversing the order of Colonel A. K. Comber, Deputy Commissioner and Subordinate Judge of Tezporo, dated the 30th April 1881.

The District Judge, in reversing the order of the Subordinate Judge, has done so on the ground that the circumstances connected with the appearance of the defendant in Court were such that the Subordinate Judge ought not to have proceeded to pass an *ex parte* decree. The Judge has mainly come to that conclusion by putting a different interpretation upon the conversation which took place between the defendant and the Subordinate Judge, before the decree was passed, from that put by the Subordinate Judge himself. It is true that the Judge does not expressly reverse the finding of the Subordinate Judge that the defendant showed no sufficient cause for not appearing when the suit was called on for trial. But it is unnecessary for us to pursue the matter further, as we are of opinion that no second appeal lies against the order made by the Judge. His order is final by virtue of s. 588 of the Civil Procedure Code.

We also think that there is no want of jurisdiction or excess of jurisdiction on the part of the Judge, nor is there any such irregularity as would induce us to interfere with his order under s. 622 of the Code. We make these observations, because it has been suggested on behalf of the plaintiff, that even if he had not a right of second appeal, he might succeed on an application [834] under s. 622, and if so, that the present second appeal might be converted into or treated as if it were an application under that section.

The appeal must be dismissed with costs.

Appeal dismissed.

[8 Cal. 834]

APPELLATE CIVIL.

The 13th April, 1882.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE AND MR. JUSTICE BOSE.

Bhadeswar Chowdhry and others.....Plaintiffs

versus

Gaurikant Nath.....Defendant.

Jurisdiction—Under-valuation of suit—Civil Procedure Code (Act X of 1877), s. 57—Return of plaint—Dismissal of suit.

A Munsif, after hearing the evidence on both sides, found that the suit had been under-
valued ; but, instead of returning the plaint under s. 57 of Act X of 1877, he dismissed the
suit. *Held*, that the provisions of s. 57 were imperative, and might be put into force at any
stage of the hearing ; and that such dismissal of the suit was a matter which affected the
merits of the case, and formed a proper subject for an appeal.

* Appeal from Appellate Decree. No. 1077 of 1880, against the decree of A. C. Campbell,
Esq., Deputy Commissioner and Subordinate Judge of Goalpara, dated the 22nd March 1880,
affirming the decree of H. H. Metcalfe, Esq., Extra Assistant Commissioner and Munsif of
Goalpara, dated the 8th November 1879.

THIS was a suit brought to recover possession of six cottas of bastu land from the defendant, who, the plaintiffs alleged, had taken possession of the same without their permission. The property was valued at Rs. 700.

The defendant, amongst other things, contended that the land was mokurari istemrari, and that the value of the land was understated, and that the Court had no jurisdiction to entertain the suit.

The Extra Assistant Commissioner, vested with the powers of a Munsif, after hearing the evidence, found that the property had been undervalued, and held, that as the issues had been fixed, and the evidence on both sides closed, he could not return the plaint to the plaintiffs under s. 57 of the Code; but that he was bound to dismiss the plaintiffs' suit.

[835] The plaintiffs appealed to the Subordinate Judge, who affirmed the decision of the lower Court.

The plaintiffs appealed to the High Court.

Bahoo *Durga Mohun Doss* for the Appellants.

Bahoo *Amarendra Nath Chatterjee* for the Respondent.

The **Judgment** of the Court (GARTH, C.J., and BOSE, J.) was delivered by

Garth, C. J. In this case, an objection that was made in the Court below by the defendant was that the property was undervalued, and that, consequently, the plaintiffs had brought their suit in the wrong Court. That question was gone into by the first Court, which found that the property was undervalued, and that, consequently, the suit should be dismissed.

Upon that the plaintiffs appealed, apparently upon the ground that the finding of the first Court was wrong upon the question of valuation. That was a point which, of course, went to the merits of the question. But they also contended that the first Court, finding as it did, ought not to have dismissed the suit altogether; but should, under s. 57 of the Code of Civil Procedure, have returned the plaint to the plaintiffs to be presented to the proper Court.

The lower Appellate Court found, that the first Court was right in saying that the suit was undervalued; and the Subordinate Judge also held, that the lower Court was right upon the other point,—*viz.*, in dismissing the suit and not returning the plaint. Both Courts seem to have thus decided upon the ground, that, according to the proper construction of s. 57, a plaint cannot be returned to the plaintiff after the defendant has been called upon to state his case. That is as much as to say, that a plaint cannot be returned to the plaintiff under that section after the defendant's written statement has been put in.

We think that, in this respect, the lower Court's were clearly wrong; s. 57 says nothing of the kind; and the good sense and reason of the matter is certainly against that view.

[836] Any objection upon the ground of valuation would naturally come from the defendant. The objection would not appear upon the face of the plaint itself; and the Court would have no means of knowing whether the suit is undervalued or not until the objection had been pointed out in the defendant's written statement.

If, therefore, the Courts below were right in the view which they have taken, the provision in s. 57 for returning the plaint to the plaintiff would be virtually useless.

We think, therefore, that the plaintiffs were perfectly justified in coming to this Court to have the matter set right.

I had at first, I confess, some doubt whether the question was one affecting the merits of the case; but I think it is, because, as regards limitation, it might affect the plaintiffs' rights very materially, whether they had their plaint returned to them or are compelled to bring a fresh suit.

Moreover, the provisions of s. 57 seem to be imperative. The words are —“ the plaint shall be returned to be presented to the proper Court.” The section, therefore, leaves the Court no option; and if, instead of returning the plaint, the Court dismisses the suit by its decree, that is undoubtedly a matter which affects the merits of the case, and becomes the proper subject of an appeal.

We think, therefore, that the case must go back to the first Court in order that the plaint may be returned by that Court to the plaintiffs; and we also think, that the plaintiffs ought to have their costs in this Court. In the Court below we leave the order as to the costs as it was, as we find that the Court has given no costs to either party.

Appeal allowed, and case remanded.

NOTES.

[RETURN OF PLAINT —

C. P. C. 1908, O. 7, r. 10 enacts that the plaint shall *at any stage of the suit* be returned to be presented to the Court in which the suit should have been instituted; this was enacted with a view to settle the doubts raised in the previous case law :—(1887) 10 Mad. 211; (1895) 20 Bom. 675; (1884) 8 Bom. 313; (1879) 2 All. 357. See also 8 Cal. 126.] *

[10 C.L.R. 449: 7 Ind. Jur. 26.]

[837] APPELLATE CIVIL.

The 14th April, 1882.

PRESENT:

MR. JUSTICE FIELD AND MR. JUSTICE O'KINEALY.

Benode Mohini Chowdhraia.....Plaintiff

versus

Sharat Chunder Doy Chowdhry and others.....Defendants.†

Special Appeal - Revisional jurisdiction - Death of sole defendant —

Survival of cause of action - Legal representative - Limitation —

Civil Procedure Code (Act X of 1877), ss. 368, 372 - Limitation

Act (XV of 1877) sched. ii, cls. 171 B, 178.

In a suit for the recovery of land against a sole defendant, the latter died before the hearing. Sixty-three days after the death of the defendant, the plaintiff applied to the Court to enter on the record the legal representative of the deceased defendant. On the 22nd of November 1880, the Court rejected the application under the provisions of Act XV of 1877,

* Appeal from Original Order, No. 350 of 1881, against the orders of Baboo Amirtollah Chatterjee, Subordinate Judge of Nudden, dated the 22nd of November 1880 and 20th of September 1881.

sched. ii, cl. 171B, and ordered the suit to abate. On the same day the plaintiff applied to the Court to set aside the order directing the suit to abate, but this application was also rejected on the 20th of September 1881. On appeal to the High Court—

Held, that no appeal lay against the order of the 20th of September 1881, and that an appeal against the order of the 22nd of November 1880 was out of time; but that the High Court would take cognizance of the case under s. 622 of the Code of Civil Procedure.

Held also, that the application which was rejected on the 22nd of November 1880 was an application under s. 372, and not under s. 368 of the Code of Civil Procedure, and that the applicant was entitled to make the application within three years, as allowed by Act XV of 1877, sched. ii, cl. 178.

Gool Chunder Gossamee v. The Administrator-General of Bengal (I. L.R., 5 Cal., 726; S.C., 5 C. L. R., 108) referred to.

THIS was a suit in ejectment for the recovery of land. The sole defendant died on the 5th September 1880, before decree, and the plaintiff, on the 8th November 1880, applied to have the name of his legal representative entered on the record. Upon that application the Judge of the Court below, treating the application as one under s. 368 of the Civil Procedure Code, as amended by Act XII of 1879, held, that it was out of time under [838] art. 171B of sched. ii of the Limitation Act; and, on the 22nd November 1880, made an order that the suit should abate.

On the same day the plaintiff applied that the preceding order should be set aside; and on this application the Judge, on the 20th September 1881 delivered the following judgment:—"The present applicant brought a suit *in forma pauperis* against one Radha Madhab Dey Chowdhry. Pending the suit Radha Madhab died, but the right to sue survived against his legal representatives. More than sixty days after the date of his death, plaintiff made an application to the Court specifying the name, description, and place of abode of the present opposite parties, alleging them to be the legal representatives of the deceased, and asking the Court to make them defendants in the place of the deceased. The Court refused this application, because it was not made within the period of sixty days as prescribed for it by art. 171B of the Indian Limitation Act, and ordered that the suit should abate. The plaintiff then made the present application for an order to set aside the order for abatement, on the ground that she was prevented by a sufficient cause from continuing the suit. The opposite party questioned the sufficiency of the cause set forth in the plaintiff's application, as also the competency of the plaintiff to come in under s. 371 of the Code of Civil Procedure. Upon the question whether the present applicant was prevented by a sufficient cause from filing the application within the period of sixty days from the date of Radha Madhab's death, I am satisfied upon the evidence that she was. But upon the other question, however much I may regret the result, I agree that the present application cannot be entertained under s. 371 of the Code of Civil Procedure. That section only enables the person claiming to be the legal representative of the deceased, &c., and the plaintiff to apply for such an order. It does not enable the plaintiff to make an application like the present, in a case where the defendant is dead and the plaintiff is prevented by a sufficient cause from continuing the suit. The express mention of the one case in s. 371 of the Code implies the exclusion of the other case. I tried to bring the present case within the provisions of s. 623 of the Code of Civil Procedure, but I failed, because when the order for abatement was made [839] the present plaintiff was aware of all the facts which she now alleges as her ground for not making the application earlier. In the present case there

was no discovery of new matter or evidence, which, after the exercise of due diligence, was not within her knowledge, or could not be produced at the time when the order for abatement was made. Act VIII of 1880, which makes an amendment in art. 171A of the Indian Limitation Act, makes no amendment in art. 171B, which relates to the present case. I was much pressed with the argument that an extension of time was the more needed in the case of the death of a defendant than in that of the death of a plaintiff, and I see that the argument has much force, for the defendant may be residing at a place some thousand miles off from the place where the plaintiff resides, and the news of the former's death may not, in many cases, reach the latter within sixty days from the date of his death. It will indeed be very hard for the plaintiff if, in such a case, he has no remedy. But as I find s. 171B of the Indian Limitation Act and s. 371 of the Code of Civil Procedure stand, I cannot grant the application. Seeing that I cannot grant the application, I must reject it; but I must reject it under the circumstances of the case without costs."

The plaintiff appealed to the High Court on the following grounds :—

(i) that the suit having been commenced before Act XII of 1879 was passed, the learned Subordinate Judge erred in applying the provisions of the said Act as to procedure and limitation to the present case; (ii) that the application for making the representatives defendants in place of the deceased Radha Madhab, having been made on the 8th November 1880, *i.e.*, before the day fixed for final hearing, the learned Subordinate Judge was wrong in directing, on the 22nd November 1880, that the suit should abate; (iii) that the Subordinate Judge had erred in holding that the provisions of s. 371 of the Code of Civil Procedure do not apply to the case of an order for abatement under s. 368 of the Code; (iv) that, having found that there was sufficient cause preventing the plaintiff from making the application for substitution within sixty days, the Court below should have set aside the order that the suit should abate.

[840] The Advocate-General, offg. (Mr. Phillips) and Baboo Saroda Churn Mitter for the Appellant.

Baboo Kali Mohun Dass and Baboo Nil Madhub Bose for the Respondents.

The following **Judgments** were delivered by the Court (FIELD and O'KINEALY, JJ.)

Field, J.—This was a suit to recover land, and was brought against a sole defendant. That sole defendant died on the 5th September 1880, after the institution of the suit. On the 8th November 1880, that is, sixty-three days after his death, an application, which purported to be made under s. 368 of the Code of Civil Procedure, was made to the Subordinate Judge for the purpose of having the son and heir of the deceased defendant made a defendant in his stead. On the 22nd November 1880, the Subordinate Judge, considering this application out of time, because it was not made within the sixty days allowed by art. 171B of the second schedule of the Limitation Act, XV of 1877, rejected it, and made an order that the suit do abate. On the same day, that is, the 22nd November 1880, a further application was made to the Subordinate Judge that this order, directing the suit to abate, might be set aside, on the ground that the plaintiff was prevented by sufficient cause from applying within the sixty days. There appears to have been some delay in dealing with this application, which was not disposed of till the 20th September 1881. The Subordinate Judge then found as a fact, and his finding on this point has not been questioned before us on appeal, that the plaintiff was prevented by sufficient cause from coming in within the sixty days allowed by art. 171B of the second schedule of the Limitation Act; but being of opinion that the law allowed him no discretion

in the matter, he rejected the plaintiff's application although he considered the case to be a very hard one, and if he had thought himself empowered by law to grant the application, he would have granted it. The present appeal has been preferred against both orders,—that is, the order of the 22nd November 1880, as well as the order of the 20th September 1881. So far as the first of these orders is concerned, the appeal is out of time, as the appellant did not obtain the [841] permission of the Court to file the appeal, regarded as an appeal against the order of the 22nd November 1880, after the time allowed by the law, on the ground that she was prevented by sufficient cause from presenting such appeal within the period allowed by law. The appeal may, however, be regarded as an appeal against the order of the 20th September 1881, and so regarded, it is in time. Then it is contended that no appeal will lie against the order of the 20th September 1881, because it cannot be regarded as an order under s. 371, and if it be regarded as an order under s. 372, no express provision for such an appeal is to be found in s. 588 of the Code of Civil Procedure. It appears to us that the order of the 20th September 1881 cannot be regarded as a 'decree' within the meaning of the amended definition in s. 2, and there being no express provision in s. 588, the present appeal will not lie. Considering, however, all the circumstances of the case, and the hardship, which, in our opinion and the opinion of the Subordinate Judge, will be inflicted on the plaintiff, if the order of the Subordinate Judge is allowed to stand, while we are strongly of opinion that he had jurisdiction to make the order which he would have made did he not feel himself debarred by the language of the Code, we think that the case is one in which we may properly exercise the jurisdiction vested in us by s. 622 of the Code of Civil Procedure, and we proceed to exercise this jurisdiction accordingly.

Turning now to the essential question which has to be decided, we must first observe that s. 5 of the Limitation Act (XV of 1877), which allows an appeal, or an application for review to be admitted after the period of limitation when the appellant or applicant satisfies the Court that he had sufficient cause for not presenting such appeal or making such application within such period, has no operation in respect of applications other than an application for review. Section 371 of the Code of Civil Procedure enacts, that when a suit abates, no fresh suit shall be brought on the same cause of action; but the person claiming to be the legal representative of the deceased may apply for an order to set aside the order for abatement, and if it be proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement upon such terms as to [842] costs or otherwise as it thinks fit. Now, this section applies only to an application by a person claiming to be the legal representative of a deceased plaintiff, and who seeks, as plaintiff, to continue the suit; but it does not apply to an application by a plaintiff as against the legal representative of a deceased defendant, such plaintiff seeking to continue such suit against such representative. The section has therefore, no application in the present case. The result is that if the present case falls within s. 368, the plaintiff may lose the property to which it may happen that she has a good legal title capable of being enforced in the suit instituted by her, and this merely because she did not apply to have the representative of the defendant substituted within sixty days after such defendant's death, although she was prevented by a reasonable cause from making her application within that time. It is possible to conceive many instances in which this reasonable cause may amount to absolute impossibility, and the result may be that considerable hardship and injustice will be done by this stringent provision which leaves the Court no discretion whatever in applying it. It can scarcely be supposed that the Legislature contemplated this result, and we are unwilling

to put upon the provisions of the Code a construction which necessarily involves the imputation of such an unreasonable intention to the Legislature. It must be borne in mind, that the provision contained in s. 371 of the Civil Procedure Code, that when a suit abates no fresh suit shall be brought upon the same cause of action, is a wide departure from the principles which have been held applicable to abatement in the Courts of Common Law and of Equity in England. In the Courts of Chancery a suit, though perfect in its institution, becomes defective by the death or marriage, or by some change or transmission of the interest or liability of some of the parties. In such case the suit is said to have abated or become defective. As a general rule, no proceeding whatever can be taken in it, until an order to revive the suit or carry on the proceedings has been made. Such an order is in many cases obtained on motion of course. Where the abatement is total, that is, caused by the death, bankruptcy, or insolvency of a single plaintiff, or the marriage of a single female plaintiff, the [843] case is completely suspended and cannot be proceeded with until it has been revived or the defect caused by the abatement cured. Where the abatement is partial merely, as where it is caused by the death of the defendant, it prevents those proceedings only by which the interest of the deceased may be affected, for the death of the defendant makes an abatement *quoad* himself alone. Thus abatement, although it suspends the proceedings in a case, does not put an end to them. Therefore, where process of contempt has been executed and the defendant is in custody upon it, and afterwards the suit abates, the defendant has been held not to be thereby entitled to his discharge out of custody. But so far as we are aware, an abatement, either in a Court of Common Law or in a Court of Equity, has never had the effect of being a bar to a further suit upon the same cause of action. One of the essentials of the principle of *res judicata* is, that the matter must have been determined, and when a suit has abated before judgment, nothing has been determined in such a suit. Having regard, therefore, to this very essential difference between the procedure introduced in this country and the procedure of the Courts of England, we think that it cannot have been the intention of the Legislature to apply the provisions of s. 368 of the Code, read with art. 171 B of the Limitation Act, more stringently than the provisions of the Limitation Act as to the filing of appeals and reviews of judgment. We have seen that s. 5 of the Limitation Act allows an appeal and an application for review of judgment to be admitted after time when the Court is satisfied that there was sufficient cause for not presenting it within time. We may further observe that, in s. 368 of the Amended Code, XIV of 1882, which has just been passed by the Legislature, but which comes into force on the 1st of June next, words have been added which, if they had existed in the section of the present Code, would have rendered this appeal unnecessary. We are, therefore, led to examine very carefully the provisions of ss. 368 to 372 of the Code of Civil Procedure in order that, if possible, we may put upon these sections read together a construction which will prevent that hardship which does not appear to have been intended by the Legislature. We may observe that if the present case does not fall within [844] s. 368, it must fall within the provisions of s. 372, and as no express time is provided by the Limitation Act for applications under s. 372, the general provisions of art. 178 of sched. ii will apply; and the plaintiff will, under this article, have three years as the period allowed for making this application.

Having given the matter our best consideration, we come to the conclusion that the present case is one which does not fall within the provisions of s. 368. That section, in so far as it deals with the case of the death of a sole defendant, provides that where the right to sue survives, the plaintiff may make an

application to the Court to have the legal representative of the deceased defendant made a defendant in his stead. Now, what is meant by the 'right to sue surviving,' and what is the difference between this case and the cases provided for by s. 372, that is, "other cases of assignment, creation or devolution of any interest pending the suit"? If we turn to Order L, rule 1 of the Rules made under the Judicature Act, we find the following provisions:—"An action shall not become abated by reason of the marriage, death or bankruptcy of any of the parties, if the cause of action survive or continue, and shall not become defective by the assignment, creation, or devolution of any estate or title *pendente lite*;" and rule 3 is as follows:—"In case of an assignment, creation or devolution of any estate or title *pendente lite*, an action may be continued by or against the person to or upon whom such estate or title has come or devolved." Now, these two rules seem to draw a distinction between (i) the cause of action surviving or continuing, and (ii) the assignment, creation, or devolution of any estate or title. We think it will be found that the term 'cause of action surviving' was before the passing of the Judicature Acts generally used of cases in the Courts of Common Law, and that the idea of the assignment, creation, or devolution of an estate or title *pendente lite* is a familiar idea in the Courts of Chancery. In the Common Law Procedure Act, 15 and 16 Vict., cap. 76 s. 138, we find the following language:—"In case of the death of a sole defendant or sole surviving defendant, where the action survives, the plaintiff may, &c.," and this, we may observe, is pretty nearly the language of s. 368 with which we have to deal, and in which the term 'cause of [845] action' was used instead of 'right to sue' before the Amending Act of 1879. In the Chancery Amendment Act, 15 and 16 Vict., cap. 86, s. 52, we find the Legislature speaking of 'the change or transmission of interest or liability,' and the same language will be found used in several passages in Chap. XXXIII of Mr. Daniell's Work on Chancery Practice, which chapter deals with 'revivor and supplement.' At page 1388 of the 5th edition, Mr. Daniell says:—"Where a defendant, whose interest ceases on that event, dies, the suit may, it seems, be revived against the person who thereupon becomes entitled to his interest. Thus, where a defendant, a tenant-in-tail, died, the suit was revived by the common order of 'revivor and supplement' against the next tenant-in-tail. And where the interest of a defendant, a tenant-in-tail, ceases in consequence of the birth of a tenant-in-tail, whose interest precedes that of the former defendant, the suit may be revived against the new tenant-in-tail;" and at page 1381 and the following pages will be found a large number of instances taken from decided cases of this transmission or change of interest. In the Courts of Common Law, the general rule of law was *actio personalis moritur cum persona*; and under the principle of this rule came all actions for injuries merely personal; executors and administrators were the representatives of the temporal property,—that is, the debts and goods of the deceased, but not of their wrongs except where those wrongs operated to 'the temporal injury of their estate [see the remarks of Lord ELLENBOROUGH in *Chamberlain v. Williamson* (2 M. and S., 408); see also the remarks of BRETT, L. J., in *Twycross v. Grant* (L. R., 4 C. P. D., 40, at p. 46).] "Whenever a breach of contract or a tort has been committed in the lifetime of a testator, his executor is entitled to maintain an action, if it is shown upon the face of the proceedings that an injury has accrued to the personal estate." The cause of action did not, therefore, survive in actions of assault, battery, false imprisonment, deceit, or the like; and in the case of a sole plaintiff, his death put an end to the action. Then with respect to the cause of action surviving as against the legal representative of a deceased, [846] see the case of *Peek v. Gurney* (1 L. R., 6 H. L., 377, at p. 393). Lord CHELMSFORD there said: "This is not like the cases

referred to in argument of the *Bishop of Winchester v. Knight* (1 P. Wms., 407), and the *Marquis of Landsdowne v. Marchioness of Landsdowne* (1 Madd., 116), where the wrong complained of benefited the estate of the testator, and on that account the executors were made liable. The same liability arises and on the same ground in Courts of Law." As Lord MANSFIELD said in *Hambly v. Trott* (7 Hare, 67):—"Where property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator for the value or sale of the trees he shall." And Lord CHELMSFORD proceeded to hold that as the estate of a certain Mr. Gibbs, a party to a suit before the House of Lords, derived no benefit from the misrepresentation in which he assisted, his executors could not be made liable for the wrong done by that misrepresentation. It would not be very easy, without writing a treatise on the difference between the jurisdiction of the Courts of Common Law and the Courts of Equity in England, to define exactly those classes of cases with reference to which the use of the term 'cause of action surviving' was familiar to the English lawyer. But it may perhaps be said in a general way that this term was used more especially with reference to personal actions for damages, for breach of contract, and in some cases, for tort. The term 'change or devolution of interest,' or the more exact language 'assignment, creation, or devolution of any estate or title *pendente lite*,' used in rule 3 of Order L was, we may say, in the same general way applied to those classes of cases in which the interest in the subject-matter of the litigation passed into the hands of some other person between whom, and in the case of a defendant, the deceased defendant, there existed a legal privity. If no such privity existed, there could be no order of revivor in the Court of Chancery, and there must have been an original bill, or, as we should say in this country, a fresh suit. Applying these observations to [847] the present case, it appears to us, that it was the intention of the Legislature, in adopting the language of the rules made under the Judicature Act, which language had an accepted meaning in English practice, to limit the application of s. 368 of the Code of Civil Procedure to cases similar in their nature to those cases in which the cause of action would have been regarded in the Courts of Common Law as surviving; and that the more general provisions of s. 372 were intended to apply to cases similar in their nature to those cases in which the Court of Chancery would have considered that there was such a change or transmission of interest as would entitle the plaintiff to an order of revivor on motion of course. The present suit, being for the recovery of land, in our opinion, falls within the latter class of cases, and the provisions of s. 372 are, therefore, applicable. In this view we are of opinion that the plaintiff has the period of three years allowed by art. 178 of the second schedule of the Limitation Act within which she can apply to substitute, instead of the deceased defendant, the person upon whom the interest of such defendant devolved upon the death of the latter.

The order of the Subordinate Judge, dated the 22nd November 1880, directing the suit to abate, must be reversed. We think that this is not a case in which we should make any order as to costs.

O'Kinealy, J.—I concur in the judgment delivered by my learned brother, and consider that the application in the lower Court was an application properly falling within s. 372 of the Civil Procedure Code and not under s. 368. Looking at the manner in which a legal representative can be put on the record under the provisions of s. 222 of Act X of 1865, and s. 38 of Act V of 1881, I am of opinion that s. 368 does not necessarily imply that there has been any transmission of interest to the person whose name is put on the record.

On the other hand, s. 372 refers to cases of assignment, creation, or devolution other than those mentioned in the preceding sections, when the interest devolves on the person whom it is sought to make a party—*Sham Lal Mullick v. Sreemutty Monmohinee Dasse* (unreported, but referred to in 5 C. L. R., 109). And the application is made while the [848] suit is pending—*Gocool Chunder Gossamee v. The Administrator-General of Bengal*. (I. L. R. 5 Cal., 726, at p. 731 ; s. c., 5 C. L. R., 519). In the present case both these conditions have been fulfilled. An interest different from that referred to in the sections preceding s. 372 has devolved on the person resisting this motion, and the application to place his name on the record was made in a pending suit.

At the first blush it might appear that s. 372 only referred to cases of assignment, creation, or devolution of interest when all the parties on the record were in existence at the time that the application was made ; but in the case of *Gocool Chunder Gossamee v. The Administrator-General of Bengal* (I. L. R., 5 Cal., 726, at p. 731 ; s. c. 5 C. L. R., 519) a Division Bench of this Court held, that this section applied to cases where neither party on the record was alive when the application was made. Following this decision, which is binding on me, it appears to me that, as in the present case the only party on the record consents to the application, s. 372 does apply, and that the petitioner has three years within which to make her application to the lower Court.

Appeal allowed.

NOTES.

[I. ABATEMENT OF SUIT—APPEAL FROM ORDER REFUSING TO SET IT ASIDE—

After this decision, the C.P.C. 1882 allowed appeals by sec. 588 cls. 18, 19, 20, 21. In the C.P.C. 1908, O. 43. r. 1 (K), appeals are allowed from orders under r. 9 of Order XXII refusing to set aside the abatement or dismissal of a suit. Revision proceedings are, therefore, not the appropriate procedure now.

II. APPLICABILITY OF THE LIMITATION ACT, SEC. 5—

After this decision, the Limitation Act 1877, sec. 5 was extended by the Legislature [VII of 1888 sec. 32 (4)] to these cases. These provisions are retained in the Code of Civil Procedure 1908.

III. LIMITATION APPLICABLE TO THESE CASES—

The Indian Limitation Act 1908, Art. 177 has provided six months from the date of the death of the deceased defendant or respondent, in cases under the C.P.C. to have the legal representative of a deceased defendant or a deceased respondent made a party. It was first introduced into the Act of 1877 by Act XII of 1879 as Art. 171 B. It then applied to applications by a plaintiff to have the representatives of a deceased defendant made parties to a suit. As amended by Act VII of 1888, s. 66 it applied to the case of the death of the defendants and respondents, and the time was extended from sixty days to six months.

IV. THE AUTHORITY OF THIS CASE—

The foregoing statutory changes since the date of this decision have affected its value considerably, and further it was *dissented from* in the following cases on the ground that such a case as this properly came within sec. 368 and not sec. 372 of the C.P.C. 1882 :— (1890) A.W.N. 21 ; (1884) P.R. 76 ; (1891) 16 Bom. 27 ; (1891) P.J. 30 : 9 Bom. 151.

N.B.—The similar case of 8 Cal. 420 is justified by Starling (Limitation (1911) fifth edition) on the principle of this case, see p. 473 ; 483—and not on the ground there assigned of the suit being a *pending one*.]

[8 Cal. 848=12 C.L.R. 407]

APPELLATE CIVIL.

The 20th April, 1882.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE O'KINEALY.

In the matter of the Petition of Protap Chunder Ghose.

Kally Churn Dutt and others

versus

Protap Chunder Ghose.*

Beng. Act VIII of 1869, s. 38—Ex parte orders—Proceedings for measurement of land.

In proceedings under s. 38 of the Beng. Rent Law, Act VIII of 1869, the Collector should, as a rule, pass no order *ex parte*, without previously giving timely notice to the other party or parties sought to be affected by the order.

THE facts of this case, which was an appeal from an order passed by the Collector of the 24-Parganas on an application by a zamindar under s. 38 of the Beng. Rent Law, Act VIII of 1869, are set out in the judgment of the Court.

[849] Baboo Chunder Madhub Ghose for the Appellants.

Mr. Evans and Baboo Gurudas Banerji for the Respondent.

The Judgment of the Court (PRINSEP and O'KINEALY, JJ.), was delivered by

Prinsep, J.—In this case Protap Chunder Ghose, the proprietor of certain property in the 24-Parganas, applied, under s. 38 of Beng. Act VIII of 1869, to the Civil Court in that district, to have a survey made and the tenures and under-tenures recorded according to the provisions of the Rent Law.

This application was admitted, and a copy of the order was transmitted to the Collector, directing him to undertake the survey. When the papers came in from the Ameen, an objection was raised by Jadub Chunder Ghose, one of the tenure-holders, as to whether the record was such a record as was contemplated under the Act, and it was urged that, before the record could be considered complete, a khatean should be prepared, from which the parties interested could obtain knowledge of the amount of land recorded in their names, so as to enable them to raise any objection that they might deem necessary against the survey. Several orders were passed on this subject, but it is only now necessary for us to refer to the order of the 2nd of June 1881. On that date the Collector reported to the Subordinate Judge, that the Court Ameen had run away; that he had not made the khatean; and that, until such khatean was prepared, he, the Collector, was of opinion, that no order could be passed under s. 38. Subsequently, on the 15th June, the zamindar appeared before the Collector, and though he offered to pay the amount necessary to write out the khatean, at the same time he raised several objections to the decision at which the Collector had arrived. On the 23rd June following, the Collector sent a copy of this petition to the Subordinate Judge, asking for his instructions. The Collector then changed the opinion he had previously expressed on the 2nd June, and stated to the Subordinate Judge that the chittas and map were the only papers necessary for the survey and record of rights. On the next day, the Subordinate Judge answered that he concurred in the opinion expressed by the Collector. In [850] pursuance of an order of that date, the Collector forwarded the papers to the Civil Court on the 30th June following.

* Appeal from Original Order, No. 303 of 1881, against the order of D. R. Lyall, Esq., Officiating Collector of the 24-Parganas, dated the 30th June 1881.

All these orders were passed *ex parte*, and no notice was given of the application of the 15th June to the other side, and we may observe that the orders of the 2nd June, which were also passed *ex parte*, are open to the same objection. It appears to us that this is not the procedure which should be adopted by the Collector in deciding the objections raised to his order in proceedings under s. 38 of Beng. Act VIII of 1869. We are of opinion, that whenever objections are raised, unless they are at once disallowed, they cannot be dealt with in the absence of any party likely to be injuriously affected by the order sought for. The order of the Collector of the 2nd June, holding that a khatean was necessary, was clearly one of this description and should not have been passed in the absence of the zamindar: and a portion of the order of 15th June, revoking the previous order, should not have been passed without notice to the tenure holder, whose application for information of the result of the survey led to its being passed. We accordingly set aside the proceedings of the Collector and remand the case with directions that he shall procure the papers from the Subordinate Judge and then fix a day and decide in the presence of both parties, whether in his opinion a khatean is necessary for the record of rights under s. 38, and whether the proceedings of the Ameen ought to be sanctioned. If the Collector is of opinion that no khatean is necessary, and he sanctions the proceedings of the Ameen, then the date of such order, will be considered the date on which the survey proceedings are sanctioned, and the parties will have fifteen days from that date to object. But if, on the contrary, he thinks that the preparation of a khatean is necessary to carry out the provisions of the law, then the date from which the fifteen days will run will be the date on which he sanctions the entire proceedings taken under the orders of the Civil Court, after receipt of this khatean or on conclusion of any further enquiry that he may think necessary. Under the circumstances we make no orders as to the costs of this appeal.

Case remanded.

[851] CRIMINAL REFERENCE.

The 20th April, 1882.

PRESENT :

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

In the matter of the Petition of Dinendro Nath Shanial.*

Criminal Procedure Code (Act X of 1872), ss. 47, 491—District Magistrate—Withdrawal of case—Act XI of 1874, s. 6.

The provisions of s. 47 of the Code of Criminal Procedure Act X of 1872, as amended by s. 6 of Act XI of 1874, are wide enough to empower a District Magistrate to withdraw a case falling under s. 491 of the same Code.

THE terms of the reference in this case were as follows :-—"The Joint Magistrate of Serajgunge, proceeding with reference to s. 491, Code of Criminal Procedure, issued summonses against the petitioner Dinendro Nath Shanial and others to show cause before him why they should not give 2,000 rupees bail and 2,000 rupees recognizance to keep the peace for one year. The date of the original summons is 17th February 1882. Subsequently, in a vernacular order of the 11th March 1882, the Joint Magistrate, no reasons being assigned

* Criminal Reference, No. 91 of 1882, and letter No. 110, made by the order of C. A. Kelly, Esq., Sessions Judge of Pubna and Bogra, dated the 18th April 1882.

in his order, directed the defendants each to give 200 rupees bail to appear before the District Magistrate of Pubna on the 20th of March. It does not appear from the record that there was any order from the District Magistrate withdrawing the case, or directing the Joint Magistrate to send the papers to him. The case is now pending before the Magistrate of the District.

"In this case it does not appear to me that s. 47, Code of Criminal Procedure, should be held to apply. I find from the District Magistrate's letter of the 15th April, which accompanies, that he withdrew the case from the file of the Joint Magistrate by a letter, of which a copy, as it appears, has been sent by the District Magistrate with his letter to me. But I am doubtful whether the proceedings would be legal. It does [852] not appear clear that the withdrawal of proceedings under s. 491, Code of Criminal Procedure, especially after summonses have issued, is contemplated by s. 47, Code of Criminal Procedure. The summons mentions one Magistrate, one time, and one place; the order of the 11th March directs bail to be given for appearance before another Magistrate, on another date, and virtually at another place. In this case the case was not withdrawn, it appears, by any order, but by memo. signed by a Deputy Magistrate for the Magistrate. The explanation of the Joint Magistrate was called for through the District Magistrate, but the District Magistrate has given his reason in his letter for not calling upon him to give it.

I am of opinion that the proceedings should not be allowed to go on before the Magistrate of the District, and that the vernacular order signed by the Joint Magistrate should be considered null and void, and beg to recommend accordingly."

No one appeared on the reference.

The **Judgment** of the Court (McDONELL and FIELD, JJ.) was delivered by **McDonell, J.** We are of opinion that the provisions of s. 47 of the Code of Criminal Procedure, as amended by s. 6 of Act XI of 1874, are wide enough to empower the Magistrate of the District to withdraw a case falling under s. 491 of the same Code.

Were it otherwise, it is not suggested, and we are unable to see, that the person concerned has been in any way prejudiced by the course which has been taken; and we think that this reference in the matter of an interlocutory order was unnecessary in the interests of justice.

NOTES.

[See also 22 Cal. 898; 28 Cal. 709; 31 Cal. 350; 35 Cal. 243; 21 All. 151; 26 Mad. 188; (1902) 1 P. R. 78.]

[853] CIVIL REFERENCE.

The 25th April, 1882.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE WHITE.

Ram Bushan Mahto and others.....Plaintiffs
versus
Jebli Mahto and others.....Defendants.*

Land Registration Act (Beng. Act VII of 1876)—Co-Proprietors—Registration of shares in land—Evidence of possession—Evidence of title.

Registration of land under Beng. Act VII of 1876 is not only not conclusive proof, but no evidence at all, upon the question of title of a proprietor so registered.

* Civil Reference, No. 17 of 1881, under s. 617 of Act X of 1877, made by J. Tweedie, Esq., Officiating District Judge of Gya, dated the 11th November 1881.

Such registration does not relieve a plaintiff from the *onus* of proving his title to land claimed by him.

Quere.—Whether, in a suit founded upon possession alone, or in which the relief sought depends solely upon possession, such registration ought not to be treated as *prima facie* evidence of actual possession at the date when the registration was effected?

THIS was a reference to the High Court under s. 617 of the Code of Civil Procedure.

The suit was brought by the plaintiffs against the defendants, who were their co-sharers in a certain zamindari, to recover a certain quantity of grain or its value. The plaintiffs alleged that they were the proprietors of a certain share in a mouza, and under that title were in separate possession of a certain share in some land held by a common tenant of themselves and the defendants, and they claimed to have the corn-rent payable by that tenant divided between themselves and the defendants in the proportion in which they alleged the land to be separately possessed by themselves and the defendants.

In support of their claim the only evidence produced was the record of shares in the estate, which set out the shares in which both themselves and the defendants had been respectively registered under Beng. Act VII of 1876.

[854] The Munsif was of opinion that the registration of shares was "at most a relevant fact of little or no import."

The Judge took a different view, but referred the following questions to the High Court:—

First.—Whether for the purpose of settling the *de facto* rights and interests of co-sharers as amongst themselves (for example, the proportion of grain-rent receivable by each sharer out of the total amount paid as grain-rent by a common tenant) registration under Beng. Act VII of 1876 of specific shares is "conclusive proof" (so long as the registration remains unaltered by a civil suit) of the *de facto* rights and interests of co-sharers amongst themselves?

Second.—If the said registration is not "conclusive proof" of the matter before set forth in detail, is it sufficient to place the onus of proving the correctness of the share claimed on him whose allegations are contrary to the registered shares?

No one appeared before the High Court.

The **Opinion** of the Court (GARTH, C.J., and WHITE, J.) was delivered by

Garth, C.J.—The plaintiffs in the case referred to us allege in their plaint that they are the proprietors of certain shares in a mouza, and under that title are in separate possession of a certain share in some land held by a common tenant of themselves and the defendants, who are the proprietors of the remaining shares of the mouza. The plaintiffs claim to have the corn-rent payable by that tenant divided between themselves and the defendants in the proportion in which the plaint alleges the land to be separately possessed by them and the defendants.

The suit is, therefore, not based upon the plaintiffs' possession only, but also upon their title, and their right to succeed depends upon their proving such title.

The first question, on which our opinion is solicited, describes the questions of right which have to be determined between the parties to this suit as *de facto* rights and interests. But the law knows nothing about *de facto* rights in such a case as the present. Suits relating to property are sometimes founded on title, and sometimes on possession alone; and in the latter case, title is not [855] enquired into. In the present case the suit is of the former description.

With these preliminary remarks we proceed to give our decision on the two questions submitted to us, which are: (i) that the registration

under Beng. Act VII of 1876 is not only not conclusive proof, but no evidence at all upon the question of the title of the plaintiffs to the share which they claim; and (ii) that the registration referred to does not relieve the plaintiffs from the onus of proving their title to these shares.

Whether, in a suit founded upon possession alone, or in which the relief sought depends solely upon possession, such registration ought not to be treated as *prima facie* evidence of actual possession at the date when the registration was effected is a question unnecessary to be decided upon the present reference.

We may add, that, if the plaintiffs are unable to give any evidence of title, their suit must fail, unless it is shown that the defendants have deprived them of the share or some part of the share of the corn-rent which the defendants admit to belong to them, or unless the District Judge thinks fit to permit further evidence of title to be given by the plaintiffs, and they satisfy the Court from the further evidence adduced that they have a good title to the share which they claim in the land.

We observe that the Munsif did not try the question of title, but only that of possession; and it would therefore seem only fair, that the plaintiffs should have an opportunity of adducing fresh evidence if they can upon the question of title.

As neither of the parties was represented by counsel in this Court, we make no order as to costs.

NOTES.

[The real proprietor is not affected by the registration :- 23 Cal. 87 (110); 9 C. L. J. 91; see also the explanation in 9 Cal. 431.]

[12 C.L.R. 152] [886] ORIGINAL CIVIL.

The 26th April, 1882.

PRESENT :

MR. JUSTICE WILSON.

Sreegopal Mullick

versus

Ram Churn Nuskur and another.

Vendor and purchaser-- Conditional contract "Subject to approval of title by purchaser's solicitors"-- Rescission Registration Act (III of 1877), s. 17, cl. (b).

An agreement for the purchase and sale of certain immoveable property provided that the completion of the contract should be "subject to the approval of the purchaser's solicitors", (naming them), and that if they should not approve of the title, the vendor should refund the earnest-money and pay all costs incurred by the purchaser in investigating the title. The purchaser's solicitors disapproved of the title, and the purchaser rescinded the contract. The agreement was not registered.

Held, in a suit to recover the amount of the earnest-money and costs, that, assuming the objections to be reasonable, the purchaser was entitled to rescind the contract.

Held further, that the agreement did not require registration.

THIS was a suit to recover two sums of Rs. 500 each, and the sum of Rs. 328-8, the costs of investigating the title to certain immoveable property. The plaint stated that, on the 2nd of April 1878, the defendants Ram Churn Nuskur

and Doyaram Nuskur agreed in writing to sell certain premises at Ghosery to the plaintiff, and on the same day, the plaintiff deposited Government securities of the value of Rs. 500 with the defendant Doyaram Nuskur by way of earnest-money. The agreement contained, among others, the following provisions :—

2. "The sale and purchase shall be subject to the approval of the purchaser's solicitors, Messrs. Dutt and Mitter, and subject to the vendors satisfying the purchaser that the said premises, hereby contracted to be sold, yield the monthly rent of Rs. 1,183.

3. "Should the purchaser's said solicitors not approve of the title, then the vendors shall refund the earnest-money hereinafter mentioned, and shall pay all costs which the purchaser may or shall incur in respect of these presents and the investigation of the title.

[857] 4. "The vendors declare that their tenure is a permanent maurasi one, not liable to enhancement of the rent payable to the zamindar or Government in respect thereof; and that their (the vendors') tenants have no sub-maurasi or other permanent holding; and that the aggregate area of the two plots of land, hereby contracted to be sold, shall be at least 35 bighas.

5. "The vendors shall forthwith deliver, or cause to be delivered, all the title-deeds, documents and writings in any way relating to the said premises to the purchaser's solicitors, Messrs. Dutt and Mitter.

9. "The purchase shall be completed within one week or such further time as may mutually be agreed upon from the date of delivery of all title-deeds documents and papers, subject however to the approval of the title as aforesaid."

The plaintiff alleged that, on the 18th of April he paid another sum of Rs. 500 to the defendants, and a subsequent payment of Rs. 5,000 was made: this latter sum had, however, been recovered. The plaintiff's solicitor disapproved of the title, and on the 8th of June 1878 the plaintiff declined to carry out the agreement. He now sued to recover the two sums of Rs. 500 each, and for the payment of Rs. 328-8 incurred on account of costs.

The defendants denied receipt of the second sum of Rs. 500; they contended that the title disclosed was a good one, and that, under the circumstances, the plaintiff was not entitled to recover the earnest-money.

Mr. Jackson and Mr. Bonnerjee for the Plaintiff.

The Officiating Advocate-General (Mr. Phillips) and Mr. Palt for the Defendants.

Mr. Jackson. —A similar proviso to that contained in this agreement was considered in *Hudson v. Buck* (L. R., 7 Ch. D., 683), where it was held, that in the absence of *malu fides* or unreasonableness on the part of the purchaser or his solicitor, the vendor could not enforce specific performance of the contract if the purchaser's solicitor disapproved of the title. That case was approved of [858] by the Court of Appeal in *Hussey v. Horne Payne* (L. R., 8 Ch. D., 670). There is a dictum of CAIRNS, L. C., in the same case on appeal to the House of Lords (L. R., 4 App. Cas., 311), which might seem to militate against the decision of the Court of Appeal; but that decision was affirmed. There is nothing unreasonable in such a stipulation as this.

The Advocate-General. —The objection to title must be reasonable. An objection based on mistake or on ignorance of the law cannot justify the purchaser in refusing to complete his contract. The cases cited do not go to the length of saying that the purchaser is entitled to rescind merely because his

solicitor objects to the title. In *Hussey v. Horne Payne* (L. R., 8 Ch. D., 670), CAIRNS, L. C., said: "Such a term would virtually reduce the agreement to that which is illusory. It would make the vendor bound by the agreement, but it would leave the purchaser perfectly free. He might appoint any solicitor he pleased, he might change his solicitor from time to time. There is no *discretio personarum*; there is no appointment of an arbitrator in whom both sides might be supposed to have confidence. It would be simply leaving the purchaser, through the medium of his solicitors, at liberty to say from caprice at any moment, we do not like the title, we do not approve of the title, and therefore the agreement goes for nothing."

Mr. Jackson in reply.

Mr. Bonnerjee tendered the agreement in evidence.

The *Advocate-General* objected on the ground that it was not registered under s. 17 of the Registration Act. [WILSON, J. If a document only entitles a person to a future right in immoveable property, it is not within the section. There was something to be done under this agreement, namely, the payment of the purchase-money on one side and the execution of the conveyance on the other. The document is admissible.]

WILSON, J.—This case is practically before the Court under somewhat peculiar circumstances.

[859] The main question is one relating to title, and I am not really in a position to say what the title is. Naturally one would suppose that the defendants would produce all the title deeds, and lay before the Court full information on the subject, but from what fell from the defendants one can see that they are not in possession of the title-deeds.

The case arises in this way. The plaintiff entered into a contract with the two defendants on the 2nd April 1878, for the purchase from them of certain property at ghosery, comprised in two plots described in the contract. The material parts of the contract are these (after reading the portions set out above his Lordship continued):

It is not necessary to go into the details of what happened afterwards, except, on one or two points. Rupees 500 in Company's paper was paid at the time of the agreement. There is a conflict of testimony as to whether another 500 was paid to the vendors' solicitor. Rupees 5,000 was also paid, but that is recovered back. The present suit is brought to recover the two sums of 500 and costs incurred by the present plaintiff.

The transaction fell through by the plaintiff's advisers refusing to proceed.

The question is whether the plaintiff was entitled to do this. If not, he is not entitled to recover the two sums of 500, nor the costs. But if the terms of the contract are such as to entitle him to decline to carry out the purchase, he is entitled to recover, subject to proof of the payment of the second 500.

As to the 2nd paragraph it is contended that it made the decision of Messrs. DUTT and MITTER conclusive, unless there were some want of good faith or unless their objections were distinctly unreasonable. With reference to this point three cases have been cited, the first of which was *Hudson v. Buck* (L. R. 7 Ch. D., 683). In that case the document relied on as containing the terms of the contract was this:—"Received of Mr. S. Buck (the defendant), this day, the sum of £20 in respect of Arkley Copse, near Barnet, as a deposit on the purchase of the lease, with possession upon completion, for the sum of £680, and subject [860] to the transfer of the mortgage now upon the property, and also the approval of the title by Mr. Buck's solicitor."

Now the effect of the words "subject to the approval of the title by Mr. Buck's Solicitor" was much considered by Mr. Justice FRY, before whom the case came, and he held, that the words did not leave the parties as they would have been without them, but he says: "It appears to me that it is not unreasonable to suppose that the purchaser should desire to preclude the possibility of such a protracted litigation, and that he should intend to stipulate that the opinion of a particular person, his own solicitor, should be conclusive as to the sufficiency of the title deduced, and that in the absence of compliance with that condition, the contract should not be capable of being enforced." Then the learned Judge says: "It is not necessary to decide that the absence of approval by the purchaser's solicitor would be conclusive, if the purchaser himself had acted unreasonably, as for instance, if he had declined to appoint any solicitor, or if the solicitor whom he appointed had insisted upon utterly unreasonable objections to the title."

The actual conclusions were that the objections taken by the solicitor were not utterly unreasonable, and therefore the decision of the solicitor was conclusive.

The subject came before the Court of Appeal in *Hussey v. Horne Payne* (L. R., 8 Ch. D., 670). The matter turned on the correspondence, and the question on which the Court of Appeal decided the case was, whether certain words in a letter—"subject to the title being approved by our solicitors"—introduced new terms into the proposal requiring acceptance by the other side. The Court came to the conclusion they did.

The Master of the Rolls and Lord Justice COTTON gave their opinions. The Master of the Rolls said, "the only question which we are called upon to decide is, whether that additional term so expressed amounts in law to an additional term, or whether it amounts, as was very fairly admitted by the counsel for the respondents, to nothing at all, that is, whether it merely expresses what the law would otherwise have implied. The expression [861] 'subject to the title being approved by our solicitors' appears to me to be plainly an additional term. The law does not give a right to the purchaser to say that the title shall be approved by any one, either by his solicitor or his conveyancing counsel, or any one else. All that he is entitled to require is what is called a marketable title, or as it is sometimes called, a good title. Therefore, when he put in 'subject to the title being approved by our solicitors,' he must be taken to mean what he says, that is, to make it a condition that solicitors of his own selection shall approve of the title.

"The matter has been recently and fully discussed by Mr. Justice FRY in *Hudson v. Buck* (L. R., 7 Ch. D., 683), and as I entirely agree with his observations on the nature of the condition, it is unnecessary for me to repeat them. The result therefore is, that there is no contract."

Lord Justice COTTON said: "Now, is there not a new term introduced by the last words of the letter of the 6th of October, 'subject to the title being approved by our solicitors?' The argument on behalf of the respondent is this, that these words are merely surplusage, and express nothing but what the law would itself have implied. In support of that view, Mr. Pope relied upon observations made by Mr. Justice FRY, that the objection taken by a solicitor to a title under a term of this sort, if it is agreed to by both parties, must be a reasonable objection, but that by no means shows, that it is not a new term. Putting this term in the way in which Mr. Pope suggested it ought to be read, 'subject to the solicitors, provided they act reasonably, being the judges whether there is a good title or not,' it is something entirely different from the

rule of law, which is, that the judge, subject to the ordinary right of appeal, is the person to decide whether or no a good title can be made. That is what the law provides independently of stipulation, but this stipulation would make the solicitor, provided he acted reasonably and *bonâ fide*, the sole and absolute judge as to whether there was or was not a good title. If he acted reasonably and *bonâ fide*, the Court (assuming that the term had been assented to and made part of the contract) would not inquire whether his [862] objections were well-founded in law; that being so, these words introduce a new term, and the letter is not an acceptance pure and simple of the offer contained in the previous letter."

That case went to the House of Lords, and the decision was affirmed by the House of Lords, but on another ground: and one of the learned Lords, Lord CAIRNS, expresses a doubt as to the view taken by the Court. He says (L. R., 4 App. Cas., at p. 321): "I have not desired to put the opinion which I have offered to your Lordships upon that ground, and I should doubt very much myself, if it were necessary to decide it, whether the opinion of the Court of Appeal in this respect could be maintained. I feel great difficulty in thinking that any person could have intended a term of this kind to have that operation, because, as was pointed out in the course of the argument, it virtually would reduce the agreement to that which is illusory. It would make the vendor bound by the agreement, but it would leave the purchaser perfectly free. He might appoint any solicitor he pleased, he might change his solicitor from time to time. There is no *discretio personarum*; there is no appointment of an arbitrator in whom both sides might be supposed to have confidence. It would be simply leaving the purchaser, through the medium of his solicitors, at liberty to say from caprice at any moment, we do not like the title, we do not approve of the title, and therefore the agreement goes for nothing. I have great difficulty in thinking that any person would agree to a term which would have that operation. But it appears to me very doubtful whether the words have that meaning. I am disposed rather to look upon them as meaning nothing more than a guard against its being supposed that the title was to be accepted without investigation, as meaning in fact, the title must be investigated and approved of in the usual way which would be by the solicitor of the purchaser. Of course, that would be subject to any objection which the solicitor made, being submitted to decision by a proper Court, if the objection was not agreed to."

These are the authorities in the matter, and I conceive it is the duty of the Court to follow the decision of the Court of [863] Appeal until it is overruled. These are the views of the Lord Chancellor, and they must raise doubts in every mind, but still they are not the grounds of the decision.

The other Lords did not refer to the question.

I think, therefore, that it will be my duty to follow the decision of the Court of Appeal rather than the observations of the Lord Chancellor which were not strictly *ratio decidendi*.

After all, every document must be construed by its own terms. The document before him was an expression used in the close of a letter, and Lord CAIRNS construed the words as meaning a reservation of rights.

But the document here is a formal document containing in one instrument the whole of the terms between the parties, and the phrase "to the satisfaction of the purchaser's solicitors" occurs frequently in separate contexts. In the second paragraph it appears first. In that paragraph the solicitors are mentioned by name as the persons to be satisfied, and it goes on "subject to the vendors satisfying the purchaser as to the rent." When it deals with the

question as to title, the solicitors are to be satisfied, and when it deals with the facts, as to which any one can judge, the solicitors are not mentioned. On the other question as to collateral matter as to costs, the contract says: "should the purchaser's solicitors not approve of the title." I think this means "should the vendors fail to make a good title." Again the same thing occurs in paragraph 9, where it is to be "subject to the approval of title as aforesaid."

Taking the authorities and documents together, I am disposed to say, I am bound to follow the decision of the Court of Appeal. I do not think it can be a pure question of law. On looking at the whole of the circumstances, the only construction I can put upon them is, that the parties did intend that the decision of the purchaser's solicitors was to be conclusive as to whether the title would be accepted or not, subject, however, to what Mr. Justice FRY says in his decision.

It is necessary, therefore, to inquire whether the objections were proper and real. It seems to me they were. It is not necessary to go into the reasons. Any attorney wishing to advise his client safely would rightly refuse this title.

[864] (His Lordship then considered the facts of the case and decided that the objection to the title was valid.)

Decree for plaintiff.

Attorney for the Plaintiff: Baboo A. C. Dutt.

Attorney for the Defendants: Baboo G. C. Chunder.

NOTES.

[I. REGISTRATION- AGREEMENT TO SELL, THOUGH CONTAINING ACKNOWLEDGMENT OF RECEIPT OF PURCHASE-MONEY—

See also 7 Bom. 310; 18 Bom. 13; 396; 27 Cal. 498; 12 Mad. 502.

II. CONTRACT SUBJECT TO SOLICITOR'S APPROVAL OF TITLE—

Messrs. Pollock and Mulla (Indian Contract Act (1913) p. 45) criticise this case as follows:—"This case seems, however, of doubtful authority, as WILSON, J. did not feel free to follow the opinion expressed by Lord CAIRNS in *Hussey v. Horne-Payne* in the House of Lords which would presumably be upheld by the Judicial Committee. It would be a misfortune to Indian jurisprudence if English decisions made with regard to the very peculiar English conditions of land, title and transfer were to be followed literally and indiscriminately by the Indian Courts.

In (1890) 17 Cal. 919 the words "on approval of the title by the purchaser's solicitor the purchase-money should be paid" were construed to indicate the time of payment and not to impose a condition precedent.]

[8 Cal. 865: 11 C.L.R. 135: 7 Ind. Jur. 31]

APPELLATE CIVIL.

The 26th April, 1882.

PRESENT:

MR. JUSTICE WHITE AND MR. JUSTICE MACPHERSON.

Ishur Chunder Surmah.....Plaintiff

versus

Doyamoye Debea and others.....Defendants.*

Will—Lost will—Administration with will annexed—Succession Act (X of 1865), ss. 208-209—Hindu Wills Act (XXI of 1870), s. 2.

The fact that a will has been lost is not, if its contents be satisfactorily proved, any bar to obtaining a grant of letters of administration with will annexed.

Sections 208 and 209 of the Succession Act (X of 1865) apply to the cases of granting letters of administration with will annexed to the estates of Hindus, where the will was executed after the 1st of September 1870.

THIS was an application for administration with will annexed to the estate of one Gunga Gobind Surmah, who died on the 9th of November 1877. The petition stated that the testator had made and published his last will and testament on the 31st of July 1877, whereby he left all his moveable and immoveable properties to his wife Sarbamangala Debi, his two daughters, Doyamoye Debi and Shibosoondari Debi, and the petitioner Ishur Chunder Surmah. The petitioner stated in his petition that the will was in possession of Sarbamangala, whom he charged with suppressing the will for the purpose of destroying it. Petitions of objection were put in on the part of Doyamoye, Shibosoondari, and Sarbamangala, which were to the effect that the alleged testator had made no will; that he had made a will but destroyed it (with intent to revoke it) before his death; [865] and that he had been insane for a long time previous to his death. The first and third defences were in no way supported. After the evidence on both sides had been given, the Judge dismissed the application saying: "I consider that there was no necessity to call any evidence in this case. By Act XXI of 1870, the provisions of s. 209 of the Wills Act do not apply to the will of a Hindu that has been lost, as Act XXI says, that only as regards applications with the will annexed do the provisions of Chapter XXX apply."

The applicant appealed to the High Court on the grounds—(i) that the Court was wrong in rejecting the application on the ground that the will had been lost; (ii) that there was no evidence to show the will had been lost; (iii) that, even supposing the will had been lost, the Court should have granted the application; and (iv) that the Judge, was wrong in holding that s. 209 of the Succession Act did not apply to the wills of Hindus.

Baboo Joy Gobind Shome for the Appellant.

Baboo Bama Churn Banerjee for the Respondents.

* Appeal from Original Decree, No. 78 of 1881, against the order of H. Muspratt, Esq., Judge of Sylhet, dated the 30th of December 1880.

The **Judgment** of the Court (WHITE and MACPHERSON, JJ.) was delivered by

White, J.—This is an appeal against a decision of the District Judge of Sylhet, dismissing an application of the appellant upon a preliminary ground and without going into the evidence.

The appellant's application is contained in a petition which states that Gunga Gobind Misser died on the 9th November 1877, having previously made his will on the 31st July 1877. The testator is alleged to have bequeathed by that will all his moveable and immoveable properties to the petitioner, who is a *sapinda* and kinsman to the testator, and also to the testator's widow and two daughters. The petition further alleges that the will is in the possession of Sarbamangala Debi, the widow. The petition was accompanied by a copy of the will, but of course not by the will itself. The application was two fold : *first*, praying that the original will should be called for from [866] Sarbamangala Debi; and *secondly*, that letters of administration under the Act should be granted to the petitioner.

The petitioner claims, indeed, to be only one of the residuary legatees beneficially entitled to the testator's estate. But, supposing the will not to have been revoked by the testator, and that the will is either produced and proved, or if not produced, its contents can be satisfactorily proved, and the petitioner upon such proof appears to be one of the residuary legatees, he, failing executors named in the will, may obtain a grant of letters of administration either jointly with the other residuary legatees, or solely if the latter are unwilling to join in the grant, and such grant would be either with the will annexed or with a copy of the will or its proved contents annexed, as the case may be.

The answers put in by the widow and the daughters of the deceased were also in the shape of petitions. They admit that the deceased did make a will giving the petitioner certain rights in the deceased's property, but allege that the will was, by the orders of the deceased, torn up and destroyed as being contrary to his intentions. The widow further denies that she has with her any will of the deceased.

The judgment of the lower Court is very brief. The District Judge disposed of the case without going into evidence, considering that it was unnecessary to do so; and he did this upon a ground which it is not easy to understand. His words are these: "By Act XXI of 1870, the provisions of s. 209 of the Wills Act do not apply to the will of a Hindu that has been lost, as Act XXI says, that only as regards applications with the will annexed do the provisions of Chap. XXX apply." After making these remarks, the District Judge proceeds to dismiss the case with costs to be paid out of the estate of the deceased.

We think that the Judge was in error both in the construction which he has put upon Act XXI of 1870, and also in dismissing the application without going into the evidence.

We may observe in the first place that the District Judge assumes that the will was lost. The petitioner asserts that it is still in existence. And this, which is the first question in [867] dispute between the parties, can only be decided by hearing the evidence. Again, neither party asserts that the will has been lost, but one of them, the widow and daughters, pleads that it was destroyed by the deceased with the intention of revoking it.

The question whether s. 209 of the Indian Succession Act applies to Hindus does not really arise until it has been decided that the will has been

destroyed. Supposing that to be proved, and it also is shown that the destruction was not caused by the testator or his orders with the intention of revoking the will, we have no doubt but that s. 209 may be applied.

The will was executed after the first of September 1870, and the 2nd section of the Hindu Wills Act (XXI of 1870) enacts, that so much of Part XXX of the Indian Succession Act as relates to probates and letters of administration with the will annexed shall apply to such a will. Section 209 is one of the sections in Part XXX, and so also is s. 208, which, supposing the will to be destroyed but unrevoked, is the section more applicable to the present case, for the petitioner has annexed a copy of the will, and according to the latter section limited probate may be granted of the copy.

We must reverse the decree of the lower Court, and remand the case to that Court for retrial. In trying the case the first question to be determined will be whether there was a will of the testator in existence at his death. If there was such a will, and it is proved to be in the custody of the widow, or under her control by being in the hands of her servants or agents, she must produce it, and the further hearing of the applicant's petition must be adjourned to allow of its being produced. If the will is produced, the question raised by the widow and the daughters as to its revocation by destruction, will be disposed of, and if the will does, as the petitioner alleges, bequeath the property to himself and the widow and daughters, the Court should grant letters of administration with the will annexed to all the residuary legatees, or if the others refuse to join, to the petitioner alone.

If the will is not shown to be in existence, then the Court will have to consider whether it had been destroyed by the [868] testator, or by his orders with the intention of revoking it as alleged by the widow and daughters (see s. 57 of the Succession Act). If it has been so destroyed, of course there will be an end of the matter, and the petitioner's application must be dismissed. But if the destruction of the will was not intended by the testator to be a revocation of it, the petitioner will be at liberty to prove that the copy, which he has annexed to his application, is a true copy of the will, in which case he alone, or jointly with the widow and daughters, if they are willing to join him, will be entitled to grant of letters of administration with a copy of the will annexed, limited until a properly authenticated copy of it is produced (see s. 208).

The lower Court will take evidence on the issues that are raised by the petition and the counter-petition of the parties, and, having regard to the observations now made by this Court, decide these issues and dispose of the petitioner's application upon the merits.

We observe that some evidence has been already recorded in this case, but it appears to be directed chiefly to the proof that testator executed a will before his death, a point upon which both parties are agreed. The real points in dispute are as to whether that will is in existence, and whether it has been revoked. Both parties will be at liberty to adduce such further evidence as they may be advised.

The costs of this appeal will abide the result of the remand.

Appeal allowed, and case remanded.

[8 Cal. 868]

APPELLATE CIVIL.

The 4th May, 1882.

PRESENT :

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

In the matter of the Petition of Nobodip Chunder
Biswas and another.

Prankisto Biswas

versus

Nobodip Chunder Biswas and another.*

Certificate of Administration—Act XXVII of 1860—Object of Act—Trustee.

The object of Act XXVII of 1860 is, not to enable parties to litigate questions of disputed title, but to enable debtors to pay the debts due by them with safety to the representatives of deceased Hindus and others ; and to facilitate the collection of such debts by removing all doubts as to the legal title [869] to demand and receive the same. In other words, the objects of the Act are to enable debtors to get sufficient acquittances when they pay money due to the estate of a deceased ; and to preserve that estate from loss by giving some one the right to collect the debts, lest they should be lost, *e.g.*, by the operation of the law of limitation. The holder of a certificate is a trustee liable to account for the moneys received by him to the legal heirs or representatives of the deceased.

Baboo *Doorga Dass Dutt* for the Appellant.

Baboo *Gurudass Banerjee* for the Respondents.

THE facts of this case sufficiently appear from the **Judgment** of the Court (McDONELL and FIELD, JJ.), which was delivered by

McDonell, J.—This is an application for a certificate under Act XXVII of 1860. The two petitioners, and the objector Prankisto Biswas, are, as the Judge says, admittedly in the same degree of affinity to the deceased, Bungshi Dhur ; and *prima facie* therefore they would inherit equally. But Prankisto Biswas contends that he is entitled to have the whole property,—*first*, on the ground of reunion ; *secondly*, on the ground of a verbal gift ; and *thirdly*, on the ground of adoption.

It is urged before us that Prankisto Biswas merely said that he was a palak-pootro and did not set up adoption ; but in the view we take of the case, it is unnecessary to enter into this matter.

The Judge, having examined one of the witnesses on the 17th December, adjourned the case till the 23rd December for the examination of the remaining witnesses cited by Prankisto Biswas ; but on the 19th December he disposed of the case without examining those other witnesses. We think that this mode of proceeding was unfortunate, because it enables Prankisto Biswas to come up here in appeal, and say that the case has been decided without hearing his witnesses.

* Appeal from Original Order, No. 17 of 1882, against the order of C. Dickens, Esq., Judge of Nuddoa, dated the 19th December 1881.

The object of Act XXVII of 1860, as has been pointed out in many cases decided by the Court, is not to enable parties to litigate questions of disputed title. The object of the Act is clearly stated in the preamble, and is two-fold,—*first*, to enable debtors to pay the debts due by them with safety to the representatives of deceased Hindus, &c. ; and *secondly*, to facilitate the collection of such debts by removing all doubts as to the [870] legal title to demand and receive the same. In other words, the objects of the Act are to enable debtors to get sufficient acquittances when they pay money due to the estate of a deceased ; and to preserve that estate from loss by giving some one the right to collect the debts lest they should be lost, *e.g.*, by the operation of the law of limitation or otherwise. This latter object is also contemplated by the provision that security is to be taken from the person who obtains the certificate. In effect, the holder of the certificate is a trustee, liable to account for the moneys received by him to the legal heir or representative of the deceased.

Now, in this case, we think that if the Judge, having pointed out that both parties were *prima facie* equally entitled, had stopped there and declined to enter into the question of title raised by Prankisto Biswas, referring him to a Civil Court for the decision of that question, and saying that the object of the Act would be sufficiently attained by granting a general certificate to the parties, there would have been no ground of objection against the proceeding of the District Judge. But the District Judge did not do this : he entered into the title set up by Prankisto Biswas, and expressed his views thereupon. We think that, as he did not hear all the evidence which Prankisto Biswas was prepared to produce, this course was not fair to Prankisto Biswas : and it is now with some reason contended before us, that from the fact of the Judge having expressed his opinion upon Prankisto Biswas's title, it may be, that when that title comes in question in a Court having jurisdiction to deal therewith, the Judge's observations may operate to influence the mind of the Judge of the Court.

Admitting the reasonableness of those arguments, we think, that the interests of justice will be sufficiently met by striking out and setting aside all that portion of the District Judge's judgment in which he discusses or remarks upon, or may be supposed to have expressed any opinion as to, the exclusive title set up by Prankisto Biswas.

We do not think that this is a case in which we ought to give costs to either party.

Appeal allowed.

NOTES.

[As to when the question of title should be gone into, see (1888) 15 Cal. 574 ; 23 Cal. 481.]

[11 C.L.R. 194 : 7 Ind. Jur. 32]

[871] APPELLATE CIVIL.

The 5th May, 1882.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE O'KINEALY.

Mukhoda Soondury Dasi.....Defendant

versus

Ram Churn Karmokar.....Plaintiff.

*Appellate Court, duty of — Changing nature of suit— Case made in plaint —
 Withdrawal of suit - Execution of decree —Sale under subsequent
 attachment—Civil Procedure Code (Act VIII of s. 1859),
 s. 97; and (Act X of 1877) s. 373.*

When a plaintiff sues to recover possession of property on the allegation that he had purchased it with his own money, and the suit is dismissed in the Court of First Instance, the Court of Appeal is not justified in giving the plaintiff a decree for a portion of the property, on the ground that the whole was the property of a joint Hindu family in which the plaintiff was a co-sharer.

A claim to attached property made under Act VIII of 1859, s. 246, was dismissed, and the claimant, in the year 1875, instituted a regular suit against the decree-holder under the provisions of that section. The decree-holder then released the property from attachment, and the plaintiff withdrew his suit. The same property was afterwards, in the year 1878, attached again and sold in execution of the same decree.

Held, that a subsequent suit for possession of the property against the purchaser at the execution-sale was not barred under s. 97 of Act VIII of 1859.

Eshen Chunder Singh v. Shama Churn Bhutto (11 Moore's L.A., 7) cited.

IN this case the plaint stated that the plaintiff purchased with his own money a jimaai right in certain land, together with the brick-built wall and tiled-huts standing thereon, under a kohala dated the 27th of November 1865, for a consideration of Rs. 125, "and held and owned the same after gradually constructing the pucca building now standing on it with his own money;" that, in the year 1875, one Prem Bibi attached the said property in execution of a money-decree obtained by her against one Muddun Mohun Karmokar, the plaintiff's nephew; that the plaintiff put forward a claim to the property under [872] s. 246 of Act VIII of 1859, which claim was dismissed on the 4th of May 1875, it not having been preferred in time; that the plaintiff thereupon, and in the same year, brought a regular suit for a declaration of his right to the property; that, pending that suit, Prem Bibi, in consequence of an arrangement entered into with her judgment-debtor, released the property from attachment; that thereupon the plaintiff withdrew his regular suit; that afterwards Prem Bibi executed her decree against the property and sold the same to one Bungshidhur Roy on the 2nd of July 1878, and he sold it to the present defendant Mukhoda Soondury Dasi.

In the fifth paragraph of the plaint the plaintiff said:—"The property above alluded to belongs to the plaintiff himself. As Muddun Mohun Karmokar was the son of a brother of the plaintiff, and as plaintiff's two other brothers lived in the same mess as members of the same joint family, they all lived

* Appeal from Appellate Decree, No. 1421 of 1880, against the decree of Baboo Menu Lall Chatterjee, Subordinate Judge of Moorsshedabad, dated the 28th May 1880, reversing the decree of Baboo Grish Chunder Chatterjee, Munsif of Berhampore, dated the 30th August 1879.

together in the house alluded to, that is all. The plaintiff did not give up his right or interest therein, nor did he make over any right to Muddun. The property was not liable to be sold for satisfaction of any debt of Muddun. As Prem Bibi caused the property to be sold, stating falsely that it belonged to Muddun Karmokar, neither the auction-purchaser, nor the defendant who claims the disputed property by virtue of a purchase made from the auction-purchaser, got any right, and the defendant had no right to keep the property in her possession." The plaint was filed on the 4th of April 1879.

The Court of First Instance held, that the suit was barred under s. 97 of Act VIII of 1859, corresponding to s. 373 of the New Civil Procedure Code, Act X of 1877. He also found that the property was, in fact, the property of Muddun Mohun Karmokar, and not that of the plaintiff. On appeal, the Subordinate Judge held, that the two suits were not for the same matter, as the causes of action were different—*Ram Chander Chowdhry v. Kashee Mohun* (21 W. R., 57), *Jardine Skinner v. Ranee Shama Soonduree Dabia* (13 W. R., 196), and *Watson v. Pokur Doss Paul* (4 W. R., 2);—and on the merits he held, that the plaintiff was entitled [873] to a share in the property sued for, the claim being, in his opinion, one for a share of the property as joint estate—*Watson v. Pokhur Doss Paul* (4 W. R., 2), *Lalla Prag Dutt v. Bandi Hossein* (7 B. L. R., 42; s.c., 15 W. R., 225), *Ram Coomur Singh v. Dewan Ram Jeelun Singh* (5 W. R., 165).

The defendant appealed to the High Court on the following grounds:—(i) that the lower Appellate Court ought to have held that the present suit was barred by s. 97 of Act VIII of 1859 and s. 373 of Act X of 1877; (ii) that the lower Appellate Court was wrong in giving the plaintiff a decree on a title different from that which he put forward in his plaint; (iii) that the plaintiff having claimed the property as one purchased by himself, the lower Appellate Court was wrong in giving him a decree on the ground of his being a member of a joint Hindu family.

Baboo *Troylokho Nath Mittra* for the Appellant.

Baboo *Mohney Mohun Roy* and Baboo *Saroda Churn Mitter* for the Respondent.

The **Judgment** of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

Prinsep, J.—The circumstances out of which this suit has arisen are as follows:—In 1874, one Prem Bibi obtained a money-decree against one Muddun Karmokar for Rs. 1,210; and, in execution of that decree, attached the property which is the subject of the present action. The plaintiff intervened under s. 246 of Act VIII of 1859, alleging that the house was his sole and exclusive property. This application was rejected. Subsequently, the plaintiff instituted a regular suit against Prem Bibi and another, to establish his exclusive title to the property; and, after the suit had been pending for some time, he withdrew it without obtaining permission of the Court to bring a second action for the same matter. After the suit had been withdrawn, the attachment fell through; but the property was re-attached and sold in execution of the same decree, and was purchased by the defendant on the 2nd July 1877. The [874] plaintiff did not appear to contest the second execution-proceedings after his suit had been withdrawn. On the 4th of April 1879, the plaintiff instituted the present suit against the purchaser to recover possession of the property, on the ground that it was his own separate property purchased by his own money. In the fifth para. of his plaint he said the property belonged to himself, and in the first he asserted that he had purchased it with his own

private money. It is, therefore, evident that, from the year 1875 up to the year 1879, the plaintiff continually asserted that this property was not joint property, but belonged to himself exclusively, and that no other member of his family had any interest in it.

In defence the purchaser said that the judgment-debtor of the former suit was the real owner of the property in dispute; that he and the plaintiff lived separately; and that the latter had no claim to the property. The Munsif dismissed the suit. He was of opinion that the plaintiff was not only barred from instituting a second suit on the ground that he had not obtained the sanction of the Court to its institution when he withdrew the former suit; but that he had no title to the property. On appeal the Subordinate Judge reversed the decision of the Munsif and gave plaintiff a decree for what he had never asked,—namely, a one-fourth share as a member of a joint and undivided Hindu family.

Before us several grounds have been raised. First, it has been contended that the present suit is barred by s. 97 of Act VIII of 1859 and s. 373 of Act X of 1877. We think that this contention is unsound. There is nothing on the record to show that the judgment-debtor was a party to the previous action. If he had been a party, the question would have assumed a different aspect, and it might have been fairly contended that the effect of that withdrawal would be to prevent any litigation between the plaintiff and the judgment-debtor in regard to the title to the property in dispute. But in the present case it cannot be shown that the judgment-debtor was a party, and it is impossible to hold that the present suit is barred.

Then it is said that the lower Court was wrong in giving plaintiff a decree on a title different from that which he put [875] forward in his plaint. The general rule is that any amendment allowed must be such as is either raised in the pleadings or is consistent with the case as originally laid, and that the state of facts and the equities and ground of relief originally alleged and pleaded by the plaintiff should not be departed from. This is the rule laid down by their Lordships of the Judicial Committee in the case of *Eshen Chunder Singh v. Shama Churn Bhutto* (11 Moore's I. A., 7), and this rule has been followed in numerous decisions of our Courts.

In the present suit, as we have already stated, plaintiff, from the very beginning of the dispute, asserted his exclusive right to the property. It is not a case where an amendment may be asked for on the ground that the matters connected with the suit were not known to him, but it is a case where plaintiff speaks exclusively from his own personal knowledge to the facts which go to constitute his cause of action. In our opinion the plaintiff should not have been allowed to have started a case which does not arise on the pleadings.

We accordingly set aside the decision of the lower Appellate Court and restore that of the first Court, dismissing plaintiff's suit with costs in this and in the lower Appellate Court.

Appeal allowed.

NOTES.

[See (1912) 15 Bom. L.R. 209, where it was held in an ejectment suit, the plaintiff could not abandon his own case and adopt that of the defendant and claim *relief* on that footing; see also 14 Cal. 801; 17 Cal. 444; (1899) L.B.R. (1893-1900) 518.]

[8 Cal. 875]
CRIMINAL REFERENCE.

The 6th May, 1882.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE O'KINEALY.

In the matter of the Petition of Ram Lall.

The Empress
versus
Ram Lall.*

District Magistrate, Power of—Reference to High Court—Order of Appellate Court—Jurisdiction—Criminal Procedure Code (Act X of 1872), ss. 295, 296, and 297.

A District Magistrate, being of opinion that the Sessions Judge had, on appeal, improperly set aside a conviction made by a Cantonment Magistrate, referred the matter to the High Court under s. 297 of the Code of Criminal Procedure.

Held, that the Magistrate had no power to make such a reference.

[876] IN this case Mr. Hastings, the Cantonment Magistrate of Dinapore, convicted Ram Lall of having poisoned a bullock, and sentenced him to two years' imprisonment under s. 429 of the Penal Code. The prisoner appealed, and on appeal the Sessions Judge held that the prisoner should have been convicted and sentenced under s. 428 of the Penal Code, and not under s. 429, and he reduced the imprisonment awarded to one year. Thereupon Mr. Hastings wrote to the Magistrate of Patna, giving his reasons for thinking that the Sessions Judge was wrong, and asking that the record of the case should be transmitted to the High Court for revision under s. 297 of the Code of Criminal Procedure. The Magistrate did so, and in his communication to the High Court, endorsed the opinion of the Cantonment Magistrate.

No one appeared on the reference.

The **Judgment** of the Court (PRINSEP and O'KINEALY, JJ.), was delivered by

Prinsep, J.—This reference has been made because the Cantonment Magistrate, who tried the case, and the District Magistrate, are of opinion that the Sessions Judge, as an Appellate Court, has improperly reduced the sentence passed.

The powers of the District Magistrate, in referring cases to this Court as a Court of Revision, are described in ss. 295, 299 of the Code of Criminal Procedure. Section 295 declares that the District Magistrate "may at all times call for and examine the record of any Court subordinate to him for the purpose of satisfying himself as to the legality of any sentence or order passed, and as to the regularity of the proceedings of such subordinate Court"; and s. 296 adds that, if

* Criminal Miscellaneous Reference, No. 9 of 1882, and letter No. 1066 C. Cases, from the order made by C. H. Vowell, Esq., Officiating Magistrate of Patna, dated the 26th April 1882.

the District Magistrate "is of opinion that the judgment or order is contrary to law, or that the punishment is too severe or inadequate, he may report the proceedings for the orders of the High Court." But s. 296 is controlled by s. 295, and it was certainly never intended that a subordinate Court should have the power of questioning the propriety of an order passed by a Court of Appeal, and should refer the order of an Appellate Court to the High Court [877] for revision, because it considers that the original sentence was a proper sentence and should not have been reduced. If this were possible, every order of this description would most probably come before the High Court on revision, and there would be no finality, such as the law contemplates, in the order of an Appellate Court. We, therefore, decline to interfere.

NOTES.

[For similar rulings, see 18 Cal. 186; 28 All. 91; 2 N. L. R. 149; 9 All. 362; 10 All. 146; 24 All. 346; 25 All. 128; 6 Bom. L. R. 1099; 9 Cr. L. J. 161; 1 Sind L.R. 40.]

[8 Cal. 877 : 41 C.L.R. 37]

APPELLATE CIVIL.

The 11th May, 1882.

PRESENT:

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

Nobo Gopal Sircar.....Plaintiff

versus

Srinath Bundopadhyas.....Defendant.*

Suit for arrears of rent— Payment of patni rent by darpatnidar to save patni from sale under Reg. VIII of 1819.

In a suit by the purchaser of a patni against a darpatnidar for arrears of rent of the year 1285 (1875), it appeared that before the plaintiff's purchase the darpatnidar had paid the amount of arrears of patni rent for the year 1281 (1877), in order to save the patni from being sold under Reg. VIII of 1819, and that the amount so paid considerably exceeded the darpatni rent due at the date of suit.

Held, that the defendant was entitled to deduct from the rent claimed the amount paid under the Regulation in excess of the darpatni rent due up to the end of 1284.

THIS was a suit for arrears of rent for the year 1285 (1878). It appeared that the plaintiff was the execution-purchaser of a patni mehal consisting of seven mouzas, and that the defendant was a darpatnidar of three of these mouzas for an annual jama of Rs. 1,840. The plaintiff's purchase was in Bysack 1285 (April 1878), and he sued the defendant for the rent due by him, including cesses and interest, for that year. Previous to the plaintiff's purchase, the zamindar had taken measures, under Reg. VIII of 1819, for the realization from the patnidar of the rents in arrear for the last half-year of 1284 (1877),

* Appeal from Appellate Decree, No. 1913 of 1880, against the decree of J. P. Grant, Esq., Judge of Hoogly, dated the 24th June 1880, affirming the decree of Baboo Sreenath Roy, Subordinate Judge of that district, dated the 23rd September 1879.

[878] amounting to Rs. 2,071; and in order to save the patni from sale under the Regulation, the defendant had paid these arrears. He applied to be put in possession of the patni tenure, but though the Collector made the order, it never had effect, and the defendant never had possession of the patni as a whole. The defendant contended that as the amount paid by him was a charge upon the mehal, the holder of the mehal could not recover rents from him until the amount so advanced should be fully recouped by the rents due by him, and that he was entitled to set off the amount paid by him under the Regulation against the amount claimed. Both the lower Courts admitted this contention, and the suit was dismissed.

The plaintiff appealed to the High Court.

Baboo *Uma Kali Mookerjee* for the Appellant.

Baboo *Rushbehary Ghose* and Baboo *Bondo Nath Dutt* for the Respondent.

The **Judgment** of the Court (McDONELL and FIELD, JJ.), was delivered by

Field, J.—The plaintiff in this case purchased, at a sale in execution of a common money-decree, the judgment-debtor's interest in a certain patni. The defendant holds a darpatni within this patni. Before the plaintiff's purchase, the patni was about to be brought to sale under Reg. VIII of 1819 for arrears of rent for the last half-year of 1284. The defendant, as darpatnidar, prevented the sale by paying the amount of arrears of the patni rent. This amount so paid considerably exceeded all the darpatni rent then due by the defendant to the patnidar. The present suit has been brought to recover the rent of 1285, and the defendant contends that he is entitled to deduct from the rent so claimed the amount so paid into Court by him under the Regulation in excess of the darpatni rent due up to the end of 1284.

Both the lower Courts have admitted this contention, and it is now argued before us that, having regard to the express language of cl. 4, s. 13 of Reg. VIII of 1819, "such deposit [879] shall not be carried to credit in, or set against, future demands for rent," the defendant is not entitled to deduct the amount, although he may pursue the remedy allowed by the clause of the Regulation, that is, treat the excess as a loan advanced upon mortgage, and apply to be put in possession of the patni tenure in order to recover the amount so advanced from the profits of such tenure.

It has been said that the defendant is seeking to 'set off' this amount against the plaintiff's claim for rent; and that the provisions of the Code of Civil Procedure as to 'set off' cannot apply. But it appears to us, that this, is not the proper way of looking at the matter, and that the principle of 'set off' has no application.

If we had to construe the language of the clause of the Regulation, we think that it is impossible to read the words "such deposit shall not be carried to credit in, or set against, future demands for rent" as standing alone, and intended as a prohibition merely. This construction would be repugnant to the intention of the whole section, which is clearly to enable undertenure-holders to protect their undertenures, and, when they do so by advancing money in excess of the rent due by themselves, to give them ample security for its recovery. The words must be read with the other words which follow—*viz.*, "but shall be considered as a loan made to the proprietor of the tenure preserved from sale by such means, etc." And the proper construction to be put upon the whole sentence is probably this, that, in respect of money advanced by the undertenure-holder in excess of the rent due by himself, his

remedy is enlarged to meet the exigency of the case. If he could merely deduct the amount from future rent, it might be very questionable if he could do this as against a person who purchased the patni at the following half-yearly sale, or who purchased at an execution-sale; but his security as against either of those purchasers is assured by giving him a lien on the patni and putting him in the position of a mortgagee.

Apart, however, from any construction to be put upon the mere language of the Regulation, we think that the Subordinate Judge has taken a very sensible view of the matter. [880] The darpatnidar did apply to be put in possession of the patni tenure. The Collector made an order that he should be put in possession, but he has not succeeded in obtaining possession of the whole portion. There can be no reasonable doubt that if he has not succeeded, the present plaintiff is the person who has prevented him from succeeding, and so far as regards the darpatni, for the rent of which the present suit is brought, we think that the defendant is under the circumstances entitled to say, as against the plaintiff, that he is in possession of the patni-right, which right substantially consists of the very rent claimed in this suit. *Qui prior est tempore, potior est jure*, who is prior in time is superior in right, is a maxim of equity: and we think that, inasmuch as the defendant, before the plaintiff's, purchase, was, by virtue of the provisions of the Regulation, in the position of a mortgagee entitled to possession for the purpose of realizing the amount advanced by him from the profits of the whole patni, the plaintiff cannot, as against him, enforce an assignment by operation of law without discharging an incumbrance created by law before such assignment.

Under these circumstances we think that the decisions of the Courts below are substantially correct, and that this appeal must be dismissed with costs.

Appeal dismissed.

[See also 13 Cal. 331.]

[8 Cal. 880—11 C.L.R. 190]

APPELLATE CIVIL.

The 15th May, 1882.

PRESENT :

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

In the matter of the Petition of Dintarini Dabi.

Dintarini Dabi

versus

Doiho Chunder Roy.*

Revocation of Probate—Procedure—Succession Act (X of 1865), s. 234—Onus Probandi.

Upon a petition under s. 234 of the Succession Act, praying that the probate of a will alleged to have been made by the petitioner's husband should be revoked upon the grounds that no citation was duly published, that the petitioner was a minor, living under the care of the person to whom probate had been granted, and had no opportunity of understanding his

* Appeal from Original Decree, No. 96 of 1881, against the decree of F. W. V. Peterson, Esq., Judge of Jessore, dated the 27th of January 1881.

mala fides and improper acts, and that the will was a forgery, the District Judge [881] held, that the burden of proof in respect of the whole case was on the petitioner, and dismissed her petition.

Held, that the District Judge ought to have given the petitioner an opportunity of proving that she had no knowledge of the previous proceedings. If satisfied that she had no such knowledge, then he should have ordered a new trial as to the *factum* of the will, when the person propounding it would have to prove it in the ordinary way.

Baboo Anurendro Nath Chatterjee for the Appellant.

Baboo Rush Behury Ghose and Baboo Golup Chunder Sircar for the Respondent.

THE facts of this case sufficiently appear from the **Judgment** of the Court (MCDONELL and FIELD, JJ.), which was delivered by

Field, J.—This was an application under s. 234 of the Indian Succession Act X of 1865, for revocation of probate of a will granted on the 8th December 1876. The will purports to have been executed by Rojoni Kant Roy Chowdhry, the late husband of the petitioner, Dintarini Dabi. Jogesh Chunder Roy Chowdhry, the brother of Rojoni Kant, obtained probate of the will, and himself died a few years afterwards. He executed a will before his death, and one Doibo Chunder Roy obtained probate of that will. The present petitioner, Dintarini, subsequently applied for a certificate under Act XXVII of 1860, and was opposed by Doibo Roy, who, as executor of Jogesh Chunder Roy, relied upon the grant of probate of Rojoni Kant's will which Jogesh Chunder had obtained. The present petitioner alleges that it was on this occasion that she first became aware of the alleged existence of the will said to have been executed by her late husband; and she thereupon made an application to the District Judge, asking that the grant of probate be revoked on the following grounds:—*First*, that no citation was duly published; *secondly*, that she was, at the time of her husband's death, a minor, living under the care of Jogesh Chunder, and so had no opportunity of understanding his *mala fides* and improper acts; and, *thirdly*, that the will was spurious and forged.

[882] The former District Judge, Mr. Brett, having examined two witnesses, made an order that Doibo Roy should prove the will. The case then came before Mr. Peterson, who seems to have been of opinion that the burden of proof in respect of the whole case was upon the petitioner Dintarini.

Now, it is contended before us that the District Judge, Mr. Peterson, is in error in laying the burden of proof upon the petitioner, and so calling upon her to prove that the will is a forgery; and an argument has been addressed to us as to the rule which should be observed with respect to the burden of proof in a case of this nature. We do not propose to lay down any general rule, but we shall deal with this case upon its own merits.

The Code of Civil Procedure is expressly made applicable to contentious probate cases. By virtue of the provisions of s. 647, the same Code is to be followed, as far as it can be made applicable, in all proceedings in all Courts of civil jurisdiction other than suits and appeals. The Code must, therefore, so far as it can be made applicable, govern non-contentious cases also. Now, according to the Code, if an *ex parte* decree or order is made in any proceeding pending in Court, and if the person against whom such *ex parte* decree or order has been made comes into Court and asserts that he had no notice of the proceedings, and was, therefore, unable to appear and answer, the ordinary course is that such defendant is called upon in the first place to satisfy the Court by giving *prima facie* evidence that he had no notice of the proceedings.

The other party is then allowed an opportunity of rebutting this evidence ; and if, after hearing both sides, the Court is satisfied that the defendant really had no notice of the proceedings, the case is re-opened, there is a new trial, and at such new trial the burden of proving the issue in the cause is governed by the ordinary rule. It appears to us that this course of procedure ought to be followed in the present case. If the petitioner is able to satisfy the District Judge that she had no notice or knowledge of the previous proceedings, the proper order to make will then be that there be a new trial as to the *factum* of the will, and upon such new trial, the burden of proving the *factum* of the will under the ordinary rule, will lie upon the person who propounded it.

[883] We think, therefore, that the proper course in the present case is to set aside the order of the District Judge and to remand the case with the following instructions :—The District Judge will first give the petitioner an opportunity of proving that she had no notice or knowledge of the previous proceedings, and if she can give *prima facie* evidence of this, either by her own testimony or otherwise, the representative of the person who propounded that will, will be allowed to rebut that evidence. The District Judge must bear in mind the petitioner's allegation that she was a minor at the time of the previous proceedings and will consider how far the citation which was issued was sufficient to give her notice of these proceedings. If, upon the whole evidence, he is satisfied that the petitioner really had no notice of the previous proceedings, the case will then follow the course already indicated, and there will be a new trial as to the *factum* of the will, and on that new trial, the party who now represents the person who propounded the will, will have to prove it in the ordinary way. The costs of this Court and of the Court below will follow the result of the remand.

Case remanded.

NOTES.

[But the mere absence of special citation is insufficient : 18 Cal., 40 ; see also (1902) P. L. R. 2 as to claims adversely to the will ; Notes to 8 Cal., 570 *supra*.]

[8 Cal. 883 : 11 C.L.R. 235]
CRIMINAL REFERENCE.

The 15th May, 1882.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE O'KINEALY.

In the Matter of the Petition of Issur Chunder Nath.

Issur Chunder Nath
versus
Kali Churn Nath and another.*

District Magistrate, Power of—Withdrawal of case—Code of Criminal Procedure (Act X of 1872), s. 521.

Where a Magistrate, in a proceeding under s. 521 of the Code of Criminal Procedure, satisfies himself that there is no necessity for proceeding further under that section, he is competent to let the matter drop.

In re Shonai Paramanick (1 C. L. R., 486) followed.

IN this case the terms of the reference were as follows:—"A complaint was laid before the Magistrate that one Kali Churn Nath and others had closed a public road used by men and [884] cattle. After taking a report from the police, the Magistrate issued an order to the accused to open the road, or show cause to the contrary under s. 521, Criminal Procedure. Kali Churn appeared and showed cause on the 24th March, and three days later Ramananda Adhikari, who was one of those against whom notice had issued, appeared and claimed a jury under s. 523. These two persons' interests appeared to be opposed. They made contradictory allegations, each charging the other with obstructing the road. On the 31st March the Magistrate appointed a jury, but on a petition made next day by Kali Churn, he cancelled the order, as he considered the case was not one for the application of the provisions of s. 521, the two defendants having conflicting interests; and he therefore referred the complainant to the Civil Court. Kali Churn's objection is, that the matter has been already decided in his favour by a decree of the Munsif's Court, which would show that the road was not a public one. The decree is one under s. 9 of Act I of 1877. I think the order for a jury ought to have been allowed to stand, because it would have been for the jurors to decide how far Kali Churn was protected by his decree. If things are allowed to remain as they are, complainant will have no remedy, for a civil suit will not lie for obstruction to a public road. Besides, I do not think the contradictory allegations of the opposite party can affect complainant's position. If the jury decides in his favour, he can force either or both of them, if necessary, to remove the obstruction. For the above reasons, I think the order cancelling the order for a jury should be set aside, and the jury directed to proceed with their deliberation."

No one appeared on the reference.

The **Judgment** of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

* Criminal Reference, No. 99 of 1882, and letter No. 314N., from the order made by R. Towers, Esq., Sessions Judge of Tipperah, dated the 5th May 1882.

Prinsep, J.—We see no reason to interfere. We agree with the judgment of another Division Court in the case of *Shonai Paramanick* (1 C. L. R., 486), that the Magistrate having satisfied himself (as in the case now before us) that there was no cause for acting under s. 521, was at liberty to let the matter drop.

[885] APPELLATE CIVIL.

The 18th May, 1882.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE BOSE.

Protap Chunder Banerjee and others.....Plaintiffs

versus

Krishto Kishore Shaha and others.....Defendants.*

Plaint, Verification of—Allegation of fraud—Practice.

In a case where the plaintiffs set up gross fraud, and where the case depends mainly upon the personal knowledge of the plaintiffs, it is imperative on the plaintiffs, or one of them, to verify the plaint.

THIS was a suit to set aside a sale in execution of a decree, duly confirmed under s. 257 of Act VIII of 1859.

The plaintiffs stated that they, with the defendants Nos. 5, 6, and 7, were joint owners of 107 bigas of land, paying an annual sadar jama of Rs. 21-10; that, in 1875, defendant No. 1 brought a suit for contribution of rent against the plaintiffs and others, and obtained a decree against them, without the knowledge and in the absence of the plaintiffs; and that, in execution of his decree, the right, title, and interest of the plaintiffs in this land was put up for sale, and was purchased by defendant No. 2 on the 19th November 1877; but that no attachment was ever taken out, nor was the proclamation of sale duly made. Defendant No. 2, on becoming the purchaser, sold to defendant No. 3.

They further stated that they knew nothing about the original suit instituted by defendant No. 1, and had not been served with parwanas in connection with the execution of the decree. They therefore brought this suit to set aside the sale, making defendants Nos. 4, 5, 6, and 7 *pro forma* defendants.

The defendants alleged that the plaintiffs had been summoned in due form; and that the property was sold after attachment and notification of sale had been duly issued; and that the objection should have been taken in the execution-proceedings.

[886] The Munsif found that the plaintiffs had been served with summonses in the original suit; and that, as the plaintiffs had been unable to

* Appeal from Appellate Decree, No. 1287 of 1880, against the decree of T. T. Allen, Esq., Judge of Rajshahye, dated the 14th April 1880, affirming the decree of Baboo Probode Chunder Dutt, Munsif of Natore, dated the 31st December 1879.

make out that fraud had been practised upon them in the original suit, or in the execution of the decree, they were not entitled to relief in the suit, and therefore dismissed it with costs.

The plaintiffs appealed to the District Judge, who held, that the plaintiff's case rested solely on an allegation of fraud, and that they had entirely failed to make out fraud; and that they, moreover, had not themselves signed and verified their plaint, but had left this to a person styling himself 'their agent'; that the most that the plaint could be taken to allege was irregularity in the proceedings preliminary to the sale, and that such irregularities could not support a suit to set aside a sale once confirmed, especially when the property had passed into the hands of third parties; and further finding that the purchaser at the sale had purchased *bona fide* and for value, dismissed the appeal.

The plaintiffs appealed to the High Court.

Bahoo Ishur Chunder Chuckerbutty for the Appellants.

Bahoo Mohiney Mohun Roy for the Respondents.

The **Judgment** of the Court (GARTH, C.J., and BOSE, J.) was delivered by

Garth, C.J.—We think that this appeal must be dismissed. The plaintiffs, in order to establish their case, were bound to prove that the irregularities mentioned in the plaint had been committed with a view to defraud them. Those irregularities might have been as well the result of mistake as of fraud. It was necessary, therefore, for the plaintiffs to prove the fraud, and fraud has been negatived by both the lower Courts. They also find that the purchaser at the sale was a *bona fide* purchaser for value.

The Judge's decision, therefore, was quite right.

We also entirely agree with what he says at the commencement of his judgment, and as that is a matter which concerns [887] Civil Courts generally, we think it right to add a few words upon the subject.

The suit was brought to set aside a sale in execution of a decree, upon the ground that the land, the subject of the sale, was in part the plaintiff's property. Their case was, that they had been fraudulently and collusively kept in ignorance of the proceedings in the suit and of the execution and sale which followed, and that all the defendants were either parties or privies to the fraud. In fact, if the plaintiffs were right, the fraud that was practised upon them was undoubtedly a very gross one.

Now, this is precisely the sort of case in which the plaintiffs should have been required, in the absence of some very good reason to the contrary, to verify the plaint themselves; one of them, at any rate, should have done so. Instead of this the plaint was not even verified by a pleader or authorized mooktear. It professes to be verified by a person who calls himself "an agent of the plaintiffs," but who acts apparently without any mooktear-nama, and who, according to the finding of the Judge, was an entire stranger.

This certainly ought not to have been allowed by the Munsif. In a case where the plaintiffs set up a gross fraud of this kind, and where the case depends mainly, as the Judge considers that it did, upon the personal knowledge of the plaintiffs, it was only right that the plaintiffs, or one of them, should have been required to verify the plaint.

The appeal will be dismissed with costs.

Appeal dismissed.

[8 Cal. 887]

ORIGINAL CIVIL.

The 23rd May, 1882.

PRESENT :

MR. JUSTICE CUNNINGHAM.

Golam Yassein

versus

The Official Trustee of Bengal.

Revocation of trusts—Voluntary settlement.

A, being at the time unmarried, executed a voluntary settlement, by which he created trusts for himself for life, and after his death for his issue and widows (if any) with ultimate trusts over. The deed contained a provision [888] empowering A at any time, with the consent of the trustee, to revoke the trusts, and to declare any new or other trusts. A subsequently married, and, after his marriage, executed a deed of revocation, declaring that the trust-property should be held for himself absolutely. The trustee refused to hand over the trust-property, and A thereupon instituted a suit to have the trust set aside. His wife was a minor and there was no issue of the marriage.

Held that, although there might be cases in which, where no other person but the settlor was interested, the deed might be regarded as a mere direction as to the manner in which the settlor's property should be applied for his benefit, and as such revocable by the settlor, yet that, in the present case, there being an infant beneficiary, the deed could not be revoked.

By an indenture, dated the 18th of September 1880, Shahabzadah Golam Yassein declared that the Official Trustee of Bengal should hold a sum of Rs. 6,000 upon trust to pay the interest to the settlor for his life, or until certain specified events should happen; and it was provided that, after the death of the settlor having issue, the Official Trustee should hold the trust-fund upon trust for the widow or widows and for the lawful lineal descendant of the settlor according to certain shares with ultimate trusts over in default of issue.

The deed also contained a provision that it should be lawful for the settlor at any time, with the consent of the Official Trustee, by deed, to revoke all or any of the trusts declared, and to declare any new or other trusts, and that the Official Trustee should be at liberty to give or withhold his consent to any such revocation or new appointment at his absolute discretion without being answerable or called upon to answer for the exercise of such discretion.

At the date of the execution of the deed, the settlor was unmarried; but in the month of August 1881 he married the defendant, Shahabzadah Kumroonnissa Begum; on the 20th of February 1882 the settlor executed a deed of revocation, by which he directed that the trust-fund should remain and be for the sole and absolute benefit of himself and should forthwith be paid over to him by the Official Trustee. The Official Trustee, however, declined to part with the trust-fund except under the direction of the Court.

The settlor now instituted a suit against the Official Trustee and Shahabzadah Kumroonnissa Begum, to have it declared that [889] the deed of the 18th September 1880 was invalid and inoperative in law and void; and for an order that the Official Trustee should pay over the trust-fund to him, alleging that he was induced to execute the deed by the influence of certain

relatives, and that it was executed without due consideration. He also alleged that a recital in the deed, that he was not indebted at the time when it was executed, was false.

The plaintiff's wife was at the time of the institution of the suit a minor, and there was no issue of the marriage.

Mr. *Bonnerjee* and Mr. *Ameer Ali* for the Plaintiff.

Mr. *Handley* and Mr. *Dunne* for the Defendant, the Official Trustee.

Mr. *Souttar* for the Defendant, *Shahabzadah Kumroonissa Begum*.

Mr. *Bonnerjee* referred to *Kanje Dass Byrgee v. Rangopal Ghose* (16 S. D. A., 23) and *Ellison v. Ellison* (6 Ves., 656).

Mr. *Handley* referred to *Bill v. Cureton* (2 M. and K., 503) and *Phillips v. Mullings* (L. R., 7 Ch., 214) and 21 Geo. III, c. 70, s. 7.

Mr. *Ameer Ali* in reply.

Cunningham, J.—In this case the plaintiff sues the Official Trustee to have it declared that a deed of settlement executed on the 18th September 1880, is invalid and void; and that the plaintiff is entitled to require the Official Trustee to make over to him Rs. 6,000, which, under the deed, have been placed in the hands of the Official Trustee.

The deed provided that the Official Trustee should, subject to certain conditions, pay the interest of the Rs. 6,000 to plaintiff for life, and after plaintiff's death, provided he should have lawful issue, the trust-fund should be for his widow or widows and lawful lineal descendants, as specified: and if there should be no lawful issue, then, after deducting the widow's share, for brothers, sisters and others.

[890] There is a power of revocation with the consent of the Official Trustee.

The plaintiff married in August 1881: his wife is an infant. Her guardian remains neutral in the suit: the Official Trustee declines to give his assent except subject to the orders of the Court. The plaintiff alleges that the statement in the deed that he was at the date thereof in no way indebted was false.

The Official Trustee was, in my opinion, right, and exercised a wise discretion in refusing his assent to the revocation of this deed.

The plaintiff is now seeking to put the Court in motion on the grounds—1st, that a deed which he deliberately executed was void under his personal law; and 2nd, that one of its principal recitals was untrue.

If I considered, which I do not, that there is anything in 21 Geo. III., c. 70, s. 17, or any other law now in force, to warrant the assertion that a Mahomedan cannot legally create a trust such as the present, I should still regard the present plaintiff as precluded from urging that ground for setting aside his own act, nor of course can the plaintiff rely on the untruthfulness of his recital as a ground of relief against his own deed.

There may be cases in which, as in the case of *Kanje Dass Byrgee v. Rangopal Ghose* (16 S. D. A., 23), since no other person but the settlor is interested, the deed may be regarded as a mere direction as to the mode in which the settlor's property should be applied for his benefit, and as such revocable by the settlor. Any question of this sort is, however, removed in the present instance by the existence of an infant beneficiary, which brings the case clearly within the rule laid down in *Bill v. Cureton* (2 M. and K., 503) and the other authorities.

The suit must be dismissed with one set of costs for the Official Trustee. No costs for the guardians of the minor.

Suit dismissed.

NOTES.

[REVOCAION OF TRUSTS—

See also (1889) P. R. 133; (1895) U. B. R. (1892-96), vol. II, 645 (648).]

[11 C. L. R. 357]

[891] CRIMINAL MOTION.

The 23rd May, 1882.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE O'KINEALY.

In the matter of the High Courts' Criminal Procedure Act (X of 1875).

and

In the matter of the Petition of J. Wood.

J. Wood

versus

The Corporation for the Town of Calcutta.*

Calcutta Municipal Consolidation Act (Beng. Act IV of 1876), s. 77—License—Assessment—Fine—Boardinghouse-keeper.

In order to obtain a conviction under s. 77, Beng. Act IV of 1876, for keeping a boarding-house without taking out a license, it must be shown that the accused held himself out to the public as one whose business or profession it is to receive boarders for profit.

In order to pass a proper sentence of fine under s. 77, Beng. Act IV of 1876, evidence should be given of the amount of assessment on the accused's house or place of business, and of the amount payable on account of the license which the accused should have taken out.

THE judgment of the Honorary Magistrate in this case was, as far as material, as follows :—

“ In this case Mr. J. Wood is charged by the Corporation of Calcutta for keeping a boarding-house at No. 5, Wood Street, without having taken out a license as required by s. 75, Beng. Act IV of 1876. This case has occupied the attention of the Court for some days; nearly all the facts of this case have been denied. I think that, in cases of this nature, the Municipality should provide the prosecuting officer with legal assistance which would save a deal of time and trouble. A License Inspector can hardly be expected to understand law, and to examine and cross-examine witnesses in a contested case such as this. The case, however, seems to me not to be one of much difficulty. The charge is, as I have already [892] stated, for keeping a boarding-house without having taken out a license, the keeping of a boarding-house being a trade within the meaning of the Act for which it is compulsory to take out a license. No attempt has been made before me to give any legal definition of the term ‘the keeping of a boarding-house,’ and it has not been attempted to be denied, that persons other than members of the defendant's family did lodge and board in his house; but it is contended that they were personal friends :

* Criminal Motion, No. 112 of 1882, against the order of H. M. Rustomjee, Esq., Honorary Magistrate of Calcutta, dated the 1st April 1882.

that no strangers were taken in ; and that the monthly sums they paid to the defendant were only their shares of the monthly expenses. A good deal has been said about a board having been hung up outside the house with the words ' Rooms to let ' on it, although the fact of a board with these words upon it would in no way go to prove that the owner or occupier of the house kept a boarding-house ; still in the present case it would go some way to disprove the evidence that all defendant's lodgers were his personal friends, for he would hardly invite his friends to lodge with him in so public a manner. I do not, however, lay much stress on this fact, for several of the bills put in clearly show that the defendant did keep a boarding-house, as they are expressly stated to be for ' board and lodging.' The witness Mr. Brown states that he shared expenses with the defendant, but he also admits having paid Rs. 90 a month during the months he stayed at defendant's house. The witness Mr. Rymer says, that he shared the expenses and paid Rs. 70 a month ; he also, on being questioned by the Court, says, that he paid Mrs. Sandeman, who kept a boarding-house in Lindsay Street, Rs. 80 a month for a room upstairs, and Rs. 70 for one in the lower floor. Mr. Burroughs, a witness for the defence, stated, that he frequently visited the defendant at his house last year—two or three times a month. He did not know to his knowledge that Mr. Wood had friends living with him, while it has been admitted that Mr. Wood had friends staying with him. Mr. Burroughs says he knew the defendant for thirty-five years, and was on visiting terms. He went to defendant two or three times a month last year, and yet he says that he had no friends boarding and lodging with him to his knowledge. The defendant in his statement to the Court says that he kept no regular accounts, but charged the friends living with him so much as their share of expenses, but it seems strange that such monthly expenses did not vary. The witnesses Brown and Rymer, it may be presumed, are men of business, and if the arrangement was that they were to share the expenses of the house, it is unlikely that they would have accepted the defendant's estimate of their share of the expenses without making some enquiry as to how such a share was arrived at. It has not been shown to the Court what the defendant is doing. Taking all the circumstances of this case into consideration, I hold that the defendant did keep a boarding-house during the year 1881 without having taken out a license as required by s. 75, Beng. Act IV of 1876, and I [893] convict him under s. 77 of the said Act, and sentence him to a fine of Rs. 75. The unstamped bills to be impounded and sent to the Collector of Stamps."

The defendant applied for, and obtained in the High Court, a rule to show cause why the conviction should not be set aside and the fine refunded.

The Advocate-General, Offg. (Mr. Phillips) showed cause against the rule.

Mr. Mitra in support of the rule.—I understand the learned *Advocate-General* is going to question the jurisdiction of this Court under s. 147 of Act X of 1875 over Justices of the Peace. [*The Advocate-General*.—I don't contend that.] The prosecution is under Beng. Act IV of 1876, s. 75, which requires every person exercising certain trades, etc., specified in the third schedule of the Act to take out a license ; the third schedule gives three classes under which such persons may be assessed, and before a person can be called upon to take out a license, the class to which he shall belong must, under s. 78, be previously determined either by the Chairman or by some one authorised by him for that purpose. Now in this case there is no evidence to show that Mr. Wood was assessed at all, nor is there any evidence to show that information of such assessment was given to him as required by s. 99 of Beng. Act IV

and s. 10 of Beng. Act VI of 1881. Moreover, a person cannot be fined under s. 77 as amended by s. 9 of Act VI of 1881, unless and until the requirement of ss. 78 and 79 have been fulfilled; because, under s. 77, the penalty for not taking out a license is not to exceed three times the amount payable by the licensee. Therefore, the amount payable by the licensee not having been fixed, the Magistrate could not impose any fine under s. 77 of the Act.

[Mr. *Mitra* was going into the evidence to show that no case has been made out against Mr. Wood, when the Court called upon the *Advocate-General* to show how there could be any prosecution and fine without having the amount payable for the license previously ascertained.]

Cur. ad. vult.

[894] The **Judgment** of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

Prinsep, J.—The petitioner Wood has been convicted under s. 77, Beng. Act IV of 1876 (the Calcutta Municipal Consolidation Act) of having, during 1881, exercised the profession of boardinghouse-keeper without the license required by s. 75, and has been fined Rs. 75.

Several questions have been raised before us on the merits of the case, and of these the most important is, whether or not petitioner Wood keeps a boarding-house within the meaning of the Act. The term 'boarding-house' is not defined in the law. Looking, however, at the manner in which it is used in Calcutta, we think that, in order to obtain a conviction, it must be shown that the accused held himself out to the public as one whose business or profession it is to receive boarders for profit. In the present case there is evidence on the record sufficient to justify the finding of the lower Court, that the petitioner Wood kept a boarding-house. Nevertheless the sentence of fine cannot be upheld. The law (s. 77) limits the fine in such a case to three times the amount payable in respect of the license which has not been taken out. There is absolutely no evidence on the record to show what is the amount payable on account of the petitioner's license, nor is there any evidence regarding the amount of assessment on petitioner's house or place of business on which any calculation of the amount payable on account of such business could be made.

Under such circumstances, we set aside the order passed, and direct that the fine, if paid, be refunded. We altogether agree with the remarks of the Magistrate regarding the result of such prosecution being left in the hands of an inexperienced Municipal officer. Much valuable time has been wasted in this Court on arguments arising from irregularities and omissions which would not have taken place if the prosecution had been properly conducted; and we consider that the employment of the *Advocate-General* in this Court to defend the conviction would in all probability have been avoided, if some legal practitioner, even of the lowest grade, had been retained to appear before the Magistrate.

Rule absolute.

NOTES.

[See the explanation of this case in (1883) 10 Cal. 194.]

[895] CRIMINAL REFERENCE.

The 30th May, 1882.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE O'KINEALY.

In re The Municipal Committee of Dacca

versus

Hingoo Raj.*

High Court, Power of, as a Court of Revision—Order of acquittal—Criminal Procedure Code (Act X of 1882), s. 296

The High Court, as a Court of Revision, will not interfere with an order of acquittal.

IN this case it appeared that the accused Hingoo Raj had applied to the Municipal authorities of Dacca for permission to make an excavation, and permission was refused; but, notwithstanding that, Hingoo Raj proceeded to make the excavation. For this he was charged before a Bench of Honorary Magistrates of Dacca; but he was acquitted, as it did not appear to the Magistrates why permission to make the excavation had been refused. The Magistrate of Dacca referred the matter to the High Court under s. 296 of the Code of Criminal Procedure.

No one appeared on the reference.

The **Judgment** of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

Prinsep, J.—It is a rule of this Court that, as a Court of Revision, it cannot interfere with an order of acquittal.

Let the papers be returned.

NOTES.

[See the Criminal Procedure Code, 1898, sec. 439 (4); also 9 All. 134; 14 Mad. 363; (1883) P. R. 41; (1900) P. R. 23; (1901) P. R. 34; (1901) U. B. R. (1897-1901), Vol. I, 91 (99); (1893) L. B. R. (1893-1900) 41.]

* Criminal Reference, No. 107 of 1882, and letter No. 1360, from the order made by E. V. Westmacott, Esq., Officiating Magistrate of Dacca, dated the 17th May 1882.

[896] ORIGINAL CRIMINAL.

The 28th June, 1882.

PRESENT :

MR. JUSTICE WILSON.

The Empress

versus

R. P. Counsell.

Witness, Examination of Commission in criminal case—High Court's Criminal Procedure Act (X of 1875), s. 76.

The High Court refused to issue a commission in a criminal case, on the ground that such a course would be unsatisfactory and dangerous to the interests of the prisoner.

IN this case an application, on petition, was made by Mrs. Dunne, a resident of Darjeeling, one of the witnesses for the prosecution, that she might be excused from attending the Court as a witness, and that the evidence should be taken by Commission on interrogatories. The accused had been committed by the Deputy Commissioner of Darjeeling to take his trial at the June Sessions of the High Court on a charge of criminal breach of trust as a public servant.

Mrs. Dunne's petition and affidavit in support of the application stated, that she was sixty-three years of age, and for the last thirty-two years had not been to the plains ; that she was examined as a witness on behalf of the Crown before the Deputy Commissioner ; and that she was suffering from congestion of the liver, and was advised by her medical attendant that her present state of health was such that it would be unsafe for her, and dangerous to her life, to go to Calcutta for the purpose of being examined as a witness or for any other purpose.

The affidavit of Dr. Joubert, Civil Surgeon of Darjeeling, stated, that Mrs. Dunne had been, and was, under his treatment for congestion of the liver ; and that, considering her age and state of health, it would be inadvisable, if not dangerous, for her to go to Calcutta at this time of year for examination as a witness.

The affidavit of Mr. Hume, Solicitor, conducting the prosecution, stated, that Mrs. Dunne was a material witness for the [897] Crown, and that without her evidence it would not be safe for the Crown to proceed to a hearing of the case.

The Officiating Standing Counsel (Mr. W. C. Bonnerjee, with him Mr. J. G. Apcar) for the Crown submitted, that the petition and affidavits showed sufficient ground for the issue of a commission to examine the witness, Mrs. Dunne, under s. 76 of Act X of 1875, the High Courts' Criminal Procedure Act.

Mr. M. P. Gasper for the prisoner opposed the application, and contended that s. 76 had no application to a case like this, inasmuch as it did not provide for inconvenience to a witness subpoenaed to attend ; that the illness alleged was not sufficient to cause inability in the witness to attend the High Court ; and that to cross-examine her on commission by interrogatories would

be a most unsatisfactory mode of proceeding and prejudicial to the interests of the prisoner. In the interests of the prisoner the witnesses ought to be before the Court and jury for cross-examination in a criminal case.

Wilson, J., refused the application, saying that, in a criminal case, the issue of a commission would be a most unsatisfactory course of proceeding, and one dangerous to the interests of the prisoner.

Application refused.

Attorney for the Crown : The Government Solicitor (Mr. Upton).

Attorney for the Prisoner : Mr. H. C. Chick.

NOTES.

[See also (1902) 15 C. P. L. R. 66 (69).]

[10 C.L.R. 508 7 Ind. Jur. 79]

[898] APPELLATE CIVIL.

The 22nd December, 1881.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Umbica Prosad Tewary and others.....Plaintiffs

versus

Ram Sahay Lall and others.....Defendants."

*Hindu Law—Mitakshara Law—Sale of joint family-property—Debts
legally contracted by father.*

There is no foundation either in the Mitakshara law itself, or in any decisions passed by the Judicial Committee, for the broad proposition that in all cases under a sale in execution of a money-decree against the father in a joint family, consisting of a father and sons, whether adults or minors, nothing but the father's share passes.

The result of an examination of the leading cases on the subject is, that in each such case, the question as to what was sold in execution must be first determined (the mere circumstance that a decree was obtained against the father alone is not conclusive upon the point); and it should further be enquired whether the father was sued in his representative capacity or not, and if not so sued, then whether the sons are entitled to set aside the sale *qua* their shares.

The decision of the Privy Council in *Deen Dayal Lall v. Jugdeep Narain Singh* (L. R., 4 I. A., 247; S. C., 1 L.R., 3 Cal., 198) in no way conflicts with the principle laid down in the case of *Muddun Thakoor v. Kanto Lall* (L. R., 1 I. A., 321; S. C., 14 B. L. R., 187).

IN this case the plaintiffs stated that defendant No. 6, the father of the plaintiffs Nos. 1 and 2, and grandfather of plaintiff No. 3, were members of a joint Hindu family governed by the Mitakshara law; that defendant No. 6 had, without legal necessity, contracted a personal debt to one Mussamut Tetra, who sued him alone and obtained a money-decree against him, and in execution of this decree put up for sale the judgment-debtor's share in four annas of the property belonging to the joint family, which was purchased by defendants Nos. 1 and 2, 4 and 5, who entered into possession.

* Appeal from Original Decree No. 115 of 1880, against the decree of Baboo Aubinash Chunder Mitter, Additional Subordinate Judge of Patna, dated the 23rd of February 1880.

[899] The plaintiffs, thereupon, brought this suit to recover possession of a three-anna share in the four annas share sold. The auction-purchasers contended that the debt was contracted for legal purposes; that the whole four annas share, and not the judgment-debtor's share only, was sold at the sale, and that they were *bona fide* purchasers for value without notice. The decree-holder was made a defendant, but did not appear.

The Subordinate Judge found that the debt had not been contracted for immoral purposes; that the property was ancestral; that the father had been sued in his representative capacity; and that the entire four annas passed at the sale, the defendants being *bona fide* purchasers for value without notice; and that, on the authority of *Suraj Bunssee Koer v. Sheopershad Singh* (L. R., 6 I. A., 88; 1 L. R., 5 Cal., 148), the plaintiffs were bound to pay their father's debts legally contracted, and could not claim to recover their shares from the auction-purchasers, who were not bound to go back beyond the decree; and on these findings dismissed the suit.

The plaintiffs appealed to the High Court.

Mr. R. E. Twidale and Baboo Roghunath Pershad Singh for the Appellants.

Baboo Chunder Mudhub Ghose and Baboo Rajendra Nath Bose for the Respondents.

The **Judgment** of the Court (MITTER and MACLEAN, JJ.), was delivered by

Mitter, J.—This appeal arises out of a suit instituted by Umbica Prosad and Sungthadin Tewary, sons of Thakoordeen Tewary, and Adiadin Tewary, grandson of the said Thakoordeen Tewary by a deceased son, to recover possession of a three annas share of Mouza Chuck Nyamut, out of the four annas share of the mouza, which constituted the joint family-property of these plaintiffs and Thakoordeen Tewary. The sixteen annas of Mouza Chuck Nyamut was registered in the Collector's Register as Estate No. 66. It is alleged in the plaint that a decree was obtained against Thakoordeen for money by Mussa-[900]mut Tetra and others, and in execution of that decree only Thakoordeen's share in the family-property was sold on the 16th April 1877, and it was purchased by the defendants, who are the respondents before us. Then it is further alleged that, although only the interest of Thakoordeen was sold, the purchasers, the defendants—respondents in this case—under that purchase, succeeded in obtaining delivery of possession through the Court of the entire family-property, *viz.*, a four-annas share of the aforesaid mouza, and thus dispossessed the plaintiffs, on the 27th of July 1877, of their share. The plaintiffs, therefore, brought this suit to recover possession of that share, *viz.*, three annas, which, on partition of the entire family-property, would fall to them. The plaint was registered on the 28th August 1879. The defendants, respondents, in answer to this suit, alleged that the entire four-annas of the mouza in dispute was the self-acquired property of Thakoordeen, although it was purchased in the benance of his father Jagadin Tewary. They further alleged in their written statement that Thakoordeen, who, being the father of the plaintiffs Nos. 1 and 2, and grand-father of the plaintiff No. 3, was naturally the manager of the joint family-property, had an aurutdaree business, which was conducted for the benefit of the joint family; that, in the course of dealing regarding that business, he having become indebted to Mussamut Tetra and others, a suit was brought against him and a money-decree was obtained. It is also alleged that the sons, who were adults, and especially Umbica Prosad Tewary, the plaintiff No. 1, took an active part in the management of the aurutdaree business, of which, it is stated, he was the cashier. The defendants

further alleged that the whole of the family-property was sold and purchased by them. They contend that, being *bonâ fide* purchasers for value of the whole of the family-property which was advertised to be sold in execution of a decree against the father Thakoordeen, they were entitled to take possession of the whole of the said family-property, which they did without any objection.

The lower Court has held upon the evidence adduced by the parties that the entire family-property passed by this auction-sale, and accordingly dismissed the plaintiffs' suit.

[901] The lower Court mainly relies upon the Privy Council decisions in the cases of *Muddun Thakoor v. Kanto Lall* (L. R., 1 I. A., 321; s. c., 14 B. L. R., 187), and *Suraj Bunssee Koer v. Sheopershad Singh* (L. R., 6 I. A., 88; s. c., I. L. R., 5 Cal., 148), and considers that the present case is distinguishable from the decision passed by their Lordships of the Judicial Committee in the case of *Deen Dayal Lall v. Jugdeep Narain Singh* (L. R., 4 I. A., 247; s. c., I. L. R., 3 Cal., 198). In this appeal before us the main contention of the plaintiffs is, that the present case is governed by their Lordships' decision in the last-mentioned case. The defendants, respondents, on the other hand, contend, that the whole of the family-property passed under the execution-sale according to the decisions of the Judicial Committee in *Muddun Thakoor v. Kanto Lall* (L. R., 1 I. A., 321; s. c. 14 B. L. R., 187) and *Suraj Bunssee Koer v. Sheopershad Singh* (L. R., 6 I. A., 88; s. c. I. L. R., 5 Cal., 148). We do not think that there is any foundation either in the Mitakshara law itself, or in any decision passed by the Judicial Committee, for the broad proposition that, in all cases under a sale in execution of a money, decree against the father in a joint family consisting of a father and sons, whether adults or minors, nothing but the father's share passes. On the other hand, if the leading cases on the subject, viz., *Muddun Thakoor v. Kanto Lall* (L. R., 1 I. A., 321; s. c., 14 B. L. R., 187), *Deen Dayal Lall v. Jugdeep Narain Singh* (L. R., 4 I. A., 247 s. c. I. L. R. 3 Cal. 198), *Suraj Bunssee Koer v. Sheopershad Singh* (L. R., 6 I. A., 88; s. c. I. L. R. 5 Cal., 148), and *Bissessur Lal Sahoo v. Maharajah Luckmessur Singh* (L. R., 6 I. A., 233), be carefully collated and examined, it would appear that this contention is not sound. Of the cases cited above, that of *Muddun Thakoor v. Kanto Lall* (L. R., 1 I. A., 321; s. c., 14 B. L. R., 187) closely resembles the present. In *Muddun Thakoor v. Kanto Lall* (L. R., 1 I. A., 321; s. c., 14 B. L. R., 187), the defendant purchased at a sale in execution of a decree against two persons, who were fathers of the plaintiffs in that case. The Judicial Committee, after finding that the plaintiffs in that case had failed to prove that the debt, which was the basis of that decree, was contracted for immoral purposes, says: "It appears that Muddun Mohun Thakoor purchased at a sale under an execution of a decree against the two fathers. He found that a suit had been brought against the two fathers; [902] that a Court of Justice had given a decree against them in favour of a creditor; that the Court had given an order for the particular property to be put up for sale under the execution, and therefore, it appears to their Lordships that he was perfectly justified, within the principle of the case which has already been referred to in 6th Moore's Indian Appeal Cases (*Hunooman Pershad Panday v. Mussamat Babooce Munraj Koonuceree* 6 Moore's I. A., 433), in purchasing the property, and paying the purchase-money *bonâ fide* for the purchase of the estate." Then their Lordships cite the passage bearing upon this question from the report of the case mentioned above, and after setting it out *in extenso* they go on to observe: "The same rule has been applied in the case of a purchaser of joint ancestral property. A purchaser under an execution is surely not bound to go back beyond the decree to

ascertain whether the Court was right in giving the decree, or, having given it, in putting up the property for sale under an execution upon it. It has already been shown that if the decree was a proper one, the interest of the sons, as well as the interest of the fathers, in the property, although it was ancestral, were liable for the payment of the fathers' debts. The purchaser under that execution, it appears to their Lordships, was not bound to go further back than to see that there was a decree against those two gentlemen; that the property was properly liable to satisfy the decree, if the decree had been given properly against them; and having inquired into that, and having *bonâ fide* purchased the estate under the execution, and *bonâ fide* paid a valuable consideration for the property, the plaintiffs are not entitled to come in, and to set aside all that has been done under the decree and execution, and recover back the estate from the defendant." In that case, therefore, it is clearly laid down that where a decree is properly obtained against the father of a Mitakshara family in his representative capacity for debts which are not proved to have been contracted for immoral purposes, and the property is sold in execution of that decree, the whole of the family-property passes. It is further laid down that if the property is purchased by a third party, and if there is nothing on the face of the decree or proceedings to show that [903] the debts were contracted for immoral purposes, the purchaser need not go beyond the decree. Now it is stated that this rule, thus distinctly laid down in that case, was to a certain extent modified in the case of *Deen Dayal Lall v. Jugdeep Narain Singh* (L. R., 4 I. A., 247; S.C., 1 L. R. 3 Cal., 198). Having carefully examined this latter case, we do not think that there is any foundation for this contention. The suit in that case was brought by one Jugdeep Narain Singh, who was the son of Tofany Singh, to recover possession of a certain share of a family-property, which belonged to Jugdeep and his father Tofany. From the printed record before the Privy Council it appears, that Tofany, the father, whether at the time of the sale or not, it does not appear clear, but at one time, was joint in estate with his two uncles, and the particular share which was the subject-matter of suit in that case was the share which belonged to Tofany and his son Jugdeep. The Court of First Instance, finding that there was no legal necessity for contracting the debts which formed the basis of the decree passed against the father, held, that the right, title, and interest of the father alone were sold. On appeal the District Judge came to the conclusion that there was legal necessity proved, and upon that ground held, that the whole of the family-property passed by the auction sale. The District Judge accordingly dismissed the plaintiff's suit. The case came up before this Court in Special Appeal, and a Division Bench of this Court held, upon the construction of the sale proceedings, that only the interest of the father passed by the auction-sale. In these proceedings the property that was brought to sale was described as "the rights and proprietary and mokurari title and share of Tofany Singh," the judgment-debtor. The Court, therefore held, that the purchaser under that sale could not, under any circumstances, acquire anything more than the interest of the father; but they, being further of opinion, that such interest was not saleable according to the Mitakshara law, decreed the plaintiff's claim. On appeal to the Judicial Committee, the learned Counsel who appeared before them for the defendant, purchaser, mainly raised the question whether such interest as that of a father in a Mitakshara family [904] was saleable in execution of a decree or not. Therefore the only question which the Judicial Committee had to consider in deciding that case was, whether the interest of a member of a joint Hindu family under the Mitakshara law was saleable in execution of a decree or not. Their Lordships observe (page 251) "that the first and principal question that arises on the

appeal is, whether the appellant acquired a good title even to the right, title, and interest of the father." There is, however, one passage in the judgment (to which I shall presently refer) which has been generally considered to have laid down this proposition of law, *viz.*, that where a decree is obtained against a father in a joint Hindu family governed by the Mitakshara law without making the sons defendants, all that can be sold in execution of the decree against the father is the father's interest only. The passage to which I refer is to the following effect: "This issue, however, seems to their Lordships to be immaterial in the present suit, because whatever may have been the nature of the debt, the appellant cannot be taken to have acquired by the execution sale more than the right, title, and interest of the judgment-debtor. If he had sought to go further, and to enforce his debt against the whole property, and the co-sharers therein, who were not parties to the bond, he ought to have framed his suit accordingly, and have made those co-sharers parties to it. By the proceedings which he took he could not get more than what was seized and sold in execution, *viz.*, the right, title, and interest of the father. If any authority be required for this proposition, it is sufficient to refer to the cases of *Nogender Chunder Ghose v. Sreemutty Kaminee Dassee* (11 Moore's I. A., 241) and *Bajum Doobey v. Brij Bhookun Lal Awasthi* (L. R., 2 I. A., 275)." Now these observations were made with reference to the particular facts of that case; their Lordships say "that if he," that is to say the creditor, "had chosen to go further and to enforce his debt against the whole property and the co-sharers therein, he ought to have framed his suit accordingly." If this observation referred to Jugdeep and his father only, their Lordships of the Judicial Committee would not have used the words "and the co-sharers therein," because there would be only one [905] co-sharer, *viz.*, the son. It has been already stated that there were other co-sharers, *viz.*, the uncles of the father, as appears from the record. It seems to me that their Lordships, in the passage cited, were referring to the question whether by the sale the whole of the family-property belonging to the father and his uncles passed or not. And they say that if it was the object to bring the whole of the family-property to sale, the plaintiff in the first suit should have made the co-sharers, namely, the uncles of Tofany, parties to the suit. Therefore there is no foundation for the contention that the passage above cited lays down generally this proposition of law, namely, that where a decree is obtained against the father alone in a joint Mitakshara family consisting of the father and sons, under no circumstances could anything more than the interest of the father be brought to sale in execution. The decision, therefore, of their Lordships of the Judicial Committee in the case of *Deen Dayal Lall v. Jugdeep Narain Singh* (L. R., 4 I. A., 247; s.c., I. L. R., 3 Cal., 198) in no way conflicts with the principle laid down in the case of *Muddun Thakoor v. Kanto Lall* (L. R., 1 I. A., 321; s.c., 14 B. L. R., 187). That is also evident from the fact that the same principle is laid down again in the still later case of *Suraj Bunssee Koer v. Sheopershad Singh* (L. R., 6 I. A., 88; s.c., I. L. R., 5 Cal. 148), and it appears from the report of the last-mentioned case that the case of *Deen Dayal Lall v. Jugdeep Narain Singh* (L. R. 4 I. A., 247; s.c., I. L. R., 3 Cal., 198) was referred to and considered. In the case of *Suraj Bunssee Koer v. Sheopershad Singh* (L. R., 6 I. A., 88; s.c., I. L. R. 5 Cal. 148), after citing a decision of the Sadr Dewany Adawlut of the year 1861, their Lordships observe: "The judgment, moreover, and this is the portion of it that is chiefly material to the determination of the present appeal, affirms the principle laid down in the judgment of the Sadr Dewany Adawlut, that a purchaser under an execution is not bound to

go further back than to see that there was a decree against the father; and that the property was properly liable to satisfy the decree, if the decree had been given properly against the father. In such a case, one who has *bonâ fide* purchased the estate under the execution, and *bonâ fide* paid a valuable consideration for it, is protected against the [906] suit of the sons seeking to set aside all that has been done under the decree and execution, and to recover back the estate as joint ancestral property." Their Lordships acted upon the same principle in the case of *Bissessur Lal Sahoo v. Maharajah Lucknessur Singh* (L. R., 6 L. A. 233). There three decrees were obtained on account of debts contracted by one Nath Dass. Upon the finding of the Judicial Committee in concurrence with that of the High Court, it appears that Nath Dass and his son Ram Nath Dass were members of a joint Hindu family. The decrees were obtained after the deaths of both Nath Dass and Ram Nath Dass, one against Mosaheb Dass, one of the sons of Ram Nath Dass, and the others against the guardian of Mosaheb Dass; and the questions which their Lordships had to determine was, whether, in execution-sales held under these decrees, the entire family property belonging to the joint family, consisting of Nath Dass, Ram Nath Dass and his sons, or only the right, title, and interest of Mosaheb Dass passed to the purchaser. Referring to one of these decrees passed against Mosaheb Dass the Judicial Committee observe: "It appears to their Lordships that, acting on the principle which follows from their finding that this family was joint, it must be assumed that Mosaheb Dass is sued as a representative of the family, and that it must further be assumed that Nath Dass, in taking the lease of the mouza here referred to, Rammuggur, in respect of which the rent was due, must be assumed to have taken it on behalf of the family, and that the debt must be deemed to be a debt from the family." It may be mentioned here that the original debt, the basis of these decrees, was contracted by Nath Dass for the purpose of obtaining a mostajeree lease taken from the defendants, and it is to that lease that their Lordships refer here. Then they go on to observe with reference to the decree framed in the suit that "the fair construction of it, though it may not be drawn up with much accuracy, is, that the decree is not to be executed against the self-acquired property of Mosaheb, but against the family-property, which is there described as that left by Nath Dass for the purpose of distinguishing it from the separate property which may have belonged to Mosaheb. The [907] only difficulty with reference to the second and third decrees arises from a certain informality with which they have been drawn up. It appears to their Lordships that, looking to the substance of the case, this second decree is a decree against the representative of the family in respect of a family debt, and that it is one which could be properly executed against the joint property of the family, and that Muddunpore was a part of that joint property." Then again: - "Their Lordships have, therefore, come to the conclusion that although there may have been some irregularity in drawing up these decrees, they are substantially decrees in respect of a joint debt of the family and against the representative of the family, and may be properly executed against the joint family-property." These passages leave no room for doubt that a decree properly obtained against the father of a joint Hindu family under the Mitakshara law, acting as manager of the family, would bind all the sons who are members of that family; and that if the entire family-property be sold in execution of that decree, and if it be purchased by a *bonâ fide* purchaser for value, the whole of the family-property would pass. The result of the examination of these cases is, that in each case the question as to what was sold in execution must be first determined; the mere circumstance that a decree was obtained against the father alone is not conclusive upon the point. It would be a material question for enquiry, *viz.*, whether the father was sued in his representative character or not. If it be

found that he was not sued in his representative character, no further question would arise ; but if on the other hand this question be found in favour of the purchaser, then a further question would arise whether the sons are entitled to set aside the sale *quâ* their shares. We must then examine the facts of this case in order to determine these questions.

We find that in this case it is well proved that Thakoordeen Tewary was the manager of the joint Hindu family ; that he was carrying on an aurutdaree business for the benefit of the family ; that in that business one of the plaintiffs in this case, *viz.*, Umbica Prosad, materially assisted him and acted in the capacity of cashier. We also find from the plaint which was [908] filed by Mussamut Tetra and others against Thakoordeen that the latter became indebted to the extent of Rs. 1,151-10-3 in the course of his dealings connected with the aurutdaree business. A suit was brought against him on the 9th July 1875. In that suit the defence of Thakoordeen Tewary was, that the claim of the plaintiffs was very much exaggerated, and that he was indebted to the extent of Rs. 134 only. In support of this defence Umbica Prosad, the plaintiff No. 1 in this case, was examined. The Court before which that case came on for decision on the 10th January 1876 passed a decree in favour of the plaintiffs. On the 14th March 1876, the decree-holders applied to execute that decree, and the petition, which was filed for the purpose of obtaining an order for execution, prayed that the Court would be pleased "to seize and attach the properties specified below, and to sell the same and pay off the amount due under the decree"; and one of the properties "specified below" was No. 66 of Towzee, four annas of the entire sixteen annas, the milkiut and malguzari rights of the debtor in Mouza Chuck Nyamut. Thereupon an order was made by the Court on the 15th March 1876, directing the proper officer of the Court to attach the four annas milkiut right in Mouza Chuck Nyamut, and in accordance with that order the attachment was effected. Before the property was sold, Thakoordeen preferred an appeal against the decree, and that appeal was dismissed on the 15th November 1876. After that appeal was dismissed, a notification of the sale of the property attached was issued, and it ran in the following words : "Notification of sale of the rights and interests in the under-mentioned properties for the realization of the amount of the decree, dated 10th January 1876"; and one of "the undermentioned properties" was No. 66 of Towzee Chuck Nyamut out of the area of Abgela. Then there were certain conditions of sale, the first of which was that, "with the exception of the right and title of the debtor, the right and interest of no one else in the property in question will be sold"; and on the 17th May 1877 the sale was confirmed. The rubakary confirming the sale, after reciting that the property No. 2, as per detail below, to wit, No. 1, four annas of the entire sixteen annas, the milkiut and malguzari property of the debtor in Mouza Chuck [909] Nyamut, out of the area of Abgela, Pargana Azimabad, Zilla Patna, bearing Towzee No. 66, and paying Government revenue Rs. 175-8, the right and interest of the debtor, was on the appointed day, that is to say, on the 16th April 1877, sold in the Court of the Judge of Patna, concludes in these terms : "That the sale of property No. 2,—that is to say, four annas of the entire sixteen annas, the milkiut and malguzari right and interest of the debtor in Mouza Chuck Nyamut out of the area of Abgela, Pargana Azimabad, Zilla Patna, bearing Towzee No. 66, and paying Government revenue Rs. 175-8, held on the 16th April 1877, be confirmed in the name of the auction-purchasers." Then, on the 7th of July 1877, a purwanna was issued by the Court to deliver possession to the purchasers of the entire four annas, the milkiut and malguzari property, the right and share of the debtor in Mouza Chuck Nyamut. It appears to us from the documents mentioned above that, in execution of

the decree, which was obtained by Mussamut Tetra and others, the entire four annas, which constituted the family property, was sold. No doubt, in the sale-proclamation, one of the conditions of sale was, that, with the exception of the right and title of the debtor, the right and interest of no one else in the property in question would be sold; but this is one of the usual conditions of sale which are inserted in all notifications. Moreover, if, upon the evidence we come to the conclusion that Thakoordeen was sued in his representative capacity, that is to say, that he represented all the members of the family, then it must be considered that the real debtors in the decree were all the members of the family. Having regard to the circumstances under which the original debt was contracted, and having regard to the circumstance that the adult sons, or at least one of them, assisted the father in carrying on the trade in the course of the dealings of which the debt was contracted, and to the fact that in the sale-proceedings the entire family-property was described as the property to be sold, we feel no hesitation in coming to the conclusion that the whole family-property was brought to sale.

We are, therefore, of opinion that the decree of the lower Court is correct, and we dismiss the appeal with costs.

Appeal dismissed.

NOTES.

[The decision in this case is good law; a similar explanation of the earlier cases was given by the Privy Council in *Nanomi Babuasin's* case (1885) 13 Cal. 21 P. C. See the Notes to 3 Cal. 198 and 13 Cal. 21 in the LAW REPORTS REPRINTS. See also (1882) 9 Cal. 389; 495; (1883) 7 Bom. 438; (1885) 9 Mad. 343; (1900) 3 Bom. L. R. 322 (341); 13 C. L. R. 96.]

[10 C. L. R. 333 : 7 Ind. Jur. 84] [910] APPELLATE CIVIL.

The 6th February, 1882.

PRESENT:

MR. JUSTICE CUNNINGHAM AND MR. JUSTICE TOTENHAM.

Nijabutoolla and others.....Plaintiffs

versus

Wazir Ali.....Defendant.*

Limitation Act (XV of 1877), ss. 5, 6—Suit to compel registration—Registration Act (III of 1877), s. 77.

The provisions of s. 5 of Act XV of 1877 apply to suits instituted under the provisions of s. 77 of the Registration Act (III of 1877).

IN this case the plaintiffs sought to have a kabuliati registered. The plaint alleged that the defendant had executed the kabuliati; that, in the Sub-Registry Office of Kishengunge, the defendant denied execution, and therefore registration was refused by the Sub-Registrar; and that the plaintiffs appealed to the District Registrar, who dismissed the appeal on the 21st of November

*Appeal from Appellate Decree, No 1965 of 1880, against the decree of F. Cowley, Esq., Officiating Judge of Purnea, dated the 4th August 1880, affirming the decree of Baboo Lal Behary Dey, Munsif of Kishengunge, dated the 29th March 1880.

1879. The present suit was instituted on the 27th of December 1879, under the provisions of s. 77 of the Registration Act (III of 1877). The Munsif dismissed the suit as barred by limitation, citing *Purran Chunder Ghose v. Mutty Lall Ghose Jahira* (I. L. R., 4 Cal., 50), notwithstanding it appeared that his Court was closed from the 20th of December 1879 to the 26th of December 1879, inclusive, on account of the Christmas and Mohurrum holidays.

On appeal the District Judge, having stated the facts, said:—"The question then is—Does s. 5, Act XV of 1877, apply or not? The appellant's pleader refers to the case of *Behari Lall Mookerjee v. Mungolanath Mookerjee* (I. L. R., 5 Cal., 110). That points out the distinction between s. 6, Act XV of 1877, and s. 6, Act IX of 1871, and shows that 'the rules prescribed by the Limitation Act for computing the period of limitation are applicable' to rent-suits. The decision refers specially to s. 12 of Act XV of 1877, and the argument applies equally to all sections in Part III of that Act. But the explanations to s. 4 and s. 5, Act XV of 1877, obviously refer to cases for which a period of limitation is prescribed in Act XV of 1877. Section 5 of [911] that Act, if applied in the present instance, would extend the period of limitation prescribed by s. 77, Act III of 1877. So far, therefore, as the question turns upon the application to this case of s. 5, Act XV of 1877, I am of opinion that the Munsif's view of it is correct. There is no provision in Part III of Act XV of 1877 which will avail the appellants. The appeal is accordingly, dismissed."

The plaintiffs appealed to the High Court.

Bahoo Bhoobun Mohun Biswas for the Appellants argued, that s. 5, Act XV of 1877 applied to the case, and that the decision of the lower Appellate Court was wrong—*Golap Chund Nowluckha v. Krishto Chunder Das Biswas* (I. L. R., 5 Cal., 314).

Moonshee Serajul Islam for the Respondent.

The following **Judgments** were delivered by the Court (CUNNINGHAM and TOTTENHAM, JJ.):—

Cunningham, J.—We think that the proper interpretation to be put upon s. 5 of the Limitation Act, considered along with s. 6, is that, except as defined in s. 6, the general provisions of the Limitation Act are applicable to cases for which periods of limitation are specially provided by local or special law: and that therefore s. 5 of the Limitation Act ought to have been allowed to operate in the present case.

We accordingly set aside the decisions of the lower Courts, and remand the case to the first Court for a decision on the merits.

Costs will abide the result.

Tottenham, J.—I desire simply to add that s. 5 is of general application to all suits notwithstanding anything contained in s. 6.

Appeal allowed and case remanded.

NOTES.

[THE LIMITATION ACT AND LOCAL AND SPECIAL ACTS—

See sec. 29 of the Limitation Act, 1908. For similar rulings as regards the Registration Act, see (1893) 18 Mad. 99; (1896) 20 Mad. 249; (1902) 24 All. 402; (1903) 30 Cal. 532; *contra* (1905) 28 All. 48; 16 C. W. N. 20.

For other applications of the section, see 8 Bom. 529; 10 Mad. 210; 12 Mad. 467 20 Bom. 543; 4 O. C. 182; 17 Cal. 263, etc.]

[912] APPELLATE CIVIL.

The 2nd March, 1882.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Bhekhan Dobey.....Defendant

versus

Rajroop Kooer.....Plaintiff.

*Kistibandi agreeing to pay off a debt due under a decree by Instalments—**Account stated Limitation Act (XV of 1877), sched. ii, art. 64.*

A, being the holder of a decree against *B*, *B*, on the 7th July 1875, entered into a kistibandi and filed it in Court, setting out that he would pay off the debt due under the decree by certain instalments, and that, in default of payment of one instalment, the whole amount of the debt might be recovered by taking out execution of the decree. By the kistibandi certain immoveable property was pledged to secure the debt, but the kistibandi was not registered. *B* failed to pay the first instalment, which fell due on the 14th August 1875; and *A*, on the 19th June 1878, applied for execution of his decree, but the application was refused, and *A* referred to a regular suit.

In a suit brought by *A* on the 29th January 1879, against *B* for the whole debt due under the decree held that, inasmuch as no appeal had been preferred against the order disallowing execution, *A* was bound by that decision; but that the suit might be taken to be one for an account stated in writing with an agreement for payment at a certain stated period of time as regards the instalments due, which were not barred by limitation; the suit as regards the instalments which had not fallen due being premature, and those previous to the 29th January 1876 being barred by art. 64 of the Limitation Act.

ON the 19th January 1874 the husband of the present plaintiff obtained a decree against the present defendant, and in that case, pending execution, the defendant entered into a kistibandi, dated the 7th July 1875, which was filed in Court, agreeing to pay off the debt without interest by instalments from 1875 to 1882, and at the same time mortgaging certain immoveable property to secure the debt. The kistibandi provided that, on default of payment of one instalment, the entire amount due might be realized, with interest at 1 per cent. per mensem, by execution of the decree. The husband of the plaintiff having died, his widow (the plaintiff), on failure of the defendant to pay on 30th Sawan 1282 (corresponding with 14th August 1875) the first instalment, applied for execution of the decree. The [913] application was refused on the 29th June 1878, and the widow was referred to a regular suit.

On the 29th January 1879 she then brought the present suit for the entire debt due to her deceased husband, and asked for a decree for realization of the amount by the sale of the mortgaged properties.

The defendant contended that the claim was barred by limitation. He denied execution of the kistibandi, and contended that, in any case, it could not be admitted in evidence, being unregistered.

* Appeal from Appellate Decree, No. 947 of 1880, against the decree of Baboo Matadin, Subordinate Judge of Gya, dated the 28th February 1880, affirming the decree of Moulvi Feda Hosain, Munsif of Aurangabad, dated the 21st August 1879.

The Munsif found that the kistibandi was genuine, and that it was admissible in evidence as a bond without registration; and that limitation did not begin to run till the 29th June 1878, when execution of the decree was applied for and refused; and he therefore decreed the suit in favour of the plaintiff, but made no declaration of any lien on the property mortgaged.

The defendant appealed to the Subordinate Judge, who, for other reasons than those given by the Munsif, not mentioning, however, the point of limitation, affirmed the decision of the Munsif, and dismissed the appeal.

The defendant appealed to the High Court.

Baboo *Koruna Sindhoo Mookerjee* for the Appellant contended that limitation ran before the 29th June 1878, and that, even allowing plaintiff the time occupied in the execution-proceedings, the suit was barred.

Mr. *Twidale* for the Respondent.

The **Judgment** of the Court (MITTER and MACLEAN, JJ.) was delivered by

Mitter, J. (who, after stating the facts, continued): --The lower Appellate Court dealt with the case apparently on two grounds: (1) that there was a verbal contract to pay the judgment-debt by instalments, and the suit would lie on that contract. (2) that a fresh cause of action arose on defendant's failure to pay the contract instalments.

[914] The defendant appeals on the ground that the lower Appellate Court has omitted to try the question of limitation, and contends that limitation ran before 29th June 1878, and that, even allowing plaintiff the time occupied in the execution-proceedings, which terminated on that day, the suit is barred.

It certainly appears to us that the Subordinate Judge's decree is erroneous on his own view of the case. If there was a cause of action on defendant's failure to pay the instalments, then certainly the suit was not brought in time from the 14th August 1875, the date of the first instalment, and the claim should have been reduced by the amount of that, and possibly of other instalments also.

Then it appears to us, that the Subordinate Judge has made a case for the plaintiff. She did not claim on a verbal contract, but on a written one; but no ground of appeal has been presented upon this point.

We are unable to see upon what grounds the plaintiff can lay her cause of action on the 29th June 1878.

The suit, therefore, resolves itself into this: What is the nature of the suit upon the kistibandi, and what is the date from which limitation runs, and what is the period of limitation?

The nearest approach to a correct answer to the first question is, that it is a suit for money payable on an account stated: see art. 61, sched. ii, Act XV of 1877. The petition or kistibandi is not inadmissible as evidence of the debt, and we may, we think, take it to be an account stated in writing, with an agreement for payment at a certain stated period of time. The time for the payment of the first instalment arrived on 14th August 1875, and one of the conditions of the agreement was, that, on defendant's failure to pay one of those, the plaintiff might take out execution for the whole amount under the existing decree.

But it has been decided by a competent Court that this condition is invalid. The parties are bound by that decision, because there has been no appeal against

it. It is evident, therefore, that the kistibandi or petition contains two conditions which are invalid and cannot be carried out,—*viz.*: (i) the clause about [915] the hypothecation of immoveable property, and (ii) the condition referred to above. That being so, the case cannot come under art. 75 of the Limitation Act: because, conceding that the petition of kistibandi was a bond, it did not provide that, on default of one instalment, the whole amount shall be due. The provision was that the whole amount shall be realizable by execution of the decree.

This provision has been held by a competent Court in a proceeding between the parties to be invalid. Putting, therefore, these two invalid conditions out of consideration, the petition or the kistibandi amounts to this. On an adjustment of accounts between the parties on the 7th July 1875, Rs. 689-14-15 were found due from the defendant to the plaintiff, and the former promised to liquidate the debt in certain instalments. In our opinion, therefore, the case is governed by art. 64.

In this view of the contract between the parties, the suit is premature as regards the instalments which had not fallen due at the time when the suit was instituted. For these instalments the suit must be dismissed on this ground.

As regards the first instalment, which had fallen due more than three years before the institution of the suit, *viz.*, on 14th August 1875, the claim is barred. The plaintiff is entitled to a decree for the other instalments due before 29th January 1879.

The appeal will, therefore, be allowed, and the decrees of the lower Courts set aside, and in lieu thereof a decree passed for the sum of Rs. 248-4, being the amount of the instalments falling due on 9th February 1876 and following dates down to 29th January 1879.

The costs of the suit and appeal throughout will be allowed to the plaintiff and defendant proportionately to the result.

Appeal allowed.

NOTES.

[ACCOUNT STATED—LIMITATION—KISTIBANDI—

This criticism appears in *Starling's Limitation* (1911), 5th Edn., p. 262:—It should be noted that the account stated must be in writing as well as signed; consequently no mere acknowledgment of a sum due will bring a case under this Article, and this provision prevents it clashing with sec. 19. Any document which is a mere acknowledgment must be dealt with under that section. These distinctions make the law different to what it is in England. These special provisions of this Article were apparently overlooked in 8 Cal. 912, where Mitter and Maclean, JJ., held that a kistibandi agreeing to pay a decree by instalments was evidence of an account stated. In this case, however, the Court was hampered by the fact that the kistibandi also related to land, and was not registered, and that the parties were bound by an unappealed order of the Court below on a question of execution.”]

[- 11 C.L.R. 348]

APPELLATE CIVIL.

The 10th March, 1882.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Jassoda Koor... ..Judgment-debtor

versus

The Land Mortgage Bank of India.....Decree-holders.

Execution of decree—Transfer of decree for execution—Order passed in Court to which proceedings are transferred—Appeal irregularly brought after time has been granted to apply to Original Court.

Under s. 239 of Act X of 1877, a Court to which a decree has been transferred may refer the objector to the Court which passed the decree.

Certain objections were taken in an execution-proceeding, and the Judge before whom the objections were heard passed an order disposing of the objections save as to two, which he decided he had no jurisdiction to entertain. The objector then made a special application to the Judge to obtain time to make an application with reference to these objections to the Court from which the decree had been transferred, and accordingly time was granted him to do so ; but, instead of applying, the objector preferred an appeal to the High Court against the order of the Judge disposing of the objections. The High Court, on hearing the appeal, made the appellant pay the costs of the appeal, disapproving strongly of the course taken by the objector.

THE Land Mortgage Bank of India having obtained, in the Patna Court, a decree against one Jassoda Koor, caused this decree to be transferred to the Court of the District Judge of Sarun for execution. The judgment-debtor raised various objections against the execution of the decree, amongst which were, (i) that execution was barred by limitation, and (ii) that the account was incorrectly stated in the proclamation of sale.

The District Judge of Sarun, on the 2nd November 1881, disposed of all the objections saving the two abovementioned ; and as to these he stated that he had no power to go into either the question of limitation or of the correctness of the account, as these questions admittedly had arisen before the case was transferred to his Court, and they, therefore, should have been raised in the Court in which the decree was originally passed. The objector then made a special application to obtain time to apply to the Patna Court with regard to certain of the objections, and one month's time was granted to him to do so ; but, instead [917] of so doing, he appealed to the High Court against the order passed on the 2nd November 1881.

Mr. C. Gregory and Baboo Rajendro Nath Bose for the Appellant contended, that the view taken by the lower Court was contrary to the Full Bench ruling in the case of *Leake v. Daniel* (B. L. R., Sup. Vol. 970 : S.C., 10 W. R. (F. B.), 10).

Baboo Kashi Kant Sen for the Respondents.

* Appeal from Original Order, No. 329 of 1881, against the order of J. F. Stevens, Esq., Officiating Judge of Sarun, dated the 2nd of November 1881.

The **Judgment** of the Court (MITTER and MACLEAN, JJ.) was delivered by **Mitter, J.**—This appeal arises out of a decision of the Officiating Judge of Sarun, in the matter of the execution of a decree, which was obtained by the decree-holders, respondents before us, against the judgment-debtor, the appellant, in the Subordinate Judge's Court of Patna. The decree was transferred under the provisions of the Code for execution to the District Judge's Court of Sarun. The judgment-debtor raised various objections against the execution of the decree. All these objections have been disposed of by the District Judge of Sarun, excepting two, *-viz.*, the objections relating to the plea of limitation and to the amount due under the decree. In this appeal the judgment of the lower Court is not questioned with reference to the objections which have been disposed of by the District Judge. As regards the plea of limitation, and the objections regarding the amount due under the decree, the District Judge held that he had no jurisdiction to entertain them. He was of opinion that it was for the judgment-debtor to raise them in the Court in which the decree was originally passed, and upon that ground he declined to go into them. It has been contended before us that the view taken by the lower Court of its power in this matter is erroneous, and is contrary to the Full Bench decision in the case of *Leake v. Daniel* (B. L. R., Sup. Vol., 970; s.c., 10 W. R. (F. B.), 10). It seems to us that the District Judge was not right in holding that he had no jurisdiction to entertain these objections. Under the Full Bench decision, no doubt, the Court to which the decree [918] is transferred for execution may entertain objections like the present; but it is not laid down in that Full Bench decision that the Court cannot refer the objector to the Court which passed the decree. Under s. 239 of the present Code, the Court to which a decree is transferred may refer the objector to the Court which passed the decree.

In this case we find that the lower Court had no materials before it upon which it could satisfactorily dispose of the objections taken by the judgment-debtor, and although we do not agree with the lower Court in the view which it has taken, *viz.*, that it had no power at all to entertain these objections, yet we think that, in this case, the proper order that the lower Court should have passed was to postpone the execution proceedings under s. 239, and allow the judgment-debtor sufficient time to apply to the Court which originally passed the decree to entertain and adjudicate upon these objections. With reference to one of them, *viz.*, the plea of limitation, the District Judge of Sarun subsequently did allow the judgment-debtor time to apply to the Patna Court to decide it. We find that an order was passed on the 16th of November, by which one month's time was allowed to the judgment-debtor to make the necessary application to the Patna Court. The judgment-debtor, instead of applying to the Patna Court, preferred this appeal on the 6th December 1881.

We ought to discourage such practices as these. The judgment-debtor, after the case was decided in the lower Court, made a special application to the District Judge to obtain time to make an application with reference to these objections in the Patna Court, and according to the prayer contained in his application the District Judge allowed him one month's time. Instead of taking advantage of this order, the judgment-debtor preferred this appeal. If the judgment-debtor had, in accordance with the order of the District Judge of Sarun, made an application to the Patna Court, the objections would by this time have been disposed of. However, be that as it may, we think that, under the circumstances, we should allow only a very short time to the judgment-debtor to make any objection he may wish to make in the Patna Court, and we [919] accordingly allow him fifteen days from this date for that purpose. As we pass this order under s. 239, we think that, under the circumstances, we should impose this condition on the judgment-debtor under s. 240, that he

should pay to the respondents in this case the costs of this appeal. We assess the hearing fee at Rs. 200. If within the time fixed by this Court no application is made by the judgment-debtor to the Patna Court, the judgment-creditors will be at liberty to apply to the Sarun Court to proceed with the execution-proceedings.

NOTES.

[See also (1895) 23 Cal. 39.]

[8 Cal. 919: 7 Ind. Jur. 85]

APPELLATE CIVIL.

The 10th March, 1882.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Ram Soonder Roy and others.....Defendants

versus

Ram Sahye Bhugut.....Plaintiff.

Hindu Law—Mitakshara family—Suit by lunatic father to recover family property—Limitation Act (IX of 1871) Disability to sue.

A lunatic, a member of a joint Mitakshara family, cannot sue to recover property belonging to the joint family, he being, under the Mitakshara law, disqualified from inheritance, and therefore entitled to no share or partition in the property, but only to maintenance.

THE plaintiff, who was a lunatic and had been so since 1838, sued by his manager to set aside a deed of sale, executed on the 18th January 1844, by his son Abhilukh, in favour of Rungi Bhugut and Sheo Ram Bhugut, and also to set aside certain subsequent transfers by Rungi Bhugut and his purchaser, and an auction-sale held on the 17th December 1850, of the right, title, and interest of Sheo Ram Bhugut, whose right, title, and interest had been sold under Act I of 1845 for default of payment of revenue and purchased by the appellants.

The plaintiff stated that the property in suit belonged to him, and that his son sold the property without his authority and at an inadequate price, and that, therefore, the sale and the subsequent transfer made of the property were invalid.

[920] The defendants contended that the suit was barred by limitation, because more than twelve years had elapsed from the time when the property was sold, and also because no suit had been brought within one year from the date of the auction-sale to set it aside; that the son was an owner of an equal share in the property with his father and was in possession, and that the sale was made for the benefit and support of the family; and that Sheo Ram Bhugut and Rungi Bhugut were *bonâ fide* purchasers for valuable consideration, and no objection had been taken to their possession for more than thirty years.

The Subordinate Judge held that the plaintiff was under a legal disability to sue when his cause of action arose, and that the suit, therefore, was not

*Appeal from Appellate Decree, No. 1898 of 1880, against the decree of J.F. Stevens, Esq., Officiating Judge of Sarun, dated the 1st July 1880, reversing the decree of Baboo Grish Chunder Chowdhry, First Subordinate Judge of that district, dated the 22nd April 1878.

barred; that there was no evidence to show that the sale was made for the benefit of the family; that the father and the son were joint, and that the plaintiff's son had no right before partition to sell a portion of the property as his definite share without the consent of his co-sharer. He, therefore, declared that the sales were invalid, with the exception of the sale of the rights of Sheo Ram in the share sold for arrears of revenue, and gave the plaintiff a decree for half the properties claimed.

The defendants appealed to the District Judge, who agreed with the lower Court, except as to the part of his decision which declared the sale of Sheo Ram's rights to be valid; and as to that he held, that the purchaser at the auction-sale bought the right, title, and interest of Sheo Ram, and that that right was *nil*, as the sale to Sheo Ram had been declared invalid; he, therefore, gave the plaintiff a decree for the whole of the properties claimed.

The defendants appealed to the High Court.

Baboo *Srinath Banerji* for the Appellants.

The **Judgment** of the Court (MITTER and MACLEAN, JJ.), was delivered by

Mitter, J.—The facts of this case are briefly these:—

On the 18th January 1844 the plaintiff's son Abhilukh and defendants Nos. 10 and 11, two sons of Sheo Sohay, the plain-[921]tiff's brother, sold one anna five gandas of Mouza Ram Chawra, seven pies ten krants share of which is the subject-matter of this suit. The sale was made to Rungi and Sheo Ram, ancestors of defendants Nos. 7 to 9. Sheo Ram pledged his share as security for revenue payable by one Hera Mohun in respect of the ticca of an akheri mehal. For default in the payment of this revenue the pledged share of Sheo Ram was sold under the provisions of Act I of 1845 on the 17th December 1850, and purchased by defendants Nos. 1 to 4, the appellants before us. Rungi's share was sold by a private bill of sale, dated the 19th July 1870, to defendants Nos. 3 and 5: the latter again sold his share to defendant No. 6 on the 19th August 1872. The plaintiff seeks to recover a seven pies ten krants share of the mouza in dispute, being half of one anna five gandas, the share originally sold. He evidently excludes the share of his brother Sheo Sohay.

The defendants Nos. 1 to 4, who only are the appellants before us, defended the suit on the ground of limitation, and also on the ground that a valid title under the bill of sale of 1844 passed to the purchasers.

The Subordinate Judge awarded a decree in favour of the plaintiff for a moiety of the share claimed, dismissing the suit as regards the share sold at auction under Act I of 1845.

The District Judge in appeal has awarded a full decree. Hence this appeal.

The defendants pleaded limitation in the lower Courts, but it was over-ruled on the ground that the plaintiff was insane at the time of the sale and that he is still insane. But it is quite clear that the rights of the other members of the family are not only barred, but have been extinguished under the last section of the Limitation Act of 1871, which was in force when this suit was brought. Their rights are vested in the defendants. Under these circumstances, a question arises—*viz.*, whether the plaintiff, an insane person, can maintain this suit for the restoration of the property in dispute to the

joint family? The answer to this question depends upon the provisions of the Mitakshara law (which governs this family) relating to the rights of an insane person.

[922] Speaking of persons who are under the Hindu law excluded from inheritance (an insane person is in that category), the Mitakshara in Chap. II Sec. X, vv. 6 and 9, says :—

“They are debarred of their shares if their disqualification arose before the division of the property. But one already separated from his co-heirs is not deprived of his allotment.

“But their sons, whether legitimate or the offspring of the wife by a kinsman, are entitled to allotments if free from similar defects.”

It is clear, therefore, that, on a partition between the plaintiff and his sons, he would not get any share, and his sons would receive the whole property. The rights of those sons have been, as shown above, extinguished, and are now vested in the defendants.

“Partition,” says the author of the Mitakshara, “is the adjustment of divers rights regarding the whole by distributing them in particular portions of the aggregate.”—Chap. I, Sec. 1, v. 4.

Under the Mitakshara law the plaintiff is entitled to receive maintenance from the joint family property, but not to a share or a partition of the said property. The definition of ‘partition,’ as given above, clearly shows that the plaintiff has no such right in the property in dispute as would entitle him to maintain this suit for the purpose of restoring it to the joint family. The plaintiff’s suit must fail upon this ground. In *Ram Sahye Bhukkut v. Lalla Laljee Sahye* (ante, p. 149), decided by us on the 19th July last, we held the same view as to the rights of the present plaintiff.

The decrees of the lower Courts must, therefore, be reversed, and the plaintiff’s suit dismissed. As this point was not taken in the lower Courts, we will not allow any costs to the defendants.

Appeal allowed.

NOTES.

[I. HINDU LAW—LUNACY—

See the Notes to 8 Cal. 149 *supra*; also 22 Cal. 864.

II. SETTING ASIDE ALIENATION MADE BEFORE BIRTH

See also (1907) 34 Cal. 372 11 C.W.N. 462; (1899) 22 Mad. 372 (375); (1898) 21 Mad. 222].

[923] APPELLATE CIVIL.

The 13th April, 1882.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE O' KINEALY.

Mudun Mohun Poddar and another.....Defendants

versus

Bhoggomanto Poddar and others.....Plaintiffs.*

Appellate Court, power of—Remand order—Civil Procedure Code (Act X of 1877), s. 562—Suit for possession after order under the Land Registration Act (Beng. Act VII of 1876)—Onus of proof.

An Appellate Court has no power to remand a case except under the provisions of s. 562 of the Code of Civil Procedure.

Where a person who, by an order of the Collector passed under the provisions of the Land Registration Act (Beng. Act VII of 1876), has been declared to be out of possession of certain land brings a suit for the recovery of possession, it lies on him in the first instance to make out a *prima facie* case.

THE judgment appealed from was as follows:—"This was a suit to establish the plaintiffs' title to certain shares in the kharija taluk called Kisto Nath Sadhoo, and to recover possession of the same, in reversal of an order passed by a Revenue officer under Beng. Act VII of 1876. The plaintiffs assert that one Bhowany Proshad Shaha was originally the owner of one-third share of that kharija taluk; that Bhowany Proshad left four sons—Shumbhoo, Janokey, Jogul, and Nobokisto, all of whom succeeded equally to their father's estate; that Shumbhoo left three sons—Mahabharat, Radhanath, and Chundernath; Janokey, one son, named Choiton; Jogul, one son, named Ramachundra, who again left three sons—Anando, Poorna, and Koilas; that Nobokisto left two sons, Premchand and Nundcoomar, the last of whom has a son named Govind; that the first plaintiff Bhoggomanto, by a kobala dated the 14th of August 1870, purchased the share of Govind, which is thirteen gandas one cowree one krantee, and the other two plaintiffs (along with Anando) succeeded to Jogul's share of the property, the share which devolved on those two plaintiffs being seventeen gandas three cowrees one krantee; that the plaintiffs were accordingly in possession of their respective shares; that they prayed for the registration of their names under Beng. Act VII [924] of 1876, but their prayer was rejected on the 14th of September 1877, in consequence of which they have been dispossessed therefrom by the defendants since Kartick 1264 (October-November 1877). The defence in substance is, that the vendor of the first plaintiff, as also the second and third plaintiffs, had no share in the Kharija taluk named in the plaint; that the whole one-third share of the taluk mentioned therein was the property of Choiton, whose right, title, and interest in the taluk having been sold on the 8th of June 1864, in execution of a decree which one Brojendro Coomar Roy had obtained against Choiton and others, was purchased by Bisheshur Gupta, from whom the defendants purchased the same, and have been in possession since Magh 1273 (January-February 1867), which, I believe, is the date of their purchase. These defendants also pleaded limitation in

* Appeal from Appellate Order, No. 2 of 1882, against the order of Baboo Rajchunder Sannyal, Officiating Second Subordinate Judge of Backergunge, dated the 30th August 1881, reversing the order of C. E. Perroux, Esq., Fourth Munsif of Burisal, dated the 10th July 1880.

bar of the suit. The Munsif has cast the onus on the plaintiffs and found that they have failed to prove their possession, and also the possession of Govind, within twelve years back from date of suit. He has dismissed the case as barred by limitation." After referring to some analogous cases decided by the Munsif, the Judge continued :—"The present case appears to me to have been carelessly conducted, and also decided, in the Court below. The issues material for arriving at a correct determination of the case have not been clearly recorded. These issues are: (i) whether the one-third share of the kharija taluk Kisto Nath Sadhoo was the joint property of Shumbhoo, Janokey, Jogul, and Nobokisto, or was it exclusively the property of Janokey or Choiton alone? (ii) whether Koilas and Poorna are the descendants or grandsons of Jogul, and Govind, the grandson of Nobokisto, or not? If the plaintiffs should succeed in proving these issues in their favour, they must be considered to have established their title to the shares they respectively claim, inasmuch as the plaintiff Bhoggomanto has proved his purchase of the share of Govind. If the plaintiffs should succeed in showing their title, it will be for the defendants to show that that title has been extinguished by reason of their adverse possession for more than twelve years. See *Radha Govind Roy v. Inglis* (7 C. L. R., 364). [925] I accordingly decree the appeal and remand the case to the Court of First Instance with directions to record the above additional issues, and after affording the parties reasonable opportunity of adducing evidence in regard to those issues, and recording such evidence, to dispose of the case with reference to the above remarks."

The defendants appealed to the High Court.

Baboo *Kashi Kant Sen* for the Appellants argued, that the Subordinate Judge had no power to remand the case, as the Munsif had not disposed of it on a preliminary point—see s. 562 of the Code of Civil Procedure. The lower Court has not understood the case of *Radha Govind Roy v. Inglis* (7 C. L. R., 364), which is wholly confined to alluvial lands, and forms an exception to the general rule: see *Mano Mohun Ghose v. Mohura Mohun Roy* (1. L. R., 7 Cal., 225), *Kally Churn Sahoo v. The Secretary of State for India* (1. L. R., 6 Cal., 725). In such a case as the present the onus is clearly on the plaintiffs.

Baboo *Doorga Mohun Dass* for the Respondents.

The **Judgment** of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

Prinsep, J.—The order of the lower Appellate Court remanding this case is clearly contrary to the law. The Subordinate Judge seems to have thought that, because the issues were not correctly framed, he was competent to draw up fresh issues and to send the case back to the first Court for retrial. No doubt the issues thus drawn up are more complete than those on which the case was tried in the first Court; but from the materials before us, it is impossible to say that there was any necessity for thus expanding the case, or that the parties before the first Court, when the case went to trial, were not fully aware of the points which they were bound, each of them, to prove. We would point out to the Subordinate Judge that if, on trying the appeal, he was of opinion that the evidence [926] on the record was not sufficient to enable him to decide all the points arising out of the case, he should have kept the appeal on his own file and dealt with it in the manner provided by s. 566 of the Code of Civil Procedure. The law allows him to pass an order such as he has passed only under the circumstances stated in s. 562,—that is, when the first Court has decided the case on a preliminary point and not on the merits.

We must, therefore, set aside the order of remand and direct the Subordinate Judge to try the case in accordance with law. So far as we are able to judge from the cases cited before us, the question of limitation will probably not arise. The question is really one of title, and should be decided on evidence adduced by both sides. The plaintiffs being out of possession by order of a competent Court, that is, by order of the Collector passed under the Land Registration Act, the onus was clearly on them, in the first instance, to make out a *prima facie* case. But if the question of limitation arises, the lower Appellate Court should deal with it on the principles laid down by the Judicial Committee in *Rajah Saheb Perhlad Sein v. Maharajah Rajender Kishore Singh* (12 Moore's L. A., 336; S.C., 2 B. L. R., P. C., 111).

Appeal allowed.

NOTES.

[See also 10 Bom. 398.]

[8 Cal. 926]

APPELLATE CIVIL.

The 20th April, 1882.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE AND MR. JUSTICE BOSE.

Roushan Bibee.....Plaintiff

versus

Hurray Kristo Nath and another.....Defendants.*

Rent suit on kabuliat—Occupation of land by one defendant previously to kabuliat—Decree for rent on failure to prove kabuliat—Alternative claim for rent at old rate.

The mere fact of one party alleging that a new contract has been substituted for an old one, does not of itself put an end to the old contract, even as against the party so alleging, unless the allegation is proved to be true.

In a suit on a kabuliat, where no alternative claim for rent at an old rate is in words expressly asked for in the plaint (although it is disclosed by the [927] plaint that the defendant had previously occupied the land in suit at a rate which the evidence proved to be lower than the rent mentioned in the kabuliat) and where the kabuliat is not proved, it is in the discretion of the Court to amend the plaint or the issues, and to allow an alternative claim to be tried; and when the omission to make the claim in the plaint appears to have been an inadvertence, it is right that the Court should do so.

Lakhee Kanto Doss Chowdhry v. Sumeeruddi Lusker (13 B. L. R., 243; S. C. 21 W. R. 208) commented upon.

The use of jama-wasil-baki observed upon.

THE plaintiff, who was the owner of a certain taluq, stated that he had, previously to 1281 (1874), let out thirteen khans thereof to the defendant No. 1; that, in 1281, defendant No. 2, who was the son of defendant No. 1, gave the plaintiff a kabuliat for one year at an annual jama of Rs. 69 in respect of

* Appeal from Appellate Decree, No. 1291 of 1880, against the decree of F. McLaughlin, Esq., Judge of Nookhali, dated the 7th of April 1880, reversing the decree of Baboo Akhoy Coomur Bose, Munsif of Begumgunge, dated the 3rd May 1879.

the same land, and that, from that date, both the defendants became his tenants at the rental mentioned, and had paid to him their rent for one year at the rate of Rs. 69; but that, they having failed to pay the rent for 1283 and 1284 (1876 and 1877), he brought this suit to recover what was due to him, without making any alternative claim for rent at the rate paid by defendant No. 1 before 1281. The defendants denied having given the kabuliati, and denied that the relationship of landlord and tenant existed between them and the plaintiff.

The Munsif found that the defendant No. 1 was not bound by the kabuliati, even if it had been entered into by the defendant No. 2, inasmuch as he had not ratified that contract; but he held, that the execution of the kabuliati was not proved, and therefore dismissed the suit against the 2nd defendant; but finding that the defendant No. 1 had been the plaintiff's tenant before 1281 at a rental of Rs. 50 per annum, the Munsif gave him a decree for rent at that rate for the years 1283 and 1284 against the defendant No. 1. The defendant No. 1 appealed to the District Judge, who held that, under s. 62 of the Contract Act, the plaintiff was not entitled to any decree, inasmuch as he had set up a new contract, and must stand or fall by that contract. He, therefore, as the plaintiff had not asked in the alternative for rent at the old rate, reversed the decision of the Munsif and dismissed the plaintiff's suit.

[928] The plaintiff appealed to the High Court.

Munshi *Serajul Islam* for the Appellant.

Baboo *Okhil Chunder Sen* for the Respondents.

The **Judgment** of the Court (GARTH, C. J., and BOSE, J.), was delivered by

Garth, C. J. -We are under the necessity of remanding this case to the lower Appellate Court for retrial, inasmuch as the District Judge appears to have decided it upon s. 62^a of the Contract Act, which, so far as we can see, has nothing to do with the matter. In fact, the Judge seems quite to have misapprehended the meaning of that section.

The suit was brought by the plaintiff against the two defendants, father and son, alleging that the father was his tenant up to the year 1281; but that, in that year, the other defendant, the son, gave him a kabuliati at an increased annual jama of Rs. 69; that thus both defendants became his tenants at the higher jama, and paid it for one year; but that, they having since failed to pay it for the years 1283 and 1284 and part of the year 1282, he brought this suit to recover the rents of those years with damages, road cess, house tax, &c.

The defendants denied not only that a kabuliati was ever given, but that the relationship of landlord and tenant ever existed between them and the plaintiff. Accordingly the first issue raised for trial was—"whether the relationship of landlord and tenant existed between the parties; and what was the jama payable by the defendants." There were also other issues which it is not necessary now to consider.

The Court of First Instance found that the alleged kabuliati was not executed by the defendant No. 2; but it also found upon the evidence (*inter alia*) of certain wasil-baki papers, that the defendant No. 1 had been the plaintiff's tenant at the rent of Rs. 50-14, and eventually gave the plaintiff a

Contracts changed, rescinded, or altered, need not be performed.

*[Sec. 62 :- If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.]

decree for that rent against the defendant No. 1, for the years 1282, 1283 and 1284, as well as for damages and other charges, amounting altogether to Rs. 172.

[929] The lower Appellate Court, without apparently considering any of the other points raised in the case, held, that the suit ought to have been dismissed under s. 62 of the Contract Act, simply upon the ground that the kabuliati was found not to have been executed by the defendant No. 2. That section enacts that "if the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed."

The District Judge then argues in this way: As the plaintiff himself alleges that the defendant No. 2 executed a kabuliati which put an end to the old tenancy, and created a new one at a higher rent, the old contract was at an end, and was not enforceable against the defendant No. 1, although the first Court may have found that in point of fact the kabuliati was not executed.

It is clear that this view is founded upon an entire misapprehension of the meaning of the section.

If the parties to a contract have in fact made a new contract in substitution of the old, or have modified the old contract, then the old contract is at an end, and the new or the modified contract takes its place; but the mere fact of one party alleging that a new contract has been substituted for the old one does not of itself put an end to the old contract, even as against the party who so alleges, unless the allegation is proved to be true. Section 62 of the Contract Act made no difference in the law in that respect.

But then it is said that although the District Judge may have been wrong in that respect, still the Munsif was not justified, according to the law which has been laid down in this Court, to give the plaintiff any relief at all, and the Full Bench case of *Lukhee Kanto Doss Chowdhry v. Sumeeruddi Lasker* (13 B. L. R., 243; s. c., 21 W. R., 208) has been cited in support of that position.

But as I read that case it is an authority distinctly in favour of the course which the Munsif has taken.

In that case the plaintiff sued a ryot for arrears of rent alleged to be due under a kabuliati. The Court found that the kabuliati had not been executed, though the ryot had occupied [930] land under the plaintiff. But it does not appear from the report of the case that the plaintiff had given or offered any proof, other than the kabuliati, as to the amount of rent, which the defendant ought to pay.

Both the lower Courts, under these circumstances, dismissed the suit; and then it was contended by the plaintiff, on appeal to this Court, that the plaintiff was entitled, as a matter of right, to have a further trial of the question as to how much rent was due to the plaintiff on account of the ryot's occupation.

That question was referred to the Full Bench; and, as I understand their judgment, it only decides that, under such circumstances, the landlord is not entitled, as a matter of right, to have a further trial.

It is a question for the discretion of the Court in each case, whether it will frame issues, or amend the plaint if necessary, so as to allow the plaintiff to enforce his alternative claim.

The Full Bench say :—" It is in the discretion of the Court to amend the plaint or the issues, and to allow it (that is the alternative claim) to be tried. And where the omission to make the claim in the plaint appears to have been from inadvertence or by mistake, it would be proper to do so."

Now in this case it appears to me, that although in the plaint the claim was not expressly made in the alternative, still the fact is undoubtedly disclosed there, that the defendant No. 1 had, previously to the alleged kabuliat, been occupying the land at a lower rent as the plaintiff's tenant; and the issues appear to have been framed with a view to this alternative claim; the first issue being, whether the defendants or either of them held the land under the plaintiff, and what was the jama payable to him for it.

As to the latter branch of this issue the questions tried in the first Court were, whether the kabuliat alleged by the plaintiff had been executed or not; and if not, what was the former rent which had been paid by the defendant No. 1.

If the Munsif found (as we understand he did) that the kabuliat had not been executed, but that the defendant No. 1 had been in fact the plaintiff's tenant, and had paid the annual sum of Rs. 50-14 for rent, it was clearly the duty of the Munsif, [931] having regard to the circumstances under which the suit was brought, and the nature of the issues raised, to give the plaintiff a decree as against the defendant No. 1. If he had refused to make such a decree, he would not have done his duty. He would have compelled the plaintiff to bring a new suit, and would have put the parties to the expense of a fresh litigation, for the purpose of trying the very question, which one of the issues in the suit distinctly raised, and he would also probably have deprived the plaintiff of a large portion of his claim, which would thus have been barred by limitation.

Then it is said that, in the first Court, the Munsif relied improperly upon certain jama-wasil-baki papers. These jama-wasil-baki papers, we all know, are not evidence by themselves. The mere production of such papers is not enough. But, coupled with other evidence, these papers often afford a very useful guide to the truth in cases of this kind; and it is only right that those who have been collecting rent with the assistance of such papers should produce them in Court.

How far this evidence is to be relied upon in this case will be a question for the Judge when the case goes before him on remand. All we now say to the Judge is, that he has done wrong in dismissing the case upon the strength of s. 62 of the Contract Act.

He does not appear to have tried some of the most material questions in the cause; and we, therefore, send it back with the above remarks to guide him in disposing of it.

The costs of this Court, and of the lower Appellate Court, will abide the ultimate result of the suit.

Case remanded,

[932] APPELLATE CIVIL.

The 24th April, 1882.

PRESENT :

MR. JUSTICE WHITE AND MR. JUSTICE MACPHERSON.

Bandy Ali.....Judgment-debtor

*versus*Madhub Chunder Nag and others.....Decree-holders and
auction-purchasers. **Setting aside sale in execution of decree—Material irregularities—Civil
Procedure Code (Act X of 1887), ss. 287, 289.*

Upon an application to set aside a sale in execution of a decree on the ground of material irregularities in publishing and conducting it, it appeared that the sale-notification had not been fixed up in the Collector's office as required by s. 289 of Act X of 1877; that no affidavit as to search having been made in the Registry Office with regard to incumbrances as required by s. 287 of the Act had been filed; and that the sale took place on, and not after, the thirtieth day from the publication of the notice; but it also appeared that the applicant had himself been present at the sale and had purchased the property, and it was not shown that any substantial injury had resulted from the irregularities.

Held, that there was no ground for setting aside the sale.

Munshi Sirajul Islam for the Appellant.

Baboo Bhobany Churn Dutt for the Respondents.

The **Judgment** of the Court (WHITE and MACPHERSON, JJ.) was delivered by

Macpherson, J.—The appellant, judgment-debtor, made an application in the Court below for setting aside the sale held in execution of the decree passed against him, but did not succeed. From the order rejecting that application he now appeals to this Court, on the ground that there were material irregularities in publishing and conducting the sale which led to substantial injury. Of the irregularities the most material one that has been pressed upon us is, that the sale-notification was not fixed up in the Collector's office as required by s. 289 of the Civil Procedure Code. The Subordinate Judge is, no doubt, wrong in his comments on this part of the case in considering that the publication of such a notice is merely a formal proceeding. But we think that, in this instance, the omission is not shown to have resulted in any substantial injury to the [933] appellant, or to have injuriously affected the price obtained for the property.

Another ground taken is, that the rule framed by this Court under s. 287, which requires an affidavit as to search having been made in the Registry Office with regard to incumbrances, was not carried out. But this, in our opinion, is in itself no ground for setting aside a sale duly effected. The object of the rule is to provide the Court with the information required by s. 287 of the Civil Procedure Code, and a mere omission to comply with it will not have the effect of vitiating the sale. In this instance it further appears from the

* Appeal from Original Order, No. 292 of 1881, against the order of Baboo Kally Das Dutt, Second Subordinate Judge of Tippera, dated the 1st July 1881.

judgment of the Subordinate Judge that the Court was in possession of the necessary information, inasmuch as the judgment-debtor himself was examined, and brought to the notice of the Court the existence of a mortgage on the property.

It was further urged that the sale took place on, and not after, the thirtieth day from the publication of the notice. But it is clear that the appellant was present throughout the sale-proceedings, and that the sale having taken place on the advertised day, this fact was never brought to the notice of the Court, or made the subject of any objection. The appellant not only himself attended the sale, but through a relative bid for, and purchased the property, which was, on his default to deposit the earnest-money, put up again and sold for Rs. 90 less than was before bid. In so acting appellant consented to the sale being held on the advertised date.

It was incumbent on the appellant to show that some substantial injury had resulted from the irregularities complained of, and having wholly failed to show this, the sale cannot be set aside, and the appeal must be dismissed with costs.

Appeal dismissed.

NOTES.

[See 5 M. L. J. 70 (74) : 14 All. 333 : 9 A. W. N. 115 and the Notes to 7 Cal. 34 in the LAW REPORTS REPRINTS.]

[934] ORIGINAL CIVIL.

The 4th May, 1882.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE WHITE.

G. A. Watson.....Plaintiff

versus

Jonmenjoy Coondoo.....Defendant.

Power-of-attorney—Meaning of the word ‘negotiate’ with reference to Government Securities—Principal and Agent.

W gave to *A* and *B* a power-of-attorney authorizing them jointly and severally to “negotiate, make sale, dispose of, assign and transfer,” amongst other things, certain Government securities standing in his name.

B pledged the securities for an advance of Rs. 19,000, and at the same time executed a promissory note for the amount of the loan, the promissory note being signed “*B*, as attorney for *W*.” In a suit by *W* to recover the Government securities,

Held in the Court below, that the power-of-attorney was sufficiently wide to cover the transaction ; that the transaction was a fraud on the part of *B*, but that the transferee (the defendant) had no notice of the fraud, and therefore the plaintiff was not entitled to succeed.

Held on appeal, *per* WHITE, J. —(i) That the words of the power were to be read disjunctively, and the powers conveyed by the words were to be treated as joint and several ; (ii) that even supposing the word ‘negotiate’ to be applicable to transactions with Government securities (which was doubtful), and that such Government securities stood in the same position as

ordinary commercial notes, the word 'negotiate' did not authorize *B* to do more than put the Government securities in the market, or to put them in the circulation in the ordinary way in which such a transaction takes place in the market, and if necessary to endorse them in the name of *W*; (iii) that the loan, which has the principal transaction, being irrecoverable from *W*, because unauthorized, the defendant could not retain the Government securities which were deposited as security for the loan, he not having taken the precaution to ascertain whether *B* had authority to enter into the transaction.

Per GARTH, C.J. : That although, on the authority of *The Bank of Bengal v. Fagan* (5 Moore's 1 A, 27) a power to negotiate Government securities would authorize the negotiation of Government securities by way of pledge, yet *W* was entitled to a decree, on the ground, that *A* and *B* had no power, under the power-of-attorney, to borrow money in the name of *W*; and that, therefore, the defendant was not entitled to retain the security given for the advance (*viz.*, the Government promissory note).

[935] APPEAL from the decision of WILSON, J.

On the 18th October 1878 the plaintiff deposited with Messrs. Nicholls & Co. (who were a firm carrying on business as bankers and financial agents in Calcutta), for safe custody, and for the purpose of drawing for and on behalf of the plaintiff the interest due thereon, a security of the Government of India of the $4\frac{1}{2}$ per cent. loan of 1879 for Rs. 20,000 standing in his name; and at the same time executed, in favour of William Nicholls and George Augustus Thompson (two of the partners of the firm of Nicholls & Co.), a power-of-attorney, authorizing them "jointly and severally to negotiate, make sale, dispose of, assign, and transfer, or cause to be procured, assigned, and transferred, at their or his discretion, all or any of the Government promissory notes or other Government paper standing in his name."

In November 1878, Nicholls & Co. renewed the security for Rs. 20,000; and on the 15th December 1880, George Augustus Thompson, without the knowledge or authority of the plaintiff, pledged the said security with the firm of Ameer Singh Shamah Mull as security for an advance of Rs. 19,000, and executed as attorney for Watson a promissory note for the amount of the loan, and the last-mentioned firm, on the same date, transferred the note and the security to one Jonmenjoy Coondoo, the defendant.

It appeared from the evidence that, on the 21st January 1881, Nicholls & Co. wrote to the defendant asking for the temporary loan of the security pledged by them; and that they, on the 22nd January 1881, made an appointment with the plaintiff at their office and showed to him his Government promissory note for Rs. 20,000.

At or about the end of January 1881, the plaintiff, having heard rumours regarding the solvency of Nicholls & Co., went to their office, when he discovered that George Augustus Thompson had absconded. He subsequently traced his Government promissory note for Rs. 20,000 to the hands of the defendant. He thereupon, through his attorney, wrote to the defendant demanding the return of the security, but received no answer to his demand. But, on the 21st March 1881, the defendant's **[936]** attorney wrote to the plaintiff's attorney calling upon him to redeem the security pledged with him.

The plaintiff then, on the 25th April 1881, brought this present suit, praying that the defendant might be ordered to deliver over the Government security or the value thereof, and for an injunction restraining him from parting with the same. The defendant denied any knowledge of the deposit of the Government security by Watson, and stated that he never was

aware that it was the property of the plaintiff; but admitted that, at the time of the pledge, the Government security bore the blank endorsement of the plaintiff by his constituted attorney.

Mr. Hill (with him Mr. Trevelyan) for the Plaintiff.—The question which arises on the pleadings is as to the power of Nicholls & Co. to pledge the security with the defendant. If the power is not large enough, then the plaintiff would be entitled to succeed. It is for the defendant to show the authority of the endorser, having admitted that the paper stood in the plaintiff's name. A power which gives an attorney power to "negotiate, make sale, dispose of, assign, and transfer" and nothing more, does not enable the attorney to pledge; but only points to an out-and-out transfer by way of sale. As to the effect of the words "sell, assign and transfer," see *De Bouchout v. Goldsmid* (5 Ves. 211); there it was held, that such words did not include a power to pledge, and that the holding applied equally to shares as to goods. Although there is not in words an express power to endorse, yet such a power would be understood. The case of *The Bank of Bengal v. Fagan* (5 Moore's L. A., 27) lays down that the words "to sell, endorse, and assign" were to be read disjunctively; where a power to endorse is given, an endorsement for the purpose of pledging might pass property, yet a distinction is drawn between a case where the power is only "to sell, assign, and transfer." [WILSON, J. The question will be (i) was the power such as to authorize the transaction? (ii) was the transaction a fraud? (iii) had the defendant notice?] As regards the first question, unless the word 'negotiate' can be said to include the word 'pledge,' there are no other words giving [937] power to pledge. In Chitty on Bills, 10th edition, p. 154, a distinction is recognized both at law and in equity between the deposit of endorsed bills of exchange and the negotiation of bills by endorsement. If the words in this power pass the notes, then comes the question of fraud; that fraud was practised on the plaintiff, there can be little doubt. As to notice, I submit that the defendant knew that the paper belonged to Watson, and knew that it was for the purposes of Nicholls & Co. that the paper was being pledged.

Mr. Evans and Mr. Bonnerjee for the Defendant.—This is, properly speaking, an action of detinue, and the first question to be determined is, what is the nature of the thing wrongfully detained; the position of a bank-note is pointed out in the case of *The Bank of Bengal v. Macleod* (5 Moore's L. A., 1). [WILSON, J.—Is it not in the same position as any other bill of exchange?] In *The Bank of Bengal v. Macleod* (5 Moore's L. A., 1) the Privy Council proceeded on the broad ground that Macleod had authority to endorse. As to whether a power to transfer includes a power to mortgage, see *Barber v. Richards* (20 L. J., Exch., N. S., 135). The word 'negotiate' clearly carries with it the word 'endorse,' because you cannot negotiate an instrument that is negotiable by endorsement except by endorsement.

Wilson, J.—In this suit the plaintiff claims to recover a Government promissory note for Rs. 20,000 under the following circumstances:

The note undoubtedly belonged to the plaintiff. He deposited it for safe custody with a firm who were then carrying on business in Calcutta as bankers—Nicholls & Co., and he took from them what is called a safe custody receipt. He at the same time gave to Nicholls & Co. a power-of-attorney, in which he authorized them to receive interest upon the paper; but he also, by that power, authorized them to do certain other things, which are thus expressed—"to negotiate, make sale, dispose of, assign, and transfer, or

cause to be procured, and assigned, and transferred, at their or his discretion [938] all or any of the Government promissory notes," and so on as to other securities.

The promissory note was renewed by Nicholls & Co., in the name of the plaintiff, and the new note of course remained in their hands on the same terms as the old. That was done without the plaintiff's knowledge for some reason which I do not understand, but that does not affect the case. Then, in December 1880, a transaction took place, out of which this controversy arises. The promissory note was pledged by Nicholls and Co. with the defendant for Rs. 19,000, one of the partners of Nicholls & Co., Thompson, having endorsed the note in blank, professing to do so as attorney for the plaintiff.

It appears from the evidence that Thompson was the person who carried out these transactions; and that he went so far as to sign a promissory note for the amount in the plaintiff's name. For that he had no authority.

Nicholls & Co. failed. The plaintiff, shortly before their failure, became suspicious as to the safety of his property in their hands, and went to their office on the 22nd January to see whether his securities were safe. He found all his securities apparently in order. The note, together with the shares, was put into his hands. He looked at the face of the note, but did not look at the back. He went away leaving his note and shares with them, and then came the failure of Nicholls & Co.

It comes now to be tried whether the note is his, or whether the defendant has a better title to it. The first question is this—Are the terms of the power-of-attorney sufficiently wide to authorize the transaction which took place, assuming that the transaction, as far as the defendant is concerned, was *bond fide*? If that question cannot be answered in the affirmative, the plaintiff is entitled to succeed. If the terms of the power are wide enough to authorize the transaction, a further question arises, to which I shall presently refer.

The words of the power are—"negotiate, make sale, dispose of, assign, and transfer, or cause to be procured, and assigned, and transferred, at their or his discretion, all or any of the Government promissory notes."

Several cases have been cited with reference to the construction [939] of powers. They turn on the particular words used, but one case does more—*The Bank of Bengal v. Macleod* (5 Moore's I. A., 1). That case lays down a rule of construction that words such as these are to be construed disjunctively so as to give a power to negotiate, a power to sell, a power to assign, and not only to authorize an act, which may be described by all those words together.

The actual words in the case of *The Bank of Bengal v. Macleod* (5 Moore's I. A., 1) were different from these. The decision in that case turned on the word 'endorse,' which does not occur here. The case of *De Bouchout v. Goldsmid* (5 Ves., 211), does not assist us in this case. In that case it was held, that the power "to assign, sell, and transfer" stock did not authorize a pledge. That case is, perhaps, so far an authority that it may show that the words here used, "assign and transfer," would not themselves authorize a pledge. *Wilson v. Moore* (1 M. & K., 337) does not assist in the construction of this power; nor does *Attwood v. Munnings* (7 B. & C., 278). The words there were "endorse, negotiate, and discount," and all that was decided was that those words did not authorize the accepting of a bill. The real question here is whether the word 'negotiate' necessarily requires the discounting of a bill, or whether the word is satisfied by a pledge as in this case.

It appears to me that the word 'negotiate' is sufficiently wide to cover a transaction such as that which took place in this case. We are speaking of

a class of documents long known as negotiable instruments, and I think the word 'negotiate' used in such an instrument means to deal with as a negotiable instrument by endorsement, if the instrument is such as to require endorsement, by delivery if it passes by delivery, and in my opinion that may be by an out-and-out sale or by pledge. I think, therefore, that the word 'negotiate' covers such a transaction as this.

But two other questions arise. Although it is shown that the act is within the power of the agent, yet every agent is presumed to act in good faith. If he employs his power otherwise than for the benefit of his principal, he deals in fraud of his principal. [940] Was this transaction in fraud of the plaintiff? That it was in fraud of the plaintiff cannot be doubted. It was a gross and deliberate fraud.

There remains the question, had any knowledge of the fraudulent nature of the transaction been brought home to the defendant? I think there were circumstances giving rise to grave suspicions. Any one's suspicions would be roused by an incident such as that of the 22nd January. The transaction between Nicholls & Co. and the defendant took place in December 1880; but on the 22nd January 1881, the security in question was in the possession of Nicholls & Co., and was by them shown to the plaintiff. That circumstance would give rise to suspicion, but I am satisfied that it has been explained. I see no reason to discredit the witnesses for the defendant. They say that when he received the letter from Nicholls & Co., to send this paper to their office, he came to the natural conclusion that it was sent for for the purpose of being sold or redeemed. I see nothing unnatural upon this view in their trusting the document to Thompson. It shows that Thompson succeeded not only in defrauding the plaintiff, but also in duping the defendant. I am satisfied with regard to the three questions, -

1st, that the power-of-attorney was sufficiently wide to cover the transaction; 2nd, that it was a gross fraud on the part of Thompson; and 3rd, that there is no reason for saying that the defendant had any knowledge of Thompson's fraud. The suit must, therefore, be dismissed with costs.

From this decision the plaintiff appealed.

Mr. Branson (with him Mr. Trevelyan) for the Appellant.—Does the word 'negotiate' cover the present transaction? If the word 'negotiate' were struck out of the power, the lower Court admits the transaction could not stand. There cannot be a negotiation by way of pledge. In the English Statute of Embezzlements, the words used are "any person who transfers, pledges, or negotiates," &c., which shows that the word 'negotiate' does not include 'pledge.' Chitty on Bills, p. 454, draws a distinction between the deposit of bills endorsed and the negotiation of bills by endorsement. When the plaintiff [941] deposited these notes with Nicholls & Co., he never 'delivered' them; he simply put them in their hands for safe custody. See *Ex parte Twogood* (19 Ves., 229), as to the distinction mentioned by Chitty. [WHITE, J.—Any way in which you can get money on a bill would be to 'negotiate' the bill.] GARTH, C.J.—The Privy Council case of *The Bank of Bengal v. Macleod* (5 Moore's I. A., 1) comes so close to this case that it is difficult to distinguish it. What is the difference between 'endorsement' and 'negotiation' of bills of exchange? In the 12th Edition of Byles on Bills, p. 175, it is laid down that a pledgee of negotiable paper has no power to sell: see cases there cited. Then the fact of the deposit itself does away with negotiation of the thing deposited, the notes in this instance being locked up for safe custody after they were endorsed. [WHITE, J.—But the deposittee could sell them to recoup

himself.] No, he could only bring a suit on the security given him. In *The Bank of Bengal v. Macleod* (5 Moore's L. A. 1), there was an express authority to sell. "Pledges of paper have no power to sell it, but are bound to collect it"—Story on Bailments, s. 321. [GARTH, C. J.—The case referred to by Chitty was an instrument endorsed without delivery; but this note was endorsed and delivered, and the property therefore passed, and that is the distinction.] The word 'negotiate' imports endorsement in blank, but I say it also imports the purpose for which the note is deposited. The decree of the Court below has dismissed our suit entirely. The Court should not have done this, as Nicholls & Co. had no power to borrow money at interest on our securities; and if they were not our agents to make a contract for the payment of interest, we should be entitled to redeem the paper on payment of the principal alone.

The Court called upon the respondent only on the question whether the word 'negotiate' was connected with the purpose for which the transfer took place, *i.e.*, whether the word 'negotiate' did not import purpose; and whether the word was distinguishable from 'endorsement,' which has a technical meaning.

[942] Mr. *Eraus* (with him Mr. *Bonnerjee*) for the Respondent contended, that the point raised came to this, *viz.*, what is the meaning of the word 'negotiate'? The word means to constitute another person a holder. A negotiable instrument is a peculiar contract capable of being transferred either by the Law Merchant or by Statute. *Crouch v. Le Credit Foncier* (L. R., 8 Q. B., 374) shows the peculiarity of negotiability to be (i) that negotiation constitutes a person a holder, who is able to sue on the instrument in his own name; and (ii) that the person so negotiating can give a better title than his transferee had. The word 'negotiate' is larger than the word 'endorse.' It covers the endorsement and also the delivery of an instrument payable to bearer. Chalmers, in his book on Bills of Exchange, s. 106, gives this definition of the word 'negotiate' to be "the transfer of" a bill in the form and manner prescribed by the Law Merchant with the incidents and privileges annexed thereby,—*i.e.*, (i) the transferee can sue all parties to the instrument in his own name; (ii) the consideration for the transfer is *prima facie* presumed; (iii) the transferor can, under certain conditions, give a good title, although he has none himself; (iv) the transferee can further negotiate the bill with the like privileges and incidents.

At a subsequent date the Court intimated that it would be glad to hear further arguments on certain points.

[GARTH, C. J. We wish to hear you, Mr. *Bonnerjee*, as to this point; the real transaction in the matter is the promissory note, and in the power-of-attorney there was no power given to borrow upon a promissory note; and the question is, therefore, does not this make a distinction between the present case and the Privy Council case—*The Bank of Bengal v. Macleod* (5 Moore's L. A. 1). In the latter case the loan was made to Macleod, the agent, and he endorsed the promissory note. Here the loan was made to the principal, and not to the agent.]

Mr. *Bonnerjee* for the Respondent.—The real transaction was not the promissory note, but the pledge of the Government paper. [GARTH, C. J.—Supposing a suit had been brought [943] for the return of the promissory note, would there have been any defence to it? WHITE, J.—I don't think the agent signing as agent could have been sued on the promissory note.] No, I don't think he could have been sued. WHITE, J.—Then Watson is entitled to get it back; you can't use the note. You can't sue either of the parties upon it. It is an unauthorized loan, and does it not follow that the securities of an unauthorized loan must be given

back?] The case the defendant came to meet was, whether he was bound to give up the Government security? No mention is made in the plaint of the promissory note. This shows that the other side looked upon the Government security as the real security, and they cannot ask for the return of the promissory note now. [GARTH, C. J.—I think we should be inclined to allow an amendment even now for that purpose. WHITE, J. Can you separate the loan from the promissory note, so far that, whilst admitting the loan to be bad, you can make out that the note holds good? GARTH, C. J.—In the Privy Council case *Macleod* had a right to obtain a loan for himself, and having the right to endorse a particular note for his brother under the power-of-attorney, endorsed the note, and did so honestly. The question there was—Was it necessary that the person who lent the money should have enquired the reason why the note was endorsed, and it was held that it was not? Now in this case the transaction was not *bona fide*, and the question is, Does this fact enable us to distinguish this case from the Privy Council case?] The defendant may have had no right to make the loan, just in the same way as the Bank of Bengal had no right to advance money to *Macleod* on pledge of paper which belonged to a principal of theirs; if, however, the words of the power-of-attorney give a right to pledge, then *Nicholls & Co.*, had a right to execute any document necessary for the purpose of pledging, and for that purpose to execute the promissory note. If the property has passed, can it be taken away from the defendant unless fraud can be shown on his part?

Mr. *Jackson* for the Appellant. —With reference to the promissory note and the attempt to sever it from the rest of the [944] transaction, what reason had the other side for calling Mr. *Larsen* of the Bank of Bengal, and asking him the question as to what was the custom of the Bank as to what they considered the principal security in such cases, except for the reason of getting out of him, that, in transactions of this kind, the principal security was the Government security. If that had not been made out, the whole transaction would fail. The question was properly objected to. [The Court here intimated that it was not necessary to go any further into the question of severance.] As to Mr. *Bonnerjee's* argument that the power-of-attorney gave *Nicholls & Co.*, power to make the promissory note, I say it does not; the word 'negotiate,' except with regard to bills, where it means only 'discounting,' is not an appropriate word to use in dealing with Government paper. If you wrote to the Bank and asked them to negotiate your Government paper, they would answer, in what way? by way of sale, or loan, or how? The word by itself conveys the idea with regard to bills of discounting and nothing more, but it has no definite separate meaning with regard to Government promissory notes or other kinds of securities. I say if the first part of the power does not enable *Nicholls & Co.* to borrow or pledge, the second part of the power cannot be taken to extend the words of the power. The other side would make out that the general words of the power enable them to enter into any mercantile transaction whatsoever as long as the Government paper was used to raise the capital. As to general words of limitation, see *Esdaile v. Le Nauze* (1 Y. & C., Exch., 400) and also s. 62 of *Story on Agency*. With regard to *The Bank of Bengal v. Fagan* (5 Moore's I. A., 27), that case is never cited except to show that the words of a power are to be construed disjunctively and that the property passes, and the case is therefore no authority on the subject of this suit.

The following **Judgments** were delivered by the Court (GARTH, C. J., and WHITE, J.):—

White, J.—The first question is, what was the transaction that took place between the defendant and Thompson as the [945] agent of the plaintiff in connection with the piece of Government paper in suit.

There can, I think, be no doubt upon the evidence that it was a lending by the defendant and a borrowing in the name of, and ostensibly for, the plaintiff, of Rs. 19,000 upon the security of the paper. When the loan was effected a promissory note for the amount was executed in favour of the defendant by Thompson in the name of the plaintiff, and the Government paper was delivered to the defendant by Thompson. The paper was not endorsed to the defendant, but at the time of its delivery to the defendant bore an endorsement in blank, which had some time previously and for some other purpose been made by Thompson in the name of the plaintiff.

There is no dispute as to the identity of the paper. It is a promissory note of the Government of India of the four-and-half per cent. Loan of 1879 for Rs. 20,000. It bears the No. 016388 over 000678, and was issued by the treasury in the name of the plaintiff and payable to his order. It was a renewal of a previous note of the same Government loan, for the same amount, numbered 000678, which had been also issued in the name of the plaintiff and payable to his order. The latter piece of paper had, together with other pieces, been deposited by the plaintiff in October 1878 with Nicholls & Co., who styled themselves "financial agents," and gave the plaintiff a receipt for the same, dated the 22nd of that month. Two days before the date of the receipt, the plaintiff had executed in favour of William Nicholls and G. A. Thompson, two of the members of the firm, a power-of-attorney, applicable, amongst other things, to the Government paper so deposited.

Benimadhub, who manages the defendant's business in Calcutta as head-man, deposes that the broker who negotiated the transaction came to him on behalf of the plaintiff, and said that the plaintiff wanted to borrow Rs. 19,000 upon a Government security for Rs. 20,000, which he represented as being in pledge with the firm of Ameer Singh for money lent by the latter to the plaintiff. The defendant requiring to see the Government security before making the advance, the Government paper in suit was brought to him, and he, after satisfying [946] himself by enquiry of the broker that Thompson had authority to draw the interest and sell the paper, sent the Rs. 19,000 by his clerk Koylash Chunder to Nicholls & Co.'s place of business. Koylash Chunder deposes that he took the money to that place, and having got what he considered to be satisfactory answers from Thompson as to his authority to borrow money on the Government paper in the name of the plaintiff, and also having received from Thompson the promissory note and Government paper in suit, handed to him the Rs. 19,000. This took place on the 15th December 1880. At the foot of the promissory note is a memorandum of the deposit of the Government paper. An account also was opened in the plaintiff's name by Benimadhub in his master's books, in which the transaction is recorded as a loan upon the Government paper.

The next question is, was this transaction authorized by the plaintiff? The defendant, in his written statement, asserts, that "he believed, and had every reason to believe, that Nicholls & Co. had full power to borrow the said sum of Rs. 19,000 as agents of the plaintiffs"; but he has given no evidence that either Thompson, or his firm, had any such authority. The plaintiff, on the other hand, denies in his evidence that he ever borrowed Rs. 19,000 from Ameer Singh, or any one else, or ever gave authority to Nicholls & Co., or to Thompson, to borrow any money for him. He adds, that he first became aware of the loan made in his name when the members of the firm of Nicholls & Co. became bankrupt and disappeared. No member of that firm has been called to contradict the plaintiff, or to prove why or when Thompson put the blank

endorsement in the plaintiff's name upon the Government paper in suit; nor any one from the firm of Ameer Singh to show the circumstances under which the Government paper was pledged with the latter firm.

But the defendant strenuously contends that the transaction was warranted by the power-of-attorney executed by the plaintiff in favour of Thompson and William Nicholls, authorizing the attorneys, amongst other things, to 'negotiate' the plaintiff's Government paper.

This word is in the power allied with the words "make sale, dispose of, assign, and transfer." Each of these words, according [947] to the decision of the Privy Council in *The Bank of Bengal v. Fagan* (5 Moore's I. A., 27), is to be read disjunctively, and the powers conveyed by these words to be treated as joint and several.

The power-of-attorney relates to many other classes of property besides Government notes and Government paper, the last class of property mentioned being "securities of any description." Viewing the words conveying absolute authority in connection with the classes of property over which the powers are to operate, it is difficult to see how the word 'negotiate' is appropriate to anything which is ordinarily done with or to a Government promissory note or piece of Government paper. As was truly said by one of the learned counsel for the plaintiff, if a banker who had a Government note belonging to a customer, deposited with him for safe custody, were to receive a written order from the customer to negotiate the Government note, he would not know how to execute the order, and would probably ask his customer for more definite instructions as to how he wished the note to be dealt with. If a similar order was given respecting an ordinary commercial promissory note, the banker would feel no hesitation what to do with the note. He would get it discounted, which means that he would sell the note and put it in circulation, with a right on the part of the purchaser or any subsequent holder to have recourse to the party on whose behalf it was discounted, in case that party's name was on the note and default made in payment of the note at maturity. If the principal's name was not on the note when offered for discount, a banker, who held a similar power-of-attorney to the present one, would, beyond doubt, be authorized to endorse the note in his principal's name for the purpose of discounting the bill.

Promissory notes of the Government of India, issued against a loan made by the public to that Government, although in form the same as ordinary commercial promissory notes, differ from them in most other essential particulars. They are not payable at any certain time, or on demand, or at sight. Their payment, with the exception of the half-yearly interest, is deferred indefinitely at the will of the borrowers, who are the makers of [948] the notes; and, as far as I am aware, though I do not think the point has ever been, or is likely to become, the subject of judicial decision, the holders have no right to come upon previous endorsers for payment of the principal or interest in case Government should make default. A consideration of all these circumstances makes the doubt whether the word 'negotiate' ought not to be confined in its application to that class of property which is described in the power-of-attorney as "securities of any description," and to such of them only as are ordinarily said to be negotiated when they are transferred or put in circulation.

Taking the term, however, to be applicable to a Government promissory note, and that such a note stands in the same position as an ordinary commercial note, did the word 'negotiate' confer upon Thompson authority to do what he did in the present case in the plaintiff's name?

Is it reasonable to suppose, or is it a reasonable interpretation of the word 'negotiate' to hold, that the plaintiff, when he executed the power in Thompson's favour, intended to confer upon Thompson authority to pledge his credit to an indefinite extent, or make him responsible for any money which Thompson might choose to borrow, or empower him to use the Government paper in Nicholls & Co.'s hands as a security for any loan that Thompson might please to contract. I think not. The word 'negotiate,' if applicable to such property as Government paper or Government promissory notes, did not, in my opinion, authorize Thompson to do more than put the paper in the market or to put it in circulation in the ordinary way in which such a transaction takes place in the market; and, if necessary for that purpose, to endorse it in the name of the plaintiff. In the transaction which Thompson entered into with the defendant, it was not put in the market or put in circulation; it was deposited as a security for money borrowed. It was an essential part of the transaction between Thompson and the defendant that the latter should keep the paper out of the market, and with himself, ready to be returned to Thompson when the loan was paid off, or when he sought to redeem the paper.

The defendant's contention is, that if the word 'negotiate' [949] does not by itself authorize the transaction, it does so when coupled with the words lower down in the power-of-attorney, which run thus, "and for the purposes aforesaid to sign for me and in my name and on my behalf any and every contract, agreement, acceptance, or other document." These are general words, and if the contention were sound, Thompson, under these words, might have entered into any transaction he pleased in the name of the plaintiff involving the plaintiff in any amount of responsibility, provided only he used the plaintiff's Government paper for the purpose of raising the money necessary to carry out the transaction,—thus he might have bought goods or opened a shop in the plaintiff's name. The authorities cited at the bar show that these general words are not to be construed as enlarging the authority of the donee of the power, but are to be confined strictly to the doing of things necessary to be done in performing the acts authorized by the power.

The defendant having, in my opinion, failed to show that the pledge of the Government note was authorized by the power-of-attorney, it follows that he acquired no title to the note by its delivery to him, although at the time it bore an endorsement in blank in the plaintiff's name.

Besides this ground, it appears to me that the plaintiff's right to recover the Government paper may be put upon another ground.

It is clear from the evidence that the defendant could not sue the plaintiff to recover the money which was borrowed by Thompson in his name, nor upon the promissory note which was executed by Thompson in his name. The loan, which is the principal transaction, being irrecoverable from the plaintiff because unauthorized, how can the defendant retain the Government paper, which was deposited as a security for that loan? If he sought to do so on the plea that he was a purchaser for valuable consideration without notice, the answer is obvious, that he took no means before lending his money to ascertain whether Thompson had authority to enter into the transaction. Neither Benimadhab nor Koylash Chunder asked to see the power-of-attorney which Thompson held; the former contented himself with seeing that the piece of Government paper was [950] endorsed by Thompson for the plaintiff, and with the answer of the broker that Thompson had authority "to draw interest and sell the paper"; and Koylash Chunder, who was sent to Nicholls & Co., with the money and instructions to "enquire whether the Government paper

had Thompson's signature upon it," was satisfied with Thompson's acknowledgment of his signature, and his answer that "he had a power-of-attorney from the plaintiff to manage all his business, and had authority to receive money on that paper."

The case of *The Bank of Bengal v. Fagan* (5 Moore's L. A., 27) has been much relied on by the defendant's counsel on the argument of this case. That decision is an authority for two propositions: *first*, that the words in a power-of-attorney conferring power are to be read disjunctively; and *secondly*, that the word 'endorse' in a power-of-attorney warranted the endorsement which was made in that case; but beyond this has little or no application or bearing upon the present case.

The points there decided arose in an action of detinue instituted on the Common Law Side of the old Supreme Court of Calcutta. The success or failure of the suit depended upon whether the property in the Company's paper had passed to the defendants, and this again turned solely upon whether, under the power-of-attorney, the plaintiff's agent had authority to endorse the paper.

The present suit is instituted in a Court of both law and equity, and it must be determined by law as modified by equity. It seems to me immaterial whether the delivery of the Government paper, with the plaintiff's endorsement in blank upon it by the hand of Thompson, passed the property in the paper or not. If it did not, no title was conferred upon the defendant; and if it did, the defendant cannot in equity be allowed to retain the property.

The plaint is not well drawn; it does not, as it might have done, ask for any relief in respect of the promissory note executed by Thompson in the plaintiff's name; but that is not, I think, a reason why the plaintiff should be denied the relief which he does ask in respect of the Government paper. Although the [951] plaint contains the omission referred to, the correspondence between the respective solicitors, which is set out in the plaint, supplies, in a great measure, the deficiency. The plaintiff's attorney's letter of the 25th February 1881 demands the return of both the promissory note and the Government paper, alleging that the latter was deposited as a security for the payment of the former; and the defendant's attorney, on the following 21st of March, writes a letter requiring the plaintiff to redeem the Government paper by paying the Rs. 19,000 and interest. These letters show how the parties regarded the transaction.

Having decided the case adversely to the defendant on the grounds which I have mentioned, it becomes unnecessary to consider the charge brought against him, that he took the Government paper with knowledge of the fraud which Thompson committed against the plaintiff by pledging it.

The plaintiff is entitled to a decree ordering the defendant to deliver to the plaintiff the Government paper in suit and to pay him all interest, if any, that he may have received upon the Government note since its deposit with him on the 15th December 1880; and that, in the meantime, the defendant be restrained from endorsing or parting with the said Government note.

Garth, C.J.—I agree in the main with my brother WHITE's judgment. He has gone very fully into the facts, and it is only necessary for me to express my opinion shortly. I confess, if the case had depended upon the meaning of the word 'negotiate' in the power-of-attorney, I should have been disposed to take the same view as the learned Judge in the Court below. I see no reason why a Government note should not be 'negotiated' like any

other promissory note; and if, as was suggested in the argument, the word 'negotiate' has any special meaning in Calcutta, which would confine its applicability to any particular class of instruments, or to any particular mode of dealing with those instruments, I think evidence to that effect should have been given at the trial.

It was held by the Privy Council in the case of *The Bank of Bengal v. Pagan* (5 Moore's I. A., 27), that a power to endorse a Government [952] note of this kind authorized an endorsement of the instrument by way of pledge; and upon the same principle it seems to me that a power to negotiate such a note would authorize its negotiation by way of pledge.

These notes are negotiated in much the same way as an ordinary promissory note,—that is to say, by endorsement and delivery in the first instance, and afterwards by delivery only; and endorsement seems to me to be only one mode of negotiation, the word 'negotiate' being the more comprehensive term of the two.

But this case does not depend, in my opinion, upon the meaning of the word 'negotiate,' nor of any other word in the power-of-attorney. It involves a different and much broader question than that in the case of *The Bank of Bengal v. Pagan* (5 Moore's I. A., 27). There the transaction in respect of which the pledge was made was perfectly honest and unimpeachable. The borrower of the money effected the loan on his own account, and the only question was, whether he had authority under the power-of-attorney to endorse, by way of pledge, the Government notes belonging to his brother; and the Privy Council held, that the word 'endorse' gave him that power without reference to the purpose for which the endorsement was made.

But in this case the plaintiff's real object is to impeach the whole transaction between Messrs. Nicholls and the defendant as a fraud upon himself, for which, from beginning to end, Messrs. Nicholls had no authority, and it is to be regretted that the plaintiff did not put his case upon this broad ground, and ask for relief as regards the promissory note, as well as the Government paper. He did take that course in the letter that was written before the suit was brought, and why he should have omitted to do so in his plaint it is perhaps not easy to explain.

I cannot help thinking that the separation of the question of pledge from that of the original loan has had a tendency to divert the argument, as well as the attention of the Court, from that which is the true issue in the cause; and I fear it may have been the means of inducing the learned Judge in the [933] Court below to take what we consider to be an imperfect view of the matter.

It seems to me now, looking at the question in its proper light, that the plaintiff had a right to unrip the whole transaction. I cannot doubt that if he had sued to have the promissory note delivered up to be cancelled, on the ground that the loan itself was unauthorized and fraudulent, the defendant would have had no answer to the suit. It is clear that Messrs. Nicholls & Co. had no authority to borrow in the plaintiff's name; indeed, it is not pretended that they had such authority, and the promissory note, although the plaintiff asks no relief in that respect, is in fact so much waste paper.

Then how can the security stand if the loan is negatived, and the promissory note is invalid? I think that the whole transaction is a fraud, and a nullity from beginning to end. The return of the Government paper is claimed upon that ground, and I think that the omission to ask relief as regards the promissory note will make no substantial difference in the result of the cause.

The plaintiff will have a decree in the terms of my brother WHITE's judgment, and he will also have his costs in both Courts on scale No.2.

Appeal allowed.

Attorney for the Appellant : Mr. Carruthers.

Attorney for the Respondent : Baboo Kallynath Mitter.

[954] APPELLATE CIVIL.

The 9th May, 1882.

PRESENT:

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

Tariny Debee.....Plaintiff

versus

Shama Churn Mitter.....Defendant.

Payment to stay final sale—Payment to zamindar—Reg. VIII of 1819, s. 13.

The direction in s. 13 of Reg. VIII of 1819, that money paid into Court by a taluqdar in order to stay the final sale shall be deducted from any claim of rent that may at the time be pending on account of the year or months for which the notice of sale may have been published, is satisfied by payment not into Court, but to the zamindar. If a strictly literal construction were put upon the words 'into Court' no payment effectual to stay the sale could be made, for 'the Court' has nothing to do with these sales, which are managed by the Collector.

Baboo *Trulokya Nath Mitter* and Baboo *Pron Nath Pandit* for the Appellant.

Baboo *Mohun Mohun Roy* and Baboo *Anand Chopal Palit* for the Respondent.

THE facts of this case sufficiently appear from the **Judgment** of the Court (McDONELL and FIELD, JJ.), which was delivered by

Field, J.—The plaintiff in this case is a patnidar, and the rent payable by him to the zamindar is Rs. 922. The defendant is darpatnidar, and the rent payable by him to the patnidar is Rs. 1,022. Under the terms of the darpatni kabuliati the darpatnidar is to pay the zamindar's rent,—i.e., the head rent. It thus appears that the actual amount payable by the darpatnidar to the putnidar for each year is Rs. 100.

The present suit is brought to recover the sum of Rs. 3,133-15, alleged arrears of the darpatni rent, with interest. This [955] amount has been obtained by making an account extending over the years after 1274 (1867). In this account the amounts paid by the darpatnidar, as well to the patnidar direct as to the zamindar, are credited to the oldest arrears of the entire amount of darpatni rent.

*Appeal from Appellate Decree, No. 1638 of 1880, against the decree of J. P. Grant, Esq., Judge of Hooghly, dated the 27th May 1880, reversing the decree of Baboo Sreenath Roy, Subordinate Judge of that district, dated the 10th July 1879.

The essential question in the case is, as the District Judge says, a question of appropriation of payments. The District Judge is of opinion that what the parties intended was, that the payments of each year should be credited to the rent of that year, and that any portion of the annual rent unpaid at the end of the year should constitute a separate debt and should not be carried on in a continuous account; in other words, he finds that, within the meaning of s. 60 of the Contract Act, there were circumstances in the case indicating it to be the intention of the parties that all payments made within the year should be credited to the rent of the current year, and not to arrears of past years. We think that this is a finding of fact with which we cannot interfere in second appeal.

It has been further contended before us that, in arriving at his conclusion upon the question of appropriation of payments, the District Judge has erred in applying the provisions of s. 13 of Reg. VIII of 1819 to the parties to the present case. We think that, quite apart from what the District Judge says as to the applicability of s. 13 of the Regulation, there is sufficient matter in his judgment to show that, even apart from the section of the Regulation, he would have arrived at the conclusion at which he has arrived upon the question of appropriation of payments.

As to the applicability of cl. 3, s. 13 of Reg. VIII of 1819, it is contended that the direction of this clause that money paid in order to stay the final sale shall be deducted from any claim of rent that may at the time be pending on account of the year or months for which the notice of sale may have been published, applies only to payments made into Court, and that, in this case, the payments were not made into Court but to the zamindar out of Court. The District Judge has found as a fact that the money was paid in each instance after the 'ashtomi' application under the Regulation had been [956] made, and in order to stay the sale; and he considered that the staying of the sale is the substance of the thing, and that the paying into Court or paying to the zamindar out of the Court is immaterial. We are not prepared to dissent from that view of the law; and, as already observed, even if we were, we think that there is sufficient matter in the District Judge's judgment to show that, apart from the consideration of s. 13 of the Regulation, he did arrive, and would have arrived, at the conclusion at which he has arrived upon the evidence before him indicating the intention of the parties as to the appropriation of payments.

We may, however, observe, that if a strictly literal construction were put upon the words 'into Court,' no payment effectual to stay the sale could be made, for 'the Court' has now nothing to do with these sales, which are managed by the Collector.

We think, therefore, that the appeal must be dismissed. But as there is no doubt that these old arrears of the annual rent have not been paid, we think it fair to direct that each party shall bear his own costs of this litigation.

Appeal dismissed.

NOTES.

[This case was **affirmed** on appeal to the **Privy Council** in (1881) 10 Cal. 901 **P. C.** See the Notes to that case.]

[8 Cal. 956 : 10 C. L. R. 577 : 7 Ind. Jur. 86]

APPELLATE CIVIL.

The 10th May, 1882.

PRESENT:

MR. JUSTICE FIELD AND MR. JUSTICE BOSE.

Charu SurnokarDefendant

versus

Dokouri Chunder ThakoorPlaintiff.

Easement—Implied grant—Modes of acquiring easements—Limitation Act (XV of 1877), s. 26.

In a suit for an injunction to restrain the defendant from using a path on the plaintiff's land it appeared that the land held by the plaintiff and defendant had originally belonged to one owner, and that the plaintiff and the defendant had obtained their respective tenements more than twenty years previously. The path had been admittedly made by the original owner, but the plaintiff contended that when he purchased the land he had closed the path. Thus the Munsif disbelieved, and refused the injunction. The District Judge, treating, [957] the case as if it fell under s. 26 of the Limitation Act, and being of opinion that the defendant had not proved twenty years' peaceable, open, and uninterrupted exercise of the right of way, gave the plaintiff a decree.

Held, that the mode of acquiring an easement provided by s. 26 of the Limitation Act is not the only way in which an easement may be acquired, but an easement may also be acquired by implied grant. In the present case the use of the path might be absolutely necessary to the enjoyment of the defendant's tenement, in which case there would be an easement of necessity; or the use of the path, though not absolutely necessary to the enjoyment of the defendant's tenement, might be necessary for its enjoyment in the state in which it was at the time of severance, and in this case, if the easement were apparent and continuous, there would be a presumption that it passed with the defendant's tenement.

Baboo Jadub Chunder Seal for the Appellant.

Baboo Girudass Banerjee for the Respondent.

THE facts of this case sufficiently appear from the **Judgment** of the Court (FIELD and BOSE, JJ.), which was delivered by

* Appeal from Appellate Decree, No. 1649 of 1880, against the decree of A. J. R. Bainbridge, Esq., Judge of Moorshedabad, dated the 22nd of May 1880, reversing the decree of Baboo Anant Ram Ghose, Second Munsif of Berhampore, dated the 31st December 1879.

* [Sec. 26 :—Where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, and as of right, without interruption, and for twenty years, and where any way or water course, or the use of any water, or any other easement (whether affirmative or negative) has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right, without interruption, and for twenty years, the right to such access and use of light or air, way, water course, use of water, or other easement, shall be absolute and indefeasible.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

Explanation.—Nothing is an interruption within the meaning of this section, unless where there is an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made.]

Field, J.—In this case the plaintiff brought a suit to obtain a perpetual injunction restraining the defendant from using a path which runs over the land and premises admittedly belonging to the plaintiff. The learned Judge of the lower Appellate Court says, that it is an admitted fact that the plaintiff's premises and the defendant's premises, which adjoin, originally belonged to the same owner, and it appears that the plaintiff and defendant obtained their respective tenements by purchase more than twenty years ago. When I say "the defendant" I include the defendant's predecessor in title, because, although the defendant himself purchased seventeen or eighteen years ago, he is for the purpose of this suit entitled to add the time during which his immediate predecessor, Gya Nath, held the particular tenement. The defendant's case was, that the two tenements belonged to the same owner; that this owner constructed the ghat and the path now used by him (defendant), and that this ghat and path continued to be used for more than sixty years. The plaintiff on oath admitted that the pathway had been in existence when the two tenements belonged to the same owner, but he added that he had closed the path after purchasing his portion of the property.

[958] The Munsif disbelieved the plaintiff's statement as to the closing of the path. He says,—“there is no trustworthy evidence to show that the pathway was discontinued by him.”

It, therefore, appeared to him that the plaintiff was not entitled to succeed, and he refused the prayer for an injunction. The case then went before the District Judge, and the District Judge treated the case as if it were one falling under s. 26 of the Limitation Act, and being of opinion that the defendant had not proved twenty years' peaceable, open, and uninterrupted exercise of the right of way, he gave the plaintiff a decree.

It appears to us that the learned District Judge has been in error in the manner in which he has dealt with the case. It has been decided by the Privy Council that the mode of acquiring an easement provided by s. 27 of Act IX of 1871, and by s. 26 of the present Limitation Act, XV of 1877,—*i.e.*, by enjoyment as of right, without interruption and for twenty years, is not the only way in which an easement can be acquired, and that this provision of law was not intended to interfere with other modes of acquiroment. See *Maharani Rajroop Koor v. Syed Abdul Hossein* (L. R., 7 I. A., 240; s. C., I. L. R., 6 Cal., 394) also, *Achul Mahtu v. Rajun Mahta* (I. L. R., 6 Cal., 812) and *Punja Kurarji v. Bai Kurar* (I. L. R., 6 Bom., 20). In the present case the defendant did not allege that he had acquired an easement by twenty years' uninterrupted enjoyment as of right. His case was that the two tenements originally belonged to the same owner; that while this unity of possession continued, the path and the ghat were constructed by the single owner; and that, when the two tenements became the property of separate owners, this path over the plaintiff's tenement continued to be used by the owner of the other tenement, in other words, the defendant alleged an implied grant. This implied grant might arise in one of two ways: (i) The use of the path and ghat might be absolutely necessary to the enjoyment of the defendant's tenement, in which case, there would be an *easement of necessity*. (ii) The use of the path and ghat, though not absolutely necessary to the enjoyment of the defendant's tenement might be necessary for its enjoyment in the state in which it [939] was at the time of severance; and in this case, if the easement were apparent and continuous, there would be a presumption that it passed with the defendant's tenement. This latter case is discussed in the books under the principle of the *disposition of the owner of two tenements (Destination du pere de famille)*. See Gale on Easements, 5th edition, pp. 96, 97 and following

pages; and as to right of way, p. 103 note, p. 124 note, and *Pyer v. Carter* (1 H. and N., 922). This principle is just and fair and accords with common sense. It is in consonance with the rule of justice, equity, and good conscience, which must guide the Courts in the absence of positive direction by the Legislature. In the present case it appears to us that if the path and ghat were made and used when the two tenements belonged to the same owner, and, as alleged by the defendant, continued to be used by the proprietor of the defendant's tenement after the two tenements became the property of separate individuals, and if the easement is one to which the principle above indicated properly applies, then the plaintiff would not be entitled to the injunction which he asks.

The case must, therefore, go back to the District Judge, and he will have to find whether he agrees with the Munsif's finding upon the question whether the plaintiff closed the path after he became the owner of the tenement which now belongs to him. If the plaintiff closed the path, and it remained closed for such a period that non-user during this period would bar any suit by the defendant to have the use of the path restored to him, then the defendant's right has been lost. If, on the other hand, the District Judge finds that the plaintiff did not, as he alleges, close the path after purchasing the tenement which now belongs to him, the Judge will further have to determine whether this particular easement is one to which the principle already explained is applicable.

The case must, therefore, be remanded, and all costs will abide the result.

Case remanded.

NOTES.

[I. MODES OF ACQUISITION OF EASEMENTS IN THE LIMITATION ACT ARE NOT EXHAUSTIVE—

This was declared by the Privy Council in (1880) 6 Cal. 394 P.C. See the notes to that case; see also 6 Bom., 20; 5 Mad. 226; 253; 10 Cal. 214; 14 Cal. 839; 35 Cal. 851.

II. EASEMENTS OF NECESSITY—

The necessity must be absolute, for this kind of easements to be recognised; this will not arise, if there should be any other mode of enjoyment though it should be attended with greater inconvenience:—(1890) 14 Bom. 452; (1891) 16 Bom. 552; (1893) 18 Bom. 616; (1893) 15 All. 270; (1894) 19 Bom. 797; (1905) 28 Mad. 495.

III. EASEMENTS BY IMPLICATION OF LAW ON SEVERANCE OF TENEMENTS.

The authority of this case has been questioned.

Under the English law, easements arise by implication when the case is one of absolute necessity or the easements are apparent and continuous. In such cases, they have been recognised in India also:—(1890) 14 Bom. 452; (1900) P. L. R. 173; 49 P.R. 1900.

In other cases, English law applies the principle that a grantor cannot derogate from his own grant and if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in his grant. Thus, if the servient tenement is granted first, the easement is at an end unless expressly reserved (and subject to certain exceptions):—*Wheeldon v. Burrows* (1885) 10 A. C. 590; *Suffield v. Brown* (1864) 4 D.G.J. & S. 185; *Crossley & Sons v. Lightowler* (1867) 2 Ch. Ap. 478; *Union Lighterage Company v. London Graving Dock Company* (1901) 2 Ch. 300; (1902) 2 Ch. 557; *Ray v. Hazeldine* (1904) 2 Ch. 17. The case of *Pyer v. Carter* (1857) 1 H. & N. 916 on which this case of 8 Cal. 956 and the Indian Easements Act sec. 13 (d) are founded is not authoritative in England at the present day; vide cases above cited.

Moreover rights of way are *discontinuous* easements, and the principles applicable to *continuous* easements ought not to be applied to easements of this sort:—See (1893) 15 All. 270; (1893) 18 Bom. 616; (1899) 26 Cal. 311; (314); 516; (520).

The recognised exceptions are easements of absolute necessity; mutual and reciprocal easements; conveyances forming part of the same scheme or transaction:—*Russell v. Watts* (1885) 10 A. C. 611; cases arising on partition:—28 Mad. 495; (1899) 3 C. W. N. 409; 407.]

[960] APPELLATE CIVIL.

The 26th May, 1882.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE AND MR. JUSTICE MITTER.

Gungadhur Shikdar and others.....Defendants

versus

Ayimuddin Shah Biswas.....Plaintiff.*

*Landlord and tenant—Grant of land—Presumption as to nature of tenure—
Erection of buildings—Bastu land—Suit to evict.*

Where it is conceded that lands were not let out for agricultural purposes, but that they had apparently been let out more than sixty years before suit for building purposes, the defendants' ancestors, having erected thereon a house more than sixty years before suit and having, with the defendants, resided there from first to last, the Court is at liberty to presume that the land was granted for building purposes, and that the grant was of a permanent character.

Prosonno Coomar Chatterjee v. Jagan Nath Bysack (10 C. L. R., 25) followed.

Prosonno Coomaree Debea v. Sheik Rutton Beparry (I. L. R., 3 Cal., 696) distinguished.

THE plaintiff was the holder of a patni right in a certain taluq, and had obtained confirmation of his title to the patni under a decree, dated the 31st March 1870, under which decree he was put into possession of the property by the Court. He, subsequently to this decree, let out the land to ryots; but the defendants, who were alleged to be trespassers, prevented them from taking possession. The plaintiff thereupon served a notice to quit on the defendants on the 20th September 1878, and brought this present suit to evict them.

The defendants denied service of the notice, and stated that they had resided on the land without interruption for more than twelve years, that the suit was barred as being a *res judicata*, and that, moreover, their ancestors and themselves had resided on the land for more than sixty years; and that the person who granted the patni to the plaintiff had acknowledged the right of the defendants to reside on the land by receiving rent from them.

The Munsif found that notice had been duly served, and that the previous suit under the decree in which the plaintiff derived [961] his title was no bar to the present suit, inasmuch as that was a suit to obtain possession of the whole mehal, whilst the present suit was to evict the defendants; that the land in question was homestead land containing the dwelling-house of the defendants, and had never been used for agricultural purposes; that the evidence produced showed that the ancestor of the defendants, and the defendants themselves, had resided on the land for a period of over sixty years, and that the defendants had bought up the jamai right in the land from a tenant of the original zamindar; and he therefore held, that the defendants had an hereditary holding in the land, and had resided thereon, and that therefore the plaintiff had no right to evict them.

The plaintiff appealed to the District Judge, before whom it was admitted that the lands were bastu lands, and that the defendants or their ancestors

* Appeal under s. 15 of the Letters Patent, against the decree of Mr. Justice FIELD, dated the 23rd February 1882, in appeal from Appellate Decree, No. 2943 of 1880.

had held this land as homestead land for sixty years : but that no statutory right of occupancy had been acquired by the defendants. The respondents' pleader however submitted that there was abundant evidence of a mourasi grant for building purposes, which, though not in writing, was a matter of legal inference from the fact that the land had been held from generation to generation, and as authority for this *Dhunput Singh v. Gooman Singh* (11 Moore's I. A., 433 ; s.c., 9. W. R. (P. C.), 3) was cited.

The District Judge held that that decision did not apply to bastu lands, but decided the case in favour of the defendants on these grounds : (i) that the facts of the case raised a fair and reasonable inference that the land was let for building purposes ; and (ii) that, as the original lessor would be estopped from evicting the defendants, inasmuch as he allowed the defendants to erect buildings on the land without objection, so the plaintiff, who was in no better position than his ancestor, would be bound in equity also as though he had granted to the defendants a building lease. He, therefore, dismissed the appeal with costs.

The plaintiff appealed to the High Court.

Baboo Mohiney Mohun Roy for the Appellant.

Baboo Hem Chunder Banerjee and Baboo Shoshee Bhusun Dutt for the Respondents.

[962] FIELD, J., held, that the case could not be distinguished from the case of *Prosonno Coomaree Dubea v. Sherik Rutton Beparry* (1. L. R., 3 Cal., 696), and that the District Judge had decided the case on a point which was not raised in the Court of First Instance, nor on any cross appeal, and that, even supposing permission had been granted to build upon the land, such permission would not debar a landlord from ejecting his tenant after proper notice to quit, and he therefore allowed the appeal.

The defendants appealed under s. 15 of the Letters Patent.

Baboo Rash Behary Ghose for the Appellants.

No one appeared for the Respondent.

The **Judgment** of the Court (GARTH, C. J., and MITTER, J.) was delivered by

Garth, C. J. - In this case we think that there was quite sufficient ground to justify the Court below in presuming a grant of a permanent nature in favour of the defendants' ancestors.

It is conceded that the land in question was never let for agricultural purposes. It was apparently let upwards of sixty years ago for building purposes ; because it is found that, after the grant (whatever it was), these buildings, which are of a substantial character, were erected some sixty years ago by the defendants' ancestors, and that they and their ancestors have lived there ever since. Under these circumstances we think that the Courts below were at liberty to presume, if they thought fit, that the land was granted for building purposes, and that the grant itself was of a permanent character.

This has been explained in several recent cases, and amongst others in the case of *Prosonno Coomar Chatterjee v. Jagun Nath Bysack* (10 C. L. R., 25), to which our attention has been called.

If the land had originally been granted for agricultural purposes, then the defendants would probably had another answer to the suit, namely, that

they had acquired a right of [963] occupancy. But as the circumstances under which the original grant was made tend to show that it was made for building purposes, the Courts below were at liberty to presume that the grant was of a permanent nature.

In the case mentioned by the learned Judge, which he thought governed this case, it did not appear that the defendants or their ancestors had ever built upon the land or laid out any money upon it. Indeed, it was found by the lower Courts in that case that such kutchu buildings as were upon the land had not been erected by the defendants.

We think, therefore, that the decision of the District Judge was right ; and that the judgment of this Court should be reversed, the appellants being entitled to the costs of both hearings in this Court.

Appeal allowed.

NOTES.

[PRESUMPTION OF PERMANENCY--BUILDINGS--]

Similar presumptions have been drawn from the erection of substantial buildings where the *origin and the purpose of the grant is not known* : --

32 Cal. 648 ; 27 Cal. 570 ; 17 Cal. 144 ; 7 Bom. L. R. 401 ; 2 C. W. N. 273 ; 5 C. L. J. 178 ; 11 C. W. N. 242 ; 8 C. W. N. 297 ; 5 C. W. N. 858 28 Cal. 738 ; 3 C. W. N. 255 ; 11 C. L. R. 281 ; 10 C. L. R. 29. Where they are known, or the holding is referable to a grant, the presumption will not arise : 16 Cal. 223 ; 25 Cal. 893 (896, 903) ; 15 Bom. 71. As regards the circumstances under which though the grant is known, the grant is held to be permanent by buildings having been erected to the knowledge of the grantor, see 21 All. 496 **P.C.** and the notes thereto ; *Plemmar v. Mayor*, 9 A. C. 699. See also the Notes to 3 Cal. 608. In 27 Mad. 211, the case of 18 Bom. 66 was criticised. As regards the right of occupancy in suburban lands, see (1889) 16 Cal. 652.]

APPELLATE CIVIL.

The 8th June, 1882.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE AND MR. JUSTICE BOSE

Rajdhur Chowdhry.....Plaintiff

versus

Kalikristna Bhatta Charjya and others.....Defendants.

Suit for declaration under a mokurari patta Alternative relief—Specific Relief Act (1 of 1877) s. 19—Civil Procedure Code (Act X of 1877) s. 28.

A suit to have a mokurari patta enforced as against one co-sharer granting it, and other co-sharers who repudiate it, and in the alternative to have the salami paid for the mokurari patta returned, is in substance a suit to enforce a contract to place the plaintiff in possession of the land under the patta and to declare his rights to it as against all the defendants; and under s. 19 † of the Specific Relief Act, the plaintiff is entitled to ask for compensation against the defendant granting the patta.

Under s. 28 of the Civil Procedure Code, such an alternative claim may be allowed against one or more of the defendants.

THIS was a suit brought to have it declared that the plaintiff was entitled to hold certain land under a mokurari patta granted [964] to him by the defendant No. 1; or, in the alternative, to recover refund of the salami paid for the mokurari lease.

Defendant No. 1, on the 31st Bhadro 1282 (15th September 1875), granted to the plaintiff, on payment by him of Rs. 250, a mokurari patta of certain lands, the lease reciting that, in the event of the lessor's co-sharers objecting to defendant No. 1 treating the lands as his private property possessed in severalty, then that the lessor would make up the deficiency of land from other lands held by him; and if he failed to do so, then the lessee might sue him for damages.

* Appeal from Appellate Decree, No. 1617 of 1880, against the decree of S. O. B. Ridsdale, Esq., Acting Judge of the Assam Valley Districts, dated the 15th May 1880, affirming the decree of Baboo Shib Pershad Chuckerbutty, Sadr Munsif of Gowhattee in Zilla Kamrup, dated the 31st December 1879.

† [Sec. 19 :—Any person suing for the specific performance of a contract, may also ask for compensation for its breach, either in addition to, or in substitution for, such performance. If in any such suit the Court

power to award compensation in certain cases.

decides that specific performance ought not to be granted, but that there is a contract between the parties which has been

broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.

If in any such suit the Court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

Compensation awarded under this section may be assessed in such manner as the Court may direct.

Explanation.—The circumstance that the contract has become incapable of specific performance, does not preclude the Court from exercising the jurisdiction conferred by this section.]

The patni ryots of defendant No. 1 and his co-sharers ejected the plaintiff, and the plaintiff then brought the present suit. Defendant No. 1 admitted the terms of the lease, but his co-sharers, the other defendants, repudiated it, stating that the land leased had never been partitioned, and objected to the form of the suit.

The Munsif found that the property had never been partitioned, and that, therefore, the lease could only operate against the share of defendant No. 1; and refusing the plaintiff the precise relief asked for, he affirmed the plaintiff's right to the lease against defendant No. 1, and further refused to grant alternative relief.

The plaintiff appealed to the District Judge, who, agreeing with the decision of the Munsif, dismissed the appeal.

The plaintiff appealed to the High Court.

Bahoo Bhabany Churn Dutt for the Appellant.

No one appeared for the Respondents.

The **Judgment** of the Court (GARTH, C. J., and BOSE, J.) was delivered by **Garth, C. J.**—We think that the lower Appellate Court has taken an erroneous view of this matter.

The plaintiff's case is, that the defendant No. 1 granted to him a maurasi patta of the land in question, professedly for himself and the other defendants, Nos. 2 to 7, who are co-proprietors with him; and it appears that the plaintiff entered upon the land and paid rent under this patta.

[1968] But then the defendants Nos. 2 to 7, instead of confirming the contract that had been made for them by the defendant No. 1, repudiated it, as having been made without their authority; and in consequence the plaintiff was ejected. He therefore brings this suit against all the defendants for the purpose of having the contract, which the defendant No. 1 made professedly for himself and his co-defendants, enforced against them all; or, as an alternative, he claims to have the Rs. 250, which he paid by way of premium for the maurasi patta, restored to him.

Both the lower Courts have found that the plaintiff is not entitled to have his maurasi patta confirmed, because the defendant No. 1 had no authority to grant it; and with that part of the decree of the lower Courts we have no power to interfere.

But then in the Courts below the plaintiff pressed his alternative claim for the Rs. 250 under s. 19 of the Specific Relief Act, and both Courts have found that a case of this kind does not come within that section.

The lower Courts do not consider that the suit is one to enforce a contract; and they say that the plaintiff has no right to sue for alternative claims,—one to establish his right to the land, and the other for a refund of the Rs. 250.

Looking only at the form of the plaint, there is much reason in that view. But looking to the substance of the claim, we think that this may well be considered as a suit to enforce a contract (the patta), to place the plaintiff in possession of the land under that patta, and to declare his right to it as against all the defendants (see s. 4 of the Specific Relief Act); and if this is so, then under s. 19 the plaintiff had a right to ask, as an alternative claim, for compensation against the defendant No. 1 for his breach of contract, such compensation being measured by the Rs. 250 which he paid by way of premium, less the very small sum which would represent the short time during which the plaintiff was in possession of the property. This is certainly the substance and justice of the case; and we think that the lower Courts should have viewed it in that way.

Then the only question is, whether we have any right to [966] dispose of the matter here, or whether we ought not to send the case back to have the amount of compensation determined.

We might, without any very great stretch of our powers, award to the plaintiff the whole of the Rs. 250 by way of compensation, but strictly speaking, of course, the amount of compensation is a question of fact, and there ought perhaps to be some reduction, however small, from the Rs. 250 for the time during which the plaintiff was in possession.

The defendant No. 1 (respondent) is not present here; so we have no means of asking him to consent to any sum; and therefore we think the best thing we can do, in order, if possible, to save expense to both parties, is to remand the case to the Court below to ascertain the proper amount, unless the first defendant will consent to a decree for Rs. 230, with costs in the two lower Courts, but not in this.

The plaintiff consents to these terms; but if the defendant No. 1 does not consent to them, then the case must go back to the lower Appellate Court to ascertain what the compensation should be. The Court will probably then give the plaintiff a larger amount than we propose to give him now.

The decrees of the Court below will, therefore, be reversed, and, subject to the first defendant's consent, the decree will be for the plaintiff for Rs. 230, with costs in the lower Courts, each party paying his own costs in this. If this decree is not consented to by the defendant No. 1, the case will go back to the lower Appellate Court to ascertain the amount; and in that case the costs of the remand, and also the costs of the lower Appellate Court in ascertaining the amount, will be paid by the defendant No. 1.

We should add that, under s. 28 of the Procedure Code, we think that this alternative claim, to which the plaintiff is entitled, may be made against one or more of the several defendants.

Appeal allowed.

NOTES.

[JOINDER—ALTERNATIVE CLAIM]

See **Hukm Chand** Civil Procedure Vol. 1 (1900) pp. 420, 421 where this subject is ably dealt with, under the suggestive heading, 'joinder as defendants of persons whose liability depends on plaintiff's option or on facts as they may be found.'

See also (1905) 29 Mad. 50 (51) - 16 M. J. J. 39; (1894) 19 Mad. 211 - 4 M. L. J. 288 (292); 29 Cal. 257 (260); 31 Mad 252 (257); 18 M. L. J. 238.]

[C.L.R. 315]

[967] APPELLATE CIVIL.

The 12th June, 1882.

PRESENT:

MR. JUSTICE FIELD AND MR. JUSTICE MACPHERSON.

Chunee Mul Johary and others.....Plaintiffs

versus

Brojo Nath Roy Chowdhry and others.....Defendants.*

Registration Act (III of 1877), s. 35—Certificate of Guardianship Act (XL of 1858)—Majority Act (IX of 1875), s. 3.

The object of s. 35 of the Registration Act, which directs the registering officer to refuse to register a document if the person by whom it purports to be executed appears to be a minor, is, that if the registration authorities refuse to register on that ground, the question of minority may at once be brought into a Civil Court and there determined.

The making of an order appointing a guardian under Act XL of 1858, and not the subsequent taking out of the certificate, is that by which a guardian is appointed of the person and property of a minor within the meaning of s. 3 of the Indian Majority Act (See *Stephen v. Stephen*, ante, p. 714).

Baboo Mohesh Chander Chowdhry, Baboo Sreenath Dass, and Baboo Bunshee Dhur Sen for the Appellants.

Baboo Trailokyanath Mitter and Baboo Kally Churn Banerjee for the Respondents.

THE facts of this case sufficiently appear from the **Judgment** of the Court (FIELD and MACPHERSON, JJ.), which was delivered by

Field, J.—This is a case under s. 77 of the Registration Act. The plaintiffs seek to have a mortgage deed registered, which was executed by the defendant Brojo Nath Roy Chowdhry. The Sub-Registrar of Howrah, who was the Registering Officer to whom it was presented for registration, refused to register, on the ground that Brojo Nath Roy Chowdhry, the executant, was a minor. In making this order he acted under the provisions of s. 35 of the Registration Act, which provides as follows:—"If any of the persons by whom the document purports to be executed appears to the Registering Officer to be a minor, the Registering Officer shall refuse to register the [968] document." Now, the object of this provision is undoubtedly this, that if the registration authorities refuse to register on the ground that the executant is a minor, the question of minority may at once be brought into a Civil Court and there determined; and it is clear that this question can be decided more satisfactorily at the time when the last evidence of age or non-age may be supposed to be available than afterwards, it may be years afterwards, when this evidence is no longer forthcoming.

An appeal was preferred against the order of the Sub-Registrar, and under the provisions of s. 72 of the Registration Act, the District Registrar affirmed the Sub-Registrar's order. This case was then instituted, and the question which we have to decide is, whether Brojo Nath Roy Chowdhry was a major on the 18th of November 1879 when he executed the mortgage deed.

* Appeal from Original Decree, No. 142 of 1881, against the decree of Baboo Kedaressur Roy, Subordinate Judge of Hoogly, dated the 29th December 1880.

In order to determine this question we have first to decide whether the Indian Majority Act (IX of 1875) is applicable. Upon this point the Subordinate Judge says in his judgment: "It has been argued by the defendants that the grandfather and the mother of the executant were ordered by the Judge to be his guardians under Act XL of 1858. He is a minor until he attains the age of twenty-one years under s. 3 of the Indian Majority Act. The plaintiffs' pleader, in answer to this contention, says that as the certificate of guardianship was not taken out by the said grandfather and the mother, the said section does not apply; but I do not think the contention of the plaintiffs' pleader is a valid one, for though no certificate was actually taken out, they were appointed as guardians by order of the District Judge, and they all along acted as guardians of Brojo Nath."

It appears to us that the view here taken by the Subordinate Judge is correct. It is not denied before us that an order was made under the provisions of Act XL of 1858 by the District Judge, and we think that the making of the order and not the subsequent taking out of the certificate, is that by which a guardian is appointed of the person or property of a minor within the meaning of s. 3 of the Indian Majority Act (IX of 1875).

[969] We then come to the evidence. In dealing with the evidence the Subordinate Judge has placed the burden of proof upon the defendants. It is not contended before us that the burden has been improperly placed, and we will assume, for the purposes of this case, that the burden of proof does rest upon the defendants.

There is no ground of appeal that evidence, which is by law irrelevant, has been received on the part of the defendants. Nevertheless, as we are bound to form our own independent opinion upon the evidence, we think we cannot allow our minds to be influenced by matter which has been admitted upon the record, but is clearly irrelevant. (His Lordship, after reviewing the evidence as to the minority of Brojo Nath, continued.)

We think that the balance of evidence is in favour of the case made by the defendants; and in this view we find that Brojo Nath was a minor on the 18th of November 1879, and therefore that the registration authorities rightly refused registration of the instrument.

The appeal will be dismissed with costs.

Appeal dismissed.

NOTES.

[I. DATE OF COMMENCEMENT OF GUARDIANSHIP- DATE OF THE ORDER OR DATE OF THE CERTIFICATE (XL OF 1858) --

There were two sets of authorities in the Calcutta High Court, one holding that the issue of the certificate was the proper date:—(1883) 9 Cal. 901; (1886) 12 Cal. 512; (1886) 13 Cal. 219; See also (1888) 13 Bom. 285; the other set of authorities held the date of the order to be the starting point:—(1882) 8 Cal. 967; (1886) 14 Cal. 55; (1887) 15 Cal. 10; the Privy Council reversed (1886) 12 Cal. 542 in (1889) 17 Cal. 317, see at p. 356 - from which it would appear that the view in this case is correct.

The question does not arise under VIII of 1890.

II. REGISTRATION—MINOR—

Though execution should be refused, the registration is not vitiated on the mere fact of minority:—(1894) 21 Cal. 872.]

[8 Cal. 969 : 11 C.L.R. 6]
APPELLATE CRIMINAL.

The 20th June, 1882.

PRESENT :

MR. JUSTICE WILSON AND MR. JUSTICE MACPHERSON.

In the matter of the Petition of Prankrishna Surma.

The Empress
versus
Prankrishna Surma.*

*Kidnapping—Abetment—Penal Code (Act XLV of 1860), ss. 109, 363—
Right to custody of children.*

A mother cannot have a right to the custody of her legitimate children adversely to the father. Ordinarily the custody of the mother is the custody of the father, and any removal of the children from place to place by the mother ought to be taken to be consistent with the right of the father as guardian, and not as a taking out of his keeping. But where a Hindu woman left her husband's house, taking with her her infant daughter, and went to the house of [970] A, and on the same day the daughter was married to B, the brother of A, without the father's consent, it was held that A was rightly convicted under ss. 109 and 363 of the Penal Code of abetting the offence of kidnapping.

Baboo *Doorga Mohun Doss* for the Petitioner.

The Deputy Legal Remembrancer (Mr. *Kilby*) for the Crown.

THE facts of this case sufficiently appear from the **Judgment** of the Court (WILSON and MACPHERSON, JJ.), which was delivered by

Wilson, J. The conviction in this case was one under ss. 109 and 363 of the Penal Code for abetting the offence of kidnapping. Upon the appeal two questions were argued: *first*, whether the substantive offence was committed; *secondly*, whether there was sufficient evidence of abetment. The second question we may dismiss at once by saying that if the substantive offence was committed, there was ample evidence of abetment. The real question is as to the kidnapping. The facts proved appear to be the following:—

Parameshwari, the wife of Uma Churn Pattuk, left her husband's house at night, taking with her a daughter of six or seven years old and a son still younger. She went to the house of a cousin of her, who lived in a house in the same homestead with the accused and his younger brother Guru Dass. The same night Parameshwari gave her daughter in marriage to Guru Dass. The leaving of her husband's house with the daughter and the marriage of the latter to Guru Dass took place in pursuance of a previous arrangement between Parameshwari and the accused: and the marriage was without the sanction or knowledge of the girl's father. It was proved that Parameshwari had been subjected to some degree of cruelty at the hands of her husband, but the Court below did not find, nor do we think it could rightly have found, that the cruelty was such as to justify her in leaving her husband's house, even if that fact, had it been proved, could have affected the present charge, which we are inclined to think it could not have done.

* Criminal Appeal, No. 280 of 1882, against the order of T. F. Bignold, Esq., Sessions Judge of Chittagong, dated the 10th May 1882.

There is no question that, by the Hindu law, a father is the guardian of his children and is ordinarily entitled to their cus-**[971]** today. But it was suggested that, in the case of a very young child, the mother has as good a right to the custody as the father, and even possibly a better. So that the taking of the child by the mother was not a taking out of the keeping of the lawful guardian within the meaning of s. 361 of the Penal Code. And in support of this a passage was cited from the work of Dr. Gurudass Banerjee on the Law of Marriage and Stridhan, page 172. But we are unable to find any authority for the proposition that a mother can ever have a right to the custody of her legitimate children adverse to the father. And such a view seems to us inconsistent with the principles governing the Hindu law in such matters. Of course, under any ordinary circumstances, the custody of the mother is the custody of the father, and any removal of the children from place to place by the mother ought to be taken to be consistent with the rights of the father as guardian and not as a taking out of his keeping. But the present case is very peculiar. The mother removed the girl from the father's house for the express purpose of marrying her without his consent, and thereby depriving him for ever of her guardianship and custody. This did, we think, amount to a taking out of the keeping of the lawful guardian. The conviction is, therefore, right.

Conviction affirmed.

NOTES.

[See (1900) 21 Mad. 281 10 M.L.J. 105 18 Weir 349 (351) ; (1902) 15 C.P.L.R. 185.]

[8 Cal. 971 7 Ind. Jur. 89] ORIGINAL CRIMINAL.

The 9th July, 1882.

PRESENT.

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE CUNNINGHAM AND
MR. JUSTICE MACLEAN.

The Empress
versus
Pemantle.

*Guardianship of illegitimate child—Kidnapping—Lawful guardian - Penal
Code (Act XLV of 1860), ss. 361, 366.*

The mother of an illegitimate child is its proper and natural guardian during the period of nurture. And where the mother, on her death-bed, entrusts the care of such child to a person, who accepts the trust and maintains the child, such a person is "lawfully entrusted" with the care and custody of the minor within the meaning of s. 361 * of the Penal Code.

*[Sec. 361 :—Whoever takes or entices any minor under fourteen years of age, if a male, or under sixteen years of age, if a female, or any person of

Kidnapping from lawful guardianship. unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to Kidnap such minor or person from lawful guardianship.

Explanation.—The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.

Exception.—This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.]

The explanation of the words "lawful guardian" in s. 361 is intended to obviate the difficulty the prosecution might be put to in being bound to [972] prove strictly in cases of abduction, that the person from whose care the minor had been abducted was the guardian of such minor within the meaning of the legal acceptation of the word.

THE prisoner was charged, tried, and found guilty, under s. 366^a of the Penal Code, for having kidnapped one Eva Fleury, in order that she might be seduced to illicit intercourse. It appeared from the evidence given at the trial in the Sessions Court that Eva Fleury was the illegitimate child of a Mrs. Fleury, who on her death-bed made over the child, who was then about three years old, to the charge of a Mrs. Lorenztsen, and that, from that time up to the time of the alleged offence Eva Fleury had lived in the house and under the care and protection of Mrs. Lorenztsen.

Eva Fleury was, at the time the offence was committed, a minor under the age of sixteen years, and for the purposes of the trial Mrs. Lorenztsen claimed to be the "lawful guardian" of the girl within the meaning of s. 361 of the Penal Code.

At the trial the prisoner was convicted and sentenced to three years' imprisonment, but at the request of Counsel, the learned Judge (CUNNINGHAM, J.) before whom the case was tried reserved the question as to whether Mrs. Lorenztsen could be said to be the "legal guardian" of the child within the meaning of s. 361 of the Penal Code.

On the case reserved coming on before the Court, Mr. Roy for the prisoner contended that Mrs. Lorenztsen was not the lawful guardian of Eva within the meaning of s. 361; that even the parents of illegitimate children had not the legal right of guardianship—*Re v. Felton* (1 Bott's Poor Law, by Const., p. 478, pl. 629) cited in Macpherson on Infants, 67; and that Mrs. Fleury, not herself being the guardian of the child, had no right to delegate her guardianship to Mrs. Lorenztsen—*Ex parte Glover* (4 Dowl., 291); Burns' Justice of the Peace, vol. 1, p. 389. Under English law a child above the age of seven years can choose her own guardian—*In re Lloyd* (3 M. and G., 547). Section 361 was intended to protect parental rights, and this child being illegitimate was in the eye of the law no one's child.

[973] The Officiating Standing Counsel (Mr. Bonnerjee) and Mr. J. G. Apear for the Crown were not called upon; but referred the Court to *Re v. Cornforth* (2 Str., 1161) and *Ex parte Glover* (4 Dowl., 291).

The **Judgment** of the Court (GARTH, C. J., CUNNINGHAM, J., and MACLEAN, J.), was delivered by

Garth, C. J. The prisoner was tried and convicted on the 30th day of March last, upon a charge framed under s. 366 of the Penal Code, for having kidnapped one Eva Fleury in order that she might be seduced to illicit intercourse.

Eva Fleury was the illegitimate child of a Mrs. Fleury, long since deceased, and was, when the offence was committed, living in the house and under the care and custody of a Mrs. Lorenztsen, who claimed to be her lawful guardian within the meaning of s. 361 of the Penal Code. Eva Fleury was, at the time

* [Sec. 366.—Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.]

when the offence was committed, a minor under the age of sixteen years, and Mrs. Lorenztsen's claim to be considered her legal guardian was based upon the fact that Mrs. Fleury, on her death-bed, confided Eva and another child to her keeping; this was some twelve years ago. Mrs. Lorenztsen accepted the trust, and has ever since had the charge of and maintained the child at her own expense.

At the trial the counsel for the prisoner raised the point that Mrs. Lorenztsen was not, at the time when the alleged offence was committed, the lawful guardian of Eva Fleury within the meaning of s. 361 of the Penal Code. This point was reserved by the learned Judge who tried the case, and the prisoner having been convicted and sentenced under s. 366, this Court has now to determine whether that conviction can be maintained.

It was argued for the prisoner that Mrs. Lorenztsen was not the lawful guardian of Eva Fleury within the meaning of s. 361, that Mrs. Fleury herself was not the child's legal guardian at the time of her death, and therefore had no right to constitute Mrs. Lorenztsen, or any one else, the child's legal guardian; and lastly that s. 361 was intended rather to protect the rights of guardians than of minors; and unless the alleged [974] guardian could be recognized by law as such, she would not come within the meaning of the section.

We think, however, that the object of that and the cognate sections of the Code is at least as much to protect children of tender age from being abducted or seduced for improper purposes, as for the protection of the rights of parents and guardians; and we also think that the somewhat liberal explanation of the words "lawful guardian" under s. 361 is intended to obviate the difficulty which would otherwise arise, if the prosecution were required to prove strictly in cases of this kind that the person from whose care or custody a minor had been abducted or kidnapped came strictly within the meaning of a guardian according to the legal acceptation of that word.

We cannot doubt for a moment that the mother of an illegitimate child is its proper and natural guardian during the period of nurture; and if, during that period, the mother dies, and commits the child, as she did in this instance to the care of a faithful friend, who accepts the trust, and maintains the child in her own house, and at her own expense, we think it clear that such a person is "lawfully entrusted" with the care and custody of the minor within the meaning of the explanation in s. 361.

It too frequently happens that illegitimate orphan children, such as Eva Fleury in the present instance, are those who most require the protection of the law; and if persons in the position of Mrs. Lorenztsen who, so far as it appears, was the child's sole protector, are not to be considered lawful guardians within the meaning of the explanation, the law would become practically useless in a large class of cases in which its intervention is more especially needed.

Conviction upheld.

NOTES.

[Sec (1905) P.R. 60 Cr. 21 P.L.R. 1906 . 3 Crim. L.J. 296 ; Ratan Lal 820 ; (1900) 10 M.L.J. 405 : 24 Mad. 281.]

[—11 C.L.R. 699]

[975] APPELLATE CIVIL.

The 4th February, 1882.

PRESENT:

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

Joytara Dassee and others.....Defendants

versus

Mahomed Moharuck and others.....Plaintiffs.*

Valuation of suit—Decree, form and contents of—Variance between pleading and proof Ejectment, Suit for—Possession Thak Maps—Evidence.

Whether or not a suit has been properly valued is a preliminary question, which ought to be disposed of before the case goes to trial.

Decrees of Court should be drawn up by the Judge in such a way as to make them self-contained and capable of execution without referring to any other document.

A plaintiff must recover *secundum allegata et probata*, and no decree should be given in his favour on a point not raised in the pleadings, nor embodied in an issue.

Quere.—Whether a plaintiff in ejectment is entitled to succeed upon mere proof of antecedent undisturbed possession?

Value of thak maps as evidence of possession discussed.

THE facts of this case and the arguments on appeal are fully set out in the judgment of the Court.

Mr. Branson, Baboo Hem Chunder Banerjee, and Baboo Joy Gobind Shome for the Appellants.

Mr. Bell and Baboo Taruck Nath Palit for the Respondents argued, that although the plaintiffs did not, in their plaint, rely on their possession, they could rely on it now —*Kylash Kamnee Dossia v. Judoo Bushinee Dossia* (22 W. R., 390). The thakbust maps were strong evidence of plaintiffs' possession —*Nobo Coomar Doss v. Gobind Chunder Roy* (9 C. L. R., 305). The onus was on the defendants who had dispossessed the plaintiffs—*Mohabeer Pershad Singh v. Mohabeer Singh* (I. L. R., 7 Cal., 591).

[976] Mr. Branson in reply.

The **Judgment** of the Court (McDONELL and FIELD, JJ.), was delivered by

Field, J.—The plaintiffs in this case sue to recover possession of 950 hals of land, consisting of two plots. Plot No. 1, according to the allegation contained in the plaint, comprises 850 hals, and is said to form the southern portion of Thak No. 2527, and to be known as Mouza or part of Mouza Rautpara. Plot No. 2 comprises 100 hals, and is said to form the southern portion of Thak No. 2581, and to constitute the Mouza or part of Mouza Bhoti Dowlutpore. The plaintiffs' case is, that these two plots and these two mouzas appertain to Taluk Mahomed Amzad and are their property, and they allege that they have been in possession thereof. The plaint does not set out the title of the plaintiffs in this property or the manner in which they came to acquire that title. With the plaint two thak maps were filed. One of these is the thak map of Gungadharpore, and is apparently undated. The other is

* Appeal from Original Decree, No. 232 of 1880, against the decree of Baboo Ram Coomar Pal Chowdhry, Subordinate Judge of Sylhet, dated the 14th June 1880.

a thak map of Mouza Dowlutpore, and bears date 1861. The plaint gives no boundaries of these two plots of land; but certain portions thereof are described to a certain extent. One portion under the Bengali letter *ku* (k) is said to consist of lands against the tenants of which the plaintiffs obtained decrees, and these lands are described by plots and boundaries of those plots as held by certain tenants whose names are given. The other portion under the Bengali letter *kha* (kh) is said to consist of lands which were in the possession of Kali Charan and Sunatun Das, and against whom also the plaintiffs are said to have obtained decrees. Of the rest of the land there is no particular description beyond the reference to the thak maps filed with the plaint.

The defence is, that the first plot of land appertains to Taluks No. 12, Anund Roy, No. 13, Ilukas Roy, No. 14, Shib Roy, No. 36, Krishna Prosad, and No. 4, Rajhullabhi, in Mouza Coyahara; and that the lands of Plot No. 2 appertain to Taluk No. 33, Bhelanugur, Kitta Anundpore, in Mouza Dowlutpore; that there is no such mouza as Rautpara or Bhoti Dowlutpore; [977] that the lands referred to in the plaint have really been the property of the defendants, their ancestors, and predecessors; and that the plaintiffs have never had any title or possession therein. The written statement of the defendants then further avers that the quantity of land has been largely overstated in the plaint; and it gives in a schedule the boundaries of the land as stated by the defendants, who further say that the first plot contains 500 hals only, and the second plot 125 hals, or 25 hals more than is stated in the plaint.

The issues fixed by the Subordinate Judge, who tried the case, are the following :—

- (1) Whether the lands under claim had been properly valued?
- (2) Whether the boundaries and quantity of land have been correctly stated?
- (3) Whether the plaintiffs were in possession of the lands in dispute, and were dispossessed therefrom at the time alleged, or the defendants having been in possession thereof from before, the suit is barred by limitation?
- (4) Whether the lands in dispute appertain to the mouza and taluk mentioned by the plaintiffs and belong to them, or to the mouza and taluk mentioned by defendants and belong to the latter (defendants)?

Now, the first of these issues is not an issue which ought to have been fixed for the trial of the case. It deals with a question of valuation, which is a preliminary question that ought to be disposed of before the case can or ought to go to trial. As to the second issue, it is impossible that the Subordinate Judge could have read the plaint when he fixed this issue, because the plaint does not give, or purport to give, the boundaries of the two parcels of land. The third and fourth issues are faulty, inasmuch as they are in that alternative form which has been repeatedly pointed out by this Court to be erroneous and misleading. When the Subordinate Judge came to deal with these issues, he found that, in consequence of there being no boundaries in the plaint, it was not possible for him to come to a categorical finding upon the second issue; and by way of getting over the difficulty, he took the boundaries [978] given by the defendants and proceeded to deal in his judgment, not with the land as described in the plaint by the plaintiffs, but with the land as described in the written statement by the defendants. Referring to the map he says :—“I find no difficulty in ascertaining the identity of the lands, inasmuch as the numbers of the thaks have been mentioned in the plaint and the maps thereof have been filed.” The difficulty which the

Subordinate Judge did not experience has formed a very considerable difficulty both to the Judges of this Court and to the Counsel who have argued the appeal, inasmuch as by a mere inspection of the maps it is not possible to identify the land, either as described by the plaintiffs, or as described by the defendants, with any superficial area upon these maps. As a necessary consequence of adopting the boundaries given by the defendants, the Subordinate Judge was forced to hold that the quantity of the land comprised in the first parcel was not 850 hals as stated by the plaintiffs, but 500 hals as stated by the defendants; and that the quantity of land in the second parcel was not 100 hals, but 125 hals. Upon the merits of the case, the Subordinate Judge came to the conclusion that the title to the land comprised in both parcels was in the defendants, but he was of opinion that the plaintiffs had been in possession for over twenty years, and that by such possession they had acquired a title which must be held to override and destroy the title which he found to be in the defendants. He says in one part of his judgment:—"In this case, there being satisfactory evidence of long possession on the part of the plaintiffs and no or doubtful proof on the part of the defendants, I am extremely sorry to say that although there is satisfactory evidence of title on the part of defendants, still they are not entitled to reap the benefit of this case." And further on, after considering the evidence, he thus expresses himself in conclusion:—"Considering all these circumstances, I come to the conclusion that the plaintiffs and their predecessors had been in possession of the disputed properties for twenty years and upwards; that they were dispossessed in the manner aforesaid in the year 1281; and that, by virtue of the excellent title that accrued to them by possession, they are entitled to recover possession." He there-
[979] fore decided the case and made a decree in favour of the plaintiffs. That decree is in the following form: *Mokuddma decree hoy*. (The case is decreed.) Now, what the *mokuddma* was which was decreed it is not very easy to say. It certainly is not the case made by the plaintiffs, for, as we have already seen, he abandoned the quantity and description of the lands given by the plaintiffs, which description gave no boundaries, and he accepted the quantity and description given by the defendants. If the Subordinate Judge means to give a decree for the quantity of land stated by the defendants, he has given the plaintiffs in respect of the second parcel more land than they have claimed in their plaint. We think that it is not creditable to the Subordinate Judge that a decree of his Court in an important case like this should be drawn up in a form animadverted upon and condemned by a Circular Order of this Court dated so far back as 19th July 1867. In that Circular Order clear instructions were given to the lower Courts as to the preparation of their decrees in accordance with the requirements of the Code of Civil Procedure so as to make those decrees self-contained and capable of execution without reference to any other documents. The fulfilment of this duty is incumbent upon every Court of Justice, and any Judicial Officer who neglects it fails in the discharge of an important public function. Against this informal decree an appeal has been preferred by the defendants; and the points which have been argued before us are briefly as follow:—*First*, it is said that as the plaint contained no boundaries, the case ought to have been dismissed; and that the decree in the form in which it has been drawn is absolutely incapable of execution, inasmuch as it is impossible for an Ameen or other officer of the Court to take that decree, proceed to the spot, and identify the land, the possession of which is thereby directed to be given to the plaintiffs. *Secondly*, it is contended that the plaintiffs did not set up any title acquired by twelve years' possession, and that the Subordinate Judge has, in consequence, decided the

case upon a point not raised in the pleadings, and which has necessarily taken the parties by surprise. *Thirdly*, it is said that the possession of the plaintiffs has not been proved.

[980] Now, as to the first of these points, we think there can be no doubt that the decree in its present form is incapable of execution, and if we were about to deal with this appeal upon this first point only, it would be necessary to remand the case in order to have a proper decree drawn up.

Then, as to the second point, we think there can be no doubt, and indeed the learned counsel, Mr. Bell, in his argument, very properly admitted, that the plaintiffs did not make in their plaint any alternative title based upon a twelve years' possession. They do, indeed, say that they were in possession of the land, but they do not say that they were in possession for twelve years, or 'from before,' or 'for a long time;' nor do they use any of those other general expressions which are to be found in plaints in this country, and which are at times argued to convey to the party, on the other side, the meaning, that the plaintiff relies upon an undisturbed possession for more than twelve years. This being so, it appears to us that it is impossible to uphold a decree which is based upon a title not stated by the plaintiffs in their plaint, and as to which no issue was framed for trial in the Court below. Cases must be tried and determined *secundum allegata et probata*, and it is contrary to this principle, and may be fraught with injustice, to decide a cause upon a point not raised in the pleadings, nor embodied in an issue, and to which, in consequence, the attention of the parties was not directed at the trial so as to enable them to produce all the evidence relevant thereto which was available to them. Then, as to the plaintiffs' title, we have already pointed out that they do not set forth in their plaint any specific title, and that the only title upon which they can be supposed to rely is a title based upon the two survey maps. The survey map of Dowlutpore gives as the western boundary of this Mouzas Gungadharpore and Rajapore. It does not mention any Mouza Rautpara on the west, but the plaintiffs' case is that the whole of Thak No. 2527 comprises three mouzas, Gungadharpore, Rajapore, and Rautpara; and they rely upon the map of Gungadharpore in support of this case. Now, in the first place, the two maps do not agree. If Rautpara were where the plaintiffs place it, - i. e., in the south [981] of Thak No. 2527, it ought to appear upon the Dowlutpore map, which it does not. Then, when we examine the map of Gungadharpore, it appears to us that this map is, on the face of it, imperfect and unreliable. There is, on the original map, or report of the officer in whose charge or custody the map may be supposed to have been, that this original map contained erasures and alterations. The map is, as we have already said, not dated. Then, as to the boundaries of the adjacent Mouzas Enatnagur, Kalargoon, and Joynabad, it is clear that the boundaries as shown on the map do not agree with the stations as given in the schedule at foot. There is in the column 'Remarks' the following observation:—"Be it known that, on the confines of Mouza Sarippore, No. 2528, some of the stations having been excluded on behalf of defendants in pursuance of orders, the three sides do not agree with the boundaries." This observation goes to show, that the map is not a correct reproduction of the locality and the true boundaries of estates. Then, neither of these maps contains any natural landmarks with reference to which the position of the parcels may be ascertained upon a local investigation, and finally no local investigation has been made, or was, indeed, applied for. The Subordinate Judge takes certain boundaries for example: Bhosachura Khal, which he finds to be on the north of Plot 1, and Dojana Dabi, which he finds to be on the north of Plot 2; but these natural boundaries are not shown on

the maps, and it is not contended that there is any evidence upon the record by means of which we may identify any places upon the map with these two natural landmarks. Under these circumstances it appears to us that these maps are absolutely useless as evidence of a title in the plaintiffs.

We then come to the third question, which is concerned with the plaintiff's possession. The learned counsel Mr. *Bell*, contended, that although the plaintiffs have not set up an alternative title acquired by possession for twelve years, yet the decree of the lower Court can be supported upon the ground that the plaintiffs have proved an undisturbed and undisputed possession in themselves; and that, as against the defendants, who are wrong-doers, such possession entitles them to recover; [982] and he contended that, even without proof of twelve years' undisturbed possession, the plaintiffs are entitled to a decree merely upon the finding of the Subordinate Judge in respect of possession. This raises an important and a difficult question which we think, however, that it will not be necessary for us to determine upon the present occasion. If in our opinion the plaintiffs had proved their undisturbed and undisputed possession of this property, we feel bound to say that we would have had hesitation in accepting the finding of the Subordinate Judge upon the question of title of the defendants. That finding is based upon three documents, which are some hundred years old. We think we ought to point out that there is no evidence of the custody of these instruments. There is no evidence that the defendants in the present case derive title from the persons in whose favour those instruments were executed; and further we should have considerable difficulty in accepting the reasoning of the Subordinate Judge by which he has satisfied himself that the lands, which form the subject of these instruments, are identifiable with the two parcels of lands which form the subject of the present suit. The question whether a plaintiff in ejectment is entitled to succeed upon mere proof of antecedent undisturbed possession in himself is one upon which the Judges of this Court are perhaps not quite unanimous in their opinion and it may be that, at some future time, this question will have to be laid before a Full Bench. In the case now before us we think that the plaintiffs have not succeeded in proving an antecedent undisturbed possession before the year in which they say that they were dispossessed by the defendants. In the first place, if we consider the thak maps as evidence of possession, they are open to the following observations: There is nothing to show that the persons whose names are entered in these maps as in possession are the predecessors in title of the present plaintiffs only. In the second place, it is not possible to identify on these maps the land in dispute with the land as described either in the plaint or in the written statement. In the third place, the map of Gungadhurpore is, on the face of it, imperfect and unreliable as already pointed out. In the fourth place, [983] these maps are not signed by the proprietors or their agents, as is usual in the preparation of thak maps of the Government survey; and lastly, as appears from the field-book, to be found at page 11 and following pages of the paper-book, nearly the whole of the land so thaked was at the time jungle. Now, thak maps are, as has been pointed out in many decisions of this Court, good evidence of possession; but the value of that evidence varies enormously. In the case of a thak map containing definite landmarks and undisputed boundaries signed by the parties or their accredited agents, and representing land which has been brought under cultivation, and is in the possession of ryots whose names are known or can be discovered from the zamindari papers, a thak map is very valuable evidence of possession. But the value of such a map is greatly diminished when we find that there are no natural landmarks delineated thereupon; that the land was jungle when measured; that the

boundaries are not discoverable from a mere inspection of the map; and that neither the zamindars nor their agents have, by their signatures, admitted the correctness of the thak. The latter is the condition of the maps in the present case, and we think that, for the purpose of proving the possession of the plaintiff, these maps are useless, more especially as no attempt has been made by a local inquiry and measurement to identify the area of the maps with the locality. Turning then to the other evidence which is to be found in the case, we may first refer to three measurements which are said to have been made by the plaintiffs at various times. The measurement papers have been filed, but as to these three measurements the same remarks are applicable, *viz.*, that there is no evidence which connects these papers with the lands which form the subject of the present suit. No ryots have been called who prove that they hold and pay rent to the plaintiffs for lands which can be identified as the lands shown in these measurement papers. We think, therefore, that the case of the plaintiffs does not derive any support from these measurements. Then, coming to the oral evidence, the testimony of all the witnesses is general in the extreme. They speak of the 'disputed land.' They say that they saw [984] plaintiffs 'in possession.' They say they saw them 'collecting rents.' All these statements are general. And to persons who have had any experience in the mofussil, and who know how easy it is to bring any number of witnesses into Court, who will readily give general testimony of this nature, the absolute worthlessness of such evidence requires no demonstration. Then, as to the persons who are said to have collected the rents, there are irreconcilable discrepancies as to the periods during which they made those collections, and as to the order in which they succeeded one another in the discharge of this duty. Lastly, it is admitted by the plaintiffs' own witnesses, that three-fourths of the land is waste; and there is no evidence whatever to show acts exercised by the plaintiffs over these waste lands from which a Court of Justice can draw the inference that the plaintiffs were in possession. In respect of the lands that are said to have been under cultivation, the tenants in possession have not been called to prove that they paid rent to the plaintiffs for any land which can be identified with the land which forms the subject of the present suit. Under these circumstances we think it impossible to say that the plaintiffs have succeeded in proving an antecedent undisturbed possession of the whole of the land as described in the boundaries given in the defendants' written statement, or of any portion of it which can be identified by boundaries or otherwise so as to describe it with reasonable accuracy in the decree. The learned counsel for the respondents has asked us to remand this case in order that there may be a local enquiry; and he has urged upon us, that if there is a proper local enquiry made by a duly qualified Ameen, it will be possible to identify the lands which form the subject of this litigation with lands to be found in the locality. We are well aware of the difficulties which the learned counsel has had to contend in arguing a case which has been so badly prepared, so badly brought into Court, and so badly tried as this case has been; but we think that this is an application to which we ought not to accede. The plaintiffs did not apply to the Subordinate Judge to have a local investigation made. Had they done so, and had that local investigation proved to be unsatisfactory [985] or infructuous in consequence of the incompetency of the officer who made it or for other causes, we think that we might fairly be asked to grant a remand; but seeing that the plaintiffs did not ask for a local enquiry, we must presume that they or their advisers did not think that the evidence to be derived from this particular mode of proceeding would have benefited their case. Under these circumstances we are unable to comply with the request of the

learned counsel to remand this case for a local enquiry. The result is, that this appeal must be decreed, and the plaintiffs' case dismissed with all costs of both Courts.

Appeal allowed.

NOTES.

I. VALUATION OF SUIT—A PRELIMINARY POINT—

See (1906) 31 Bom. 73 (77) 8 Bom. L. R. 885.

II. THAK MAPS—

Evidentiary value varies with circumstances:—(1906) 10 C.W.N. 835 (837); 35 Cal. 621; 14 C. L. J. 578.

III. VARIANCE BETWEEN PLEADING AND PROOF—

See also (1906) 3 C. L. J. 316; (1887) 14 Cal. 592; (1883) 7 Bom. 146 19 Cal. 507; 26 All. 331; 12 Mad. 292; 15 C. W. N. 158 8 I. C. 41 (adverse possession not set up in plaint).

IV. DECREES—

Should be self-contained: (1896) 18 All. 314; but reference may be made to the judgment, pleadings and records to ascertain the meaning: (1898) 25 I.A. 102; (1891) 19 Cal. 159; (1888) 16 Cal. 173 at 183; see also the Notes to 2 All. 497.]

[8 Cal. 985 11 C.L.R. 244 7 Ind. Jur. 136.]

FULL BENCH.

The 11th March, 1882.

PRESENT:

**SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE PONTIFEX,
MR. JUSTICE MORRIS, MR. JUSTICE MITTER, AND MR. JUSTICE PRINSEP.**

The Empress
versus
Keshub Mohajan and others
and
The Empress
versus
Udit Prasad.*

*Jurisdiction of criminal Court—Tributary Mehsils—Code of
Criminal Procedure (Act X of 1872), s. 70—Foreign Jurisdiction
and Extradition Act (XXI of 1879), s. 9—Revs. XII, XIII and XIV of 1805.*

The prisoners, residents of the District of Singhbhum, a district in British India, were convicted, under s. 331 of the Penal Code, at Singhbhum, of an offence committed in Mohurbhunj.

Per GARTH, C. J., PONTIFEX AND MORRIS, JJ.—The territory of Mohurbhunj is not within the limits of British India; but, under the provisions of s. 9 of Act XXI of 1879, a conviction in British India for an offence committed without the limits of British India, is good.

* Full Bench Reference made by Mr. Justice MITTER and Mr. Justice MACLEAN, in Criminal Appeals, Nos. 395 and 396 of 1881, dated 18th August 1881,

Per MITTER, J.—Mohurbhunj is within the limits of British India ; but seeing that the Tributary Mehals constitute a 'district' within the meaning of the Criminal Procedure Code, and that the Superintendent of these mehals [986] has been vested with the powers of a Sessions Judge under an order of the Government of India, a conviction under the Penal Code (having regard to the provisions of s. 70 of the Criminal Procedure Code) ought not to be set aside.

Per PRINSEP, J.—Mohurbhunj is within the limits of British India ; but the Acts which extends to British India do not extend to Mohurbhunj. The territory having been expressly placed beyond the ordinary legislation, the law in force in British India cannot come into operation there until this exemption has been removed.

THE accused in these two cases were charged with having caused grievous hurt to one Ramdhone Panti, in order to extort a confession.

The accused, who were policemen belonging to Mohurbhunj went into the District of Singhbhum, and there arrested Ramdhone Panti and six others, residents of Borla, in Singhbhum, on a charge of being implicated in a murder in Mohurbhunj. The men, after being arrested, were taken to Koodasai in Mohurbhunj. Whilst there, they were maltreated, and Ramdhone Panti died from the effects of such maltreatment after having been brought back with the other prisoners to Singhbhum. The Deputy Commissioner of Singhbhum, in the exercise of special powers under s. 36 of the Criminal Procedure, tried the cases and convicted the prisoners of causing grievous hurt in order to extort a confession, under s. 331 of the Penal Code, and sentenced them to terms of rigorous imprisonment varying from one to three years and to a fine of Rs. 200.

The prisoners appealed to the High Court.

No one appeared for the prisoners at the hearing. But a question was raised by the Court as to whether the Deputy Commissioner of Singhbhum had jurisdiction to try an offence committed in Mohurbhunj.

MACLEAN, J., following the decision in the case of *Hursee Mohapatro v. Dinobundo Patro* (I. L. R., 7 Cal., 523), decided on the 13th July 1881, was of opinion that Mohurbhunj formed part of British India specially exempted from the operation of the ordinary law by Reg. XIII of 1805, and was under the administration [987] of specially appointed officers under special rules, and that, therefore, the Penal Code and Criminal Procedure Code were not in force in Mohurbhunj.

MITTER, J., was of opinion that Mohurbhunj formed part of British India, and considered that the Criminal Codes were in force there.

There being a difference of opinion the Court referred the following questions to a Full Bench :—

1st.—Whether the Code of Criminal Procedure and the Penal Code were in force in Mohurbhunj ? and

2nd.—Whether, if the two Codes were not in force in Mohurbhunj, the prisoners could be tried in Singhbhum for causing grievous hurt to Ramdhone Panti at Koodasai in Mohurbhunj assuming his death in Singhbhum to be the consequence of the grievous hurt caused to him at Koodasai ?

The Standing Counsel, Mr. Phillips (with the Advocate-General, Mr. Paul) for the Crown.—The question is, whether Mohurbhunj is included in British India within the meaning of the various Acts of the Legislature which extend to British India. It is admitted that Mohurbhunj is not independent of the British Government, and our contention is, that although not an independent

state, Mohurbhunj is nevertheless not British India within the meaning of the enactments. Mohurbhunj has been under the paramount power of the British Government ever since the cession of Cuttack on the 19th December 1803. The territory of Mohurbhunj is, and always has been, administered by the Raja, subject to the control and interference of the British Government. Did the Legislature, when it enacted laws, which were intended to apply and be enforced in the whole of British India, intend that these laws should be enforced in Mohurbhunj? if not, the territory of Mohurbhunj is not subject to English law. If it did intend them to apply to Mohurbhunj, the Government has provided itself with no machinery to enforce such laws; but, on the contrary, it has recognized a variety of illegal tribunals, and has itself created some, and has allowed the revenue to be appropriated by the Rajas of Mohurbhunj. It therefore seems that the Government, [988] in its legislative capacity, could not have intended to apply or enforce laws in a territory which, in its executive capacity, it has left entirely without law. The treaty, by which it is assumed that Mohurbhunj was ceded, is that of the 17th December 1803, and by this treaty the province of Cuttack, including Balasore, were ceded in "perpetual sovereignty" to the East India Company; but it cannot be inferred that the cession of Cuttack in full sovereignty (even assuming that it included Mohurbhunj) transferred anything more than the suzerainty or paramount power, and this view is confirmed by the conduct of the British Government in its relations with the various territories ceded in 1803, and especially in its relations with the Tributary Mehals. In this treaty of 1803, art. x describes the chief feudatories. The mere cession in full sovereignty did not, I submit, make those subjects, who were before feudatories; it follows therefore that such a cession would not bring the territory so dealt with into "the possession or under the government" of the East India Company, within the meaning of s. 1 of 21 and 22 Viet., c. 106, although it would vest in the East India Company certain powers in relation to the government of the territory within the meaning of that section. It further follows that the territory so dealt with would not be part of India within that section, for 'India' is there defined to mean "the territories vested in Her Majesty as aforesaid, or to become vested as aforesaid" i.e., territories then in the possession or under the government of the East India Company, and which the Acts vest in Her Majesty, and also territories which might become so vested by virtue of any rights vested in, or which might have been exercised by, the Company. Now Mohurbhunj has not become vested in Her Majesty since 1858, and since 1858, Her Majesty, by Her sanad of the 11th March 1862, has recognized the Raja as a Prince or Chief, who then governed his own territories, and has conferred upon him a power of adoption, which is inconsistent with the theory that the Raja is a subject of Her Majesty, and he must be a subject, if Mohurbhunj is part of British India. Further it seems, incredible that the general laws should, in 1874, have been declared applicable in Mohurbhunj and all the Tributary Mehals, and that Angul [989] and Banki should be alone excepted; Angul and Banki having admittedly been taken possession of and placed under the Government of Her Majesty by virtue of her paramount powers. The Local Extent Act, 1874, declares certain laws applicable to the whole of British India to be in force throughout the whole of British India except the scheduled districts,—i.e., such laws were not in force in Angul and Banki; how did it happen then, apart from the exclusion supposed by PRINSEP and MACLEAN, JJ., that the general law did not prevail in Angul and Banki, which, according to their theory, were part of British India all along; and if it was by virtue of the exclusion they rely upon, how came the other mehals not to be scheduled also?

Mr. M. Ghose for the Raja of Mohurbhunj.

The following **Judgments** were delivered by the Full Bench :—

Pontifex, J.—The question whether the territory of Mohurbhunj is within the limits of British India is a question of evidence.

There is nothing to show whether the Mahrattas exercised direct authority over this territory, or whether they treated it merely as tributary. From its situation and character, however, the probability would seem to be that the Mahrattas only exacted tribute from it. Nor does the cession by the Mahrattas to the East India Company throw any further light upon the matter. If the Mahrattas had only the rights of a paramount power, the East India Company could, under the cession, gain no higher rights.

In this state of circumstances the Regulations of 1804 and 1805 were passed, the Government being probably in doubt as to what rights they actually took from the Mahrattas. Nothing was done under the Regulation of 1804 (which applies only to the territory ceded by the Mahrattas) to this particular territory. And the Regulation of 1805 seems to me to show that the Executive Government, being in doubt as to its true relation with the territory, determined to deal with it only in a negative way until such doubts were set at rest. [990] It is observable that, in the schedule to the Regulation, this territory is described differently from the other estates dealt with.

The Regulations of 1816 and 1821 do not seem to me to carry the case further. They relate only to the exercise of such authority as would properly and naturally be exercised by a paramount power.

The treaty engagement of 1829, if it stood alone, would, in my opinion, be conclusive to show that Mohurbhunj was merely tributary. It is of a different period to the engagements with the other mehals. It proceeds from the Raja of Mohurbhunj without any reciprocal instrument in the nature of a patta or sanad from the East India Company; and it speaks of "my territories," of "a contingent force of my own troops" and of "my successors," which is not the language which the Executive Government would be likely to tolerate from a mere subject.

Then come the rules of 1839 issued by the Bengal Government. They assume that there was something peculiar in the status of this territory; and on the whole they do not seem to me inconsistent with its being tributary. All that they do is to invest a Bengal officer with necessary authority as the representative of the paramount power to act at the request of the Raja.

No direct civil jurisdiction has ever been exercised in the territory by the Executive Government of India.

Lord Canning's sanad distinctly deals with the territory as independent and not British territory. For example, it ratifies the right of adoption which would have been mere surplusage if addressed to a British Indian subject. We know that both the Government of India and the Government of Bengal consider the territory to be independent.

Under these circumstances the question being a mere question of evidence, the maxim "*optimus interpretis legis consuetudo*" applies with very great force.

I am of opinion, therefore, that this territory is not within the limits of British India. And if that is so, the conviction seems to be right; for the referring Judges state that "the prisoners [991] describe themselves as residents of the Balasore or Singhbhum District," which would bring them within the provisions of s. 9 of Act XXI of 1879.

Morris, J.—I concur.

Garth, C.J.—I agree in the main with my brother PONTIFEX.

Whether the territory of Mohurbhunj forms part of British India or not, is a question of evidence. It depends partly upon documentary evidence, such as Regulations, treaties, and so forth; and partly upon the way in which the territory has been dealt with by the ruling powers, which are principally concerned with it,—that is to say, the Governments of India and Bengal on the one hand, and the Moharaja, the native chief of the territory, on the other. And when we find that the Indian Government and the Moharaja have, for a long series of years, concurred in considering and treating this territory as no part of British India, and when we also find that Acts of the Indian Legislature, which have been passed for, and have been acted upon throughout, British India, have never been acted upon or considered to be law in this territory, I must say, it seems to me, that such evidence, in the absence of any cogent proof to the contrary, ought, in British Indian Courts, to be almost conclusive upon the point.

I say “almost conclusive,” because I quite think that, under the circumstances of this case, the question is undoubtedly one which the Court is bound to determine; and that no consensus of the powers who are interested in the matter ought to be considered as binding upon it.

It is possible, of course, that the Indian Governments and the Moharaja too, may have been under a mistake. But before a Court of Justice ought to find it a mistake, I think the evidence that it is so should be clear and convincing—evidence of a very different character from the negative and equivocal language of the Regulations, to which our attention has been called, or acts of interference by the British authorities, which may have been intended rather as friendly aids to the Moharaja in the management of his own dominions, than as evidencing [992] any wish on the part of the Indian Government to take the rule of the territory out of the Moharaja's hands.

Then another point has also been suggested in this case, upon which, as the responsibility of deciding it rests peculiarly with myself, I think it right to explain my views. The question which we have been considering in this reference had previously come in much the same form before two Division Benches of this Court. Both those Benches, each consisting of two Judges, decided that Mohurbhunj was part of British India. But one of those Benches thought it right to refer certain points for the decision of a Full Bench.

Then, upon the case coming on for argument before this Court, the *Advocate-General* on behalf of the Government desired that we should also consider the question, whether Mohurbhunj formed part of British India; and my brother MITTER, one of the Judges who had previously decided that point, thought that it ought to be so considered; so, after some discussion, we all agreed to hear the point argued and to decide it. The result has been that three of the Judges of the Full Bench are of opinion that Mohurbhunj is not part of British India, whilst the two other Judges (MITTER and PRINSEP, J.J.) are of a contrary opinion. My brother MITTER, however, for reasons which he will explain himself, holds, as we do, that the prisoners were rightly convicted.

Thus it turns out, that three Judges of the Full Bench have decided one way, whilst four other Judges of the Court have decided the other way; and for this reason it has been suggested to me, that I ought to appoint another Full Bench to consider the question again. If I were to adopt this suggestion, I should appoint a Full Bench consisting of the whole Court; and if I thought

that any real good was likely to be gained, or that the interests of justice in the particular case required it, I should certainly adopt that course, the more so because in the argument before us the prisoners were not represented.

But as four out of the five Judges of the Full Bench consider (though for different reasons), that the conviction should be confirmed, and there is no reason to suppose that the prisoners have not had a fair trial, I do not think that the interests of [993] justice require that the case should be heard again. The prisoners had of course a perfect right to raise the question of jurisdiction; but it was undoubtedly a technical one, and it has been overruled by the majority of a Full Bench.

That being so, I cannot see that any good would be gained by the whole strength of the Court being occupied (perhaps for days), in discussing an abstract question as to the political status of the territory of Mohurbhunj. The result would be either to affirm our present judgment, or else to place the Government of this country in a position of considerable difficulty. And lastly I wish to say, that the alleged reason for appointing another Full Bench is in point of law no reason at all. It has constantly happened, both here and in England, that the majority of an appeal Court which finally decides a point of difficulty, are numerically fewer than the Judges who have previously decided the point the other way.

This was notably so in the Full Bench case of *Gujju Lal v. Fattah Lal* (I. L. R., 6 Cal., 171), which overruled not only the case of *Neamut Ali v. Gooroo Doss* (22 W. R., 365,) previously decided by the late Chief Justice and Mr. Justice AINSLIE, but also several other cases, which had been decided in the same way by other Judges of this Court.

And the same thing has often happened in England in the Court of Exchequer Chamber. But in all these cases the judgment of the appeal Court is no less decisive of the question, and is considered to be binding upon all other Courts, until it has either been reversed by the House of Lords, or overruled by some provision of the Legislature.

Mitter, J.—Upon the materials before us I am unable to agree in the conclusion that Mohurbhunj is a foreign territory and not part of British India.

Section 2, cl. 8 of Act I of 1868 says: "British India shall mean the territories for the time being vested in Her Majesty by the Statute 21 and 22 Vict., cap. 106 (an Act for the better government of India), other than the Settlement of Prince of Wales' Island, Singapore and Malacca." Section 1 [994] of 21 and 22 Vict., cap. 106, is to the following effect:—"The government of the territories now in the possession or under the Government of the East India Company, and all powers in relation to government vested in, or exercised by, the said Company in trust for Her Majesty, shall cease to be vested in, or exercised by, the said Company, and all territories in the possession or under the Government of the said Company, and all rights vested in, or which, if this Act had not been passed, might have been exercised by, the said Company in relation to any territories, shall become vested in Her Majesty, and be exercised in her name; and for the purpose of this Act, India shall mean the territories vested in Her Majesty, as aforesaid, and all territories which may become vested in Her Majesty by virtue of any such rights as aforesaid." Therefore the question for decision is, whether Mohurbhunj was in the possession or under the Government of the East India Company.

That Mohurbhunj is part of Zilla Cuttaok is clear from the terms of Reg. IV of 1804, as well as from the concluding section of Reg. XII, XIII and XIV of 1805, and the preamble of Reg. XI of 1816.

The Regulation of 1804 was passed almost immediately after that part of the country came into the possession of the East India Company on the close of the Mahratta war, and extended the general criminal law in force under the Government of the East India Company to the Province of Cuttack, including Balasore and its dependencies. That territory being formed into the Zilla or District of Cuttack, any doubt that might exist whether Mohurbhunj, or what is now known as the Tributary Mehals, was dealt with by that Regulation is removed by a reference to the Regulations (XII, XIII, XIV) of the following year, which "for the present" withdrew all this tract of country from the operation of "all laws and regulations" which have been or shall be enacted (Reg. XIV, 1805, s. 13). The preamble to Reg. XI of 1816, moreover, describes Mohurbhunj as one of the Tributary Estates in Zilla Cuttack. In the engagement entered into in the year 1829 by the then Raja of Mohurbhunj [see Aitchison's Treaties, &c., Vol. I, p. 184 (Ed. of 1876, p. 109)], he describes [993] himself as "of Killa Mohurbhunj" of Cuttack. Therefore it is quite clear, both from the Regulations passed by the East India Company and the engagement executed by the Raja of Mohurbhunj, that Mohurbhunj is part of Cuttack.

The whole Province of Cuttack was ceded to the British Government by a treaty, dated the 17th December 1803, between Roghuji Bhoosla and the Honourable East India Company (see page 97, Aitchison's Treaties, &c., Vol. III).

It has been said that the Mahratta Chief might have possessed only a paramount power over the Rajas of the Tributary Mehals, the sovereign power being vested in them. But by the 2nd article of the aforesaid treaty, the Province of Cuttack, of which Mohurbhunj is a component part, was ceded "in perpetual sovereignty" to the East India Company.

It has been further said that, shortly after the cession of Cuttack, the British Government was not certain as to the exact status and position of the Tributary Rajas, and that therefore the Regulations of 1805 were not extended to them. The language of these Regulations does not show any uncertainty in the mind of the ruling authorities as to the status of these mehals. They were described in s. 36 and 37 of Reg. XII of 1805 as "jungle or hill zamindaries" or "estates." Their "tributes" are styled as "quit-rents." Referring to the settlement of Mohurbhunj, s. 37 says, that it will have to be concluded with the "proprietor of that estate for the payment of a fixed annual quit-rent."

The reason for exempting the Tributary Mehals from the operation of the Regulations was not founded upon any uncertainty regarding their status or position, but upon the character of the inhabitants, who are described as "a rude and uncivilized race of people." Similar considerations influenced the Government in withdrawing Chota-Nagpore in 1833 from the operations of the Regulations. In fact, it is notorious that this was the cause of the formation of what are called Non-Regulation Districts of British India.

Then, in 1816, the Reg. No. XI was passed, vesting an officer under the British Government, *viz.*, the Superintendent [996] of the Tributary Mehals with the power of trying cases of inheritance or succession to these estates. A special procedure was also laid down in that Regulation.

It is said that these rules were laid down by the British Government as a paramount power over the native sovereigns. But the Governor-General in Council could not pass any legislative enactment in respect of any foreign territory.

It may be noticed here that, in the years 1845 and 1850, the Indian Legislative Council passed laws relating to these mehals, and under s. 43 of 3 and 4 Will. IV, cap. 85, the Governor-General in Council had authority only to legislate in respect of territories under the Government of the Honorable East India Company.

It has been already noticed that, in the year 1829 (that is, several years after the British Government had legislated for Mohurbhunj, and had by Reg. XI of 1816 assumed to itself the right of determining the succession to the estate of Mohurbhunj by establishing special Courts and procedure for this purpose), an engagement was executed by the then Raja of Killa Mohurbhunj in favour of the Government of the Honorable East India Company. It is headed in the Collection of Treaties already referred to as a "treaty engagement." Whether this heading is to be found in the document itself or not, or whether it is a mere description of it given by the editor of the Collection of Treaties, &c., I have no means of ascertaining. But in the body of the document itself, it is simply called an engagement. By it the Raja engages to maintain himself in submission and loyalty to the Government of the East India Company, to pay sicca Rs. 1,001 as pesh-kush for the said Killa, to depute a contingent force of his own troops with the forces of Government for certain purposes specified in it, and to relinquish a certain specified claim which he had on "the Government," meaning thereby the Government of the East India Company. The two last clauses are very significant, because they contain a distinct admission on the part of the Raja that there was no separate Government of his own within the Killa in question. The Raja called the Government of the East India Company "the Government," meaning thereby [997] that there was but one Government in the whole Province of Cuttack, of which Mohurbhunj was a component part.

Now it is said that the condition regarding the deputation of a contingent force of the Raja's troops to act with the forces of Government shows that the engagement was not executed by a subject, but by a sovereign. That no such inference can be legitimately drawn from the condition in question is clearly shown in the judgment of a Division Bench of this Court in *Hursee Mohapatra v. Dinobundo Patro* (I. L. R., 7 Cal., 523): the passage is to be found at page 542 of the report. I need not make an extract of it here.

In these mehals the administration of civil justice, excepting in cases provided for by Reg. XI of 1816, and Acts XXI of 1845 and XX of 1850, has been left entirely in the hands of the native Rajas, who have no criminal jurisdiction, except in petty cases. The administration of criminal justice is, with that exception, in the hands of the officers under the British Government. Special rules of procedure were framed in 1839 by the then Superintendent of the Tributary Mehals; though they were not formally sanctioned by the Government, yet the officers entrusted with the administration of criminal justice in these mehals were directed to follow the spirit of these rules as closely as possible.

The recent orders of Government regarding the powers to be exercised by these officers are thus succinctly recited in the judgment of CUNNINGHAM, J., in the case already referred to (p. 531). "On the 12th December 1870, the Secretary of the Bengal Government addressed the Magistrate as 'ex officio Assistant Superintendent, Tributary Mehals,' informing him that as ex-officio Assistant Superintendent of the Tributary Mehals, he was empowered to take up for trial all offences committed within the Tributary Mehals not punishable

with death, and to pass sentences not exceeding seven years, submitting his proceedings, in each case, to the Superintendent. Trials thus conducted were to be, as far as possible, in accordance with the Criminal Procedure Code.

"In 1872, the Government of India vested the Superintendent [998] of the Tributary Mehals with the powers exercised by a Sessions Judge in Regulation Districts, and with power to hear appeals from sentences passed by any subordinate officer in Tributary Mehal cases.

"On the 30th April 1873, the Government of Bengal addressed the Superintendent of the Tributary Mehals, in answer to a letter submitting a tabular statement of the powers then exercised by officers in the tributary estate of Orissa, and the powers which, in the opinion of the Superintendent, ought to be exercised in accordance with the spirit of the new Criminal Procedure Code; authorised the Superintendent to exercise the powers of Magistrate of a District and of a Sessions Judge under s. 15 of the Act, and gave him power to hear appeals from sentences under s. 36. The Magistrates and *ex-officio* Assistant Superintendents of the Tributary States were invested with the powers of a Magistrate of the first class and under ss. 36 and 222 of the Code."

Upon the materials before us we have therefore these facts established :—

(1) The cession of Cuttack, of which Mohurbhunj is a component part, to the Government of the East India Company "in perpetual sovereignty" in 1803.

(2) In 1804, 1805, several Regulations were passed by the British Government treating the Tributary Mehals as part of Cuttack ceded to them.

(3) Legislative enactments were passed from time to time vesting officers under the British Government with power to decide suits of particular descriptions arising in these Mehals.

(4) An engagement was executed by the Raja of Killa Mohurbhunj in 1829 to pay a certain amount of posh-kush for the Killa and to maintain himself in submission and loyalty to the Government of the East India Company.

(5) With very insignificant exceptions, British officers administer criminal justice in these mehals.

In a case decided by the Judicial Committee of the Privy Council—*Damodar Gordhan v. Deoram Kanji* (I. L. R., 1 Bom., 367) a similar [999] question arose, *viz.*, whether a village named Gangli, which was admittedly in British Territory, was ceded to a native sovereign or not? In the Province of Kattyad, the Thakur of Bhaunagar held certain taluqs which have never been brought under the ordinary administration of the British Government in India. For these taluqs the Thakur of Bhaunagar used to pay certain tributes to the Peshwa and the Gaikwar. The rights of the Peshwa and Gaikwar in these taluqs were transferred to the East India Company between 1802 and 1820. The judicial administration in these taluqs was left in the hands of the Thakur down to 1831. In that year a Criminal Court of justice in Kattyad was established for the trial of capital crimes in certain cases, the sentence of the Court requiring confirmation by the Bombay Government. By an order of Government, the village Gangli was withdrawn from the ordinary jurisdiction of the British Courts of the Bombay Presidency and made part of these taluqs belonging to the Thakur of Bhaunagar. It was contended that this act of Government amounted to a cession of Gangli to a native sovereign, *viz.*, the Thakur of Bhaunagar. The Judicial Committee held that this act did not amount

to a cession of territory, but it was intended to confer upon the Thakur of Bhaunagur within Gangli as large a criminal and civil jurisdiction as that which he exercised in these taluqs. It is clear that the status of Mohurbhunj is very much similar to that of these taluqs of the Thakur of Bhaunagur. The Judicial Committee of the Privy Council was strongly inclined to the opinion that these taluqs formed part of British territory. This point was not expressly decided, because it was not absolutely necessary.

Some stress has been laid on the sanad of adoption granted to the Raja of Killa Mohurbhunj by British Government in the year 1862. But such sanads were granted to persons who are admittedly holders of mere zamindari and jagirs (see Aitchison's Treaties, &c., Vol. III, pp. 319, 320). On the whole, I am of opinion that Mohurbhunj is within British India.

The next question is, whether the conviction of the appellants is right, they not having been tried by the Superintendent of the Tributary Mehals.

[1000] I think the Tributary Mehals constitute by themselves a district within the meaning of the Criminal Procedure Code, and by the Government order of 1872, the Superintendent was vested with the powers of a Sessions Judge. I am of opinion, therefore, that, having regard to the provisions of s. 70 of the Criminal Procedure Code, the conviction of the prisoners ought not to be set aside.

Prinsep, J.—I have had the advantage of seeing the judgments of all my learned colleagues in this case, but I regret to be unable in any respect to alter the opinions expressed by me in the case of *Hursee Mohapatro v. Dinobundo Patro* (I. L. R. 7 Cal., 523). That case was decided by CUNNINGHAM, J., and myself, after hearing the arguments of counsel on both sides. In the present case the prisoners, appellants, have not been represented: the case has, therefore, been decided on *ex parte* arguments.

The points for our decision are:—

First.—Whether the territory of Mohurbhunj is or is not British India, as defined in the Statutes 21 and 22 Vict., cap. 106?

Second.—If it is British India, whether the Indian Penal Code and the Code of Criminal Procedure are in force within that territory?

Third.—If it is not British India, whether the prisoners can be properly tried in British India?

All these points were fully discussed and decided in the case of *Hursee Mohapatro v. Dinobundo Patro* (I. L. R., 7 Cal., 523), and as, after hearing the matter reargued by the Law Officers of Government, and Mr. *Mon Mohun Ghose* on behalf of the Raja of Mohurbhunj, I see no reason to modify the opinion expressed in my judgment in that case, I do not propose to give the grounds of my opinion with the same fulness as I expressed them in that judgment. It will be sufficient that I should briefly state them, and at the same time mention the reasons for which I altogether dissent from the opinions of the majority of my learned colleagues.

[1001] I would first of all observe that it was no part of the argument in the case heard by CUNNINGHAM, J., and myself, that there was any difference between the status of Mohurbhunj and the other Tributary Mehals, and though this distinction has been made by my learned colleagues in this case, I find myself unable, for reasons which I shall presently state, to agree in that opinion. It will, I think, be more convenient to deal with the case first as if no such distinction existed.

The Province of Orissa as now known, together with the country termed the Tributary Mehals, was conquered by the British from the Mahrattas in 1803, and afterwards formed the subject of a treaty entered into with the chief of the Mahrattas, Sewa Sahib Roghuji Bhoosla, on 13th December 1803, by which the country was ceded to us in "perpetual sovereignty." Treaties made by us during the course of the war with some of the chiefs of the Tributary Mehals who are described as feudatories of the Mahrattas, were confirmed by that treaty. Mohurbhunj was not among those feudatories who had joined us, but that is immaterial, as will appear from the narrative of subsequent events. The British Government then proceeded to legislate for this new territory, and passed Reg. IV of 1804 to provide for the administration of criminal justice and the authority of the Police. We learn from this Regulation that our rule dated, not from the date of the treaty of 13th December 1803, but from that of the conquest of Cuttack, 11th October 1803.

The Regulation deals with the "Province of Cuttack, including Balasore and the other dependencies of the said Province," and forms this country into the Zilla or District of Cuttack with two divisions. Whatever doubt there may be regarding the inclusion of the Tributary Mehals as dependencies of the Province of Cuttack within the operation of this Regulation, is removed by the Regulations passed in the following year. The Reg. IV of 1804 was repealed, and three Regulations were passed (XII, XIII, XIV of 1805) providing respectively for the revenue, criminal, and civil administration in the Province of Cuttack, and every one of these Regulations specially exempts the Tributary Mehals [1002] from the operation of those laws which it is declared shall not be "construed for the present to extend to the estates of certain hill or jungle rajas or zamindars," of which a list is given. There would have been no necessity for this provision if the law of 1804 had not been intended to apply, and did not apply, to the estates of these rajas or zamindars, and if, in the opinion of Government, the legislation for the Province of Cuttack would not otherwise extend to these estates.

The preamble to Reg. XI of 1816, which was enacted to provide for the trial and determination of "claims to the right of inheritance or succession in certain tributary estates in Zilla Cuttack," also confirms this view. Act XXI of 1815, is to the same effect, and so is the preamble to Act XX of 1850, which recites that "whereas certain jungle or hill zamindari in the Zilla of Cuttack enumerated in s. 36, Reg. XII, 1803, of the Bengal Code, and the territory of Mohurbhunj in the same zilla, are temporarily exempted by the said Regulation," &c., "and were temporarily exempted from the laws and regulations for the maintenance of the Police and for the administration of justice in criminal cases." That Act provided for the determination of boundaries of those zamindari, not only as between them and what may be termed regulation territory, but as between one another.

This is all the legislation on the subject, and from this, to my mind, it clearly appears that all the Tributary Mehals have been regarded as country ordinarily subject to the laws in force under the British Government, but specially exempted "for the present" from their operation. The Tributary Mehals have also uniformly been described as estates or zamindari in Zilla Cuttack, of which they were first made part by Reg. IV of 1804. I regard the terms of the Regulations and Acts to which I have referred as clear and express on this point, and I cannot consider the legislation of the Government in thus temporarily exempting the Tributary Mehals from the operation of the general laws and regulations,—in authorizing the Collector of Cuttack to conclude a settlement for the payment of a fixed annual quit-rent,—

in providing for the determination of all claims of inheritance or succession to those estates,—in empowering the Governor-General in Council to prescribe rules for the guidance of such agents and their subordinates as he shall appoint and for the powers to be exercised by them in civil suits and criminal trials,—and in investing the Superintendent of the Tributary Mehals with power to determine all disputes regarding the boundaries between the several estates, as negative or of any doubtful meaning. If any further indication of the intention of Government is necessary, it is to be found in the orders passed by Government in 1814 when creating the office of Superintendent of the Tributary Mehals, which I shall presently quote.

I will next refer to what may be termed the executive or political action of Government with regard to the Tributary Mehals. Section 37, Reg. XII of 1805, declared that "it shall be the duty of the Collector of the Zilla (Cuttack) to conclude a settlement of that estate (*i.e.*, the lands known as the Territory of Mohurbhunj) for the payment of a fixed annual quit-rent, on the principles on which a settlement has been concluded with the other hill or jungle zamindars, specified in the foregoing section." These other zamindars are the chiefs of the other Tributary Mehals.

In accordance with the terms of s. 37, the settlement, which appears in Aitchison's Treaties, etc., Vol. I, page 184, was in 1829 made with the Raja of Mohurbhunj. The engagements with the rajas or zamindars of the other estates known as the Tributary Mehals were made several years earlier; in fact, they are referred to in s. 36 of Reg. XII of 1805 as having been already entered into.

Some stress has been laid on the terms of the engagement entered into by the Raja of Mohurbhunj in 1829 as showing that he was not a subject of the British Government. That engagement is similar in all its terms to those entered into by all the other Rajas, except the Raja of Keonjhar, and, as I have already stated, the engagements of all those Rajas formed the subject of s. 36, Reg. XII of 1805, and are mentioned as "settlements for the payment of a fixed annual quit-rent." The terms 'estate,' 'zamindar,' 'settlement' and 'rent' applied to all the Rajas of the Tributary Mehals leave [1004] no doubt in my mind of their status with respect to the British Government. I have already in my judgment in the previous case noticed the terms in the engagement which, in my opinion, do not bear the interpretation put on them by my learned colleagues. The Raja styles himself as "of Killa Mohurbhunj of Cuttack." Zilla Cuttack has, since its conquest in 1803, invariably been a part of British territory and British India, and therefore the reference to Zilla Cuttack would, in my opinion, only be an additional indication of the fact that Mohurbhunj was, as set forth in Reg. IV of 1804, a dependency of the Province of Cuttack, and from that time a part of that Zilla. The expressions quoted from the treaty in the judgment of my learned colleagues appear to me of little significance. The succession to all those Rajas has always been assured to them, and the British Government has gone further to establish special Courts to determine claims to the right of succession or inheritance (Reg. XI of 1826). The Government, moreover, in its desire to be guided by local customs, in 1826, circulated among all these Rajas 25 questions to ascertain the customs in their families, and their answers have always been used by our Courts in determining all questions of inheritance in that part of the country. The papers known as the Pachees Sawal (25 questions) have always been regarded as authoritative by our Courts, and have more than once been quoted to me without any objection in cases tried by me in this Court. The expression "my successors" in the treaty engagement is thus easily

explained. The country having sometimes been described in the Regulation as the Territory of Mohurbhunj, I see no special force in the expression "my territory." As regards the co-operation of "a contingent force of my own troops," I would only again refer to the preamble to Reg. XIII of 1805, which describes the origin of the maintenance of such "troops" throughout Orissa, and shows that after all they are merely police levies kept for the protection of the country. The Orissa paiks are well known to every one who has been officially connected with that part of India. The treaty engagement, too, is similar to those entered into by the other Rajas, which were referred to with approval in s. 36, [1005] Reg. XII of 1805, and this was a Regulation for the settlement of the revenue of the Province or Zilla of Cuttack. So far then as its terms go, I cannot regard this treaty engagement otherwise than as the result of the settlement which it was the duty of the Collector of Cuttack (s. 37, Reg., XII of 1805) to conclude for the payment of a fixed annual quit-rent, not tribute.

Next in order come the rules of 1839. These were prepared by the then Superintendent of the Tributary Mehals, Mr. H. Ricketts, and submitted by his successor, Mr. Moffat Mills, for the sanction of Government. That sanction was never accorded. Instructions were, however, issued, that the officers were to act up to the spirit of those rules. I can find no authority for asserting that the action of those officers was to be exercised at the request of the Raja of Mohurbhunj, or any other Raja. On the contrary, the Government officers have always assumed a superior authority up to the present day, which seems to me to go far to indicate the exact position occupied by all these Rajas. That such a state of things existed and has been continued is (to use the words of the Regulations of 1805) "owing to the rude and uncivilized race of people occupying those hill and jungle zamindari," not, as has been stated, in consequence of any doubt on the part of Government regarding its true relations with that territory.

But if it be necessary to refer to other evidence of the intention and policy of Government in their relations with the Tributary Mehals, I would quote the orders of the Governor-General in Council in 1814 when the appointment of Superintendent of the Tributary Mehals was created. These orders are particularly important from the early date on which they were issued, as well as from the occasion which called for them. The letter is addressed to the officer who was appointed the first Superintendent of the Tributary Mehals.

"With respect to the office of Superintendent of the Tributary Estates, your attention is desired to the following remarks and instructions:—

"Under the existing Regulations (Sections 36 and 37, Reg. XII, 1805; s. 13, Reg. XIII, 1805) certain estates situated [1006] within the limits of the District of Cuttack are exempt from the operation of the general regulations, but pay a fixed annual revenue to Government.

"The Governor-General in Council does not understand that such exemption was founded upon any claims which the proprietors of those estates have to the exercise of independent authority. On the contrary, his Lordship in Council apprehends that it originated entirely from the opinion which was entertained of the uncivilized manners of the zamindars themselves, and of the inhabitants generally of those places, combined with the nature of the country, which was supposed to consist for the most part of hills and jungles. These circumstances, of course, render it extremely difficult to execute any process of the Courts of judicature, or otherwise to give effect to any orders which the Judge, the Magistrate or Collector in the discharge of their public

functions may have occasion to enforce in any of those places.

"From this short review of the subject it follows that the continuance of the above-mentioned estates on their present footing is a mere question of expediency, and that there is not anything in the nature of our connection with the proprietors of them which should preclude us from placing them under the ordinary jurisdiction of the Civil and Criminal Courts, should it at any time be thought advisable with reference to the points noticed in the preceding paragraph to do so. It will of course be understood that, in adopting any arrangements of that nature, no alteration is to be made in the amount of the revenue payable by the proprietors of the above-mentioned estates respectively which has been declared (Section 36, Reg. XII of 1805) to be fixed in perpetuity.

"Under the circumstances above noticed, it will be one of the first objects of your consideration to inform yourself whether any of the mehals to which the foregoing paragraphs refer can be conveniently brought under the ordinary jurisdiction of the Civil and Criminal Courts, and to report the result of your enquiries on that subject to Government."

[1007] I further find from a selection of official papers published by Government in 1867 as "papers of the settlement of Cuttack and on the state of the Tributary Mehals," that various Superintendents have, from time to time, endeavoured to obtain the introduction of some definite law into the Tributary Mehals, the necessity being generally recognized, until in 1839 some rules were proposed by Mr. Moffat Mills, the then Superintendent, but that the Government, probably for the same considerations as influenced them in enacting the Regulations of 1805, has hesitated to introduce any regular system. All these attempts were altogether in accordance with the directions of the Governor-General in Council in his orders of 1814, in which, by requiring the Superintendent, then appointed, to inform himself "whether any of the mehals can be conveniently brought under the ordinary jurisdiction of the Civil and Criminal Courts, and to report the result of his enquiries on that subject to Government," he declared the policy of Government to be to make these mehals, as soon as circumstances would permit, subject to the general law in force elsewhere.

It has been suggested that none of these acts of Government show that they even took possession of this territory, but that all that the Government has done is to exercise a sovereign control as the paramount power over the conduct of the Raja, and has allowed him to rule the territory as an independent state.

I cannot accept this view for the following reasons:—

The British Government has repeatedly legislated for Mohurbhunj. The treaty engagement of 1829 was entered into under authority of a Revenue Regulation of 1805, declaring it to be the duty of the Collector to make a settlement with the Raja for the payment of a fixed annual quit-rent for his estate, and even to the present time British officers have assumed to themselves the sole right to try in British India even inhabitants of Mohurbhunj for heinous offences committed by them in Mohurbhunj. Added to all these facts we have the orders of Government of 1814.

These papers of 1814 were not placed in my hands when [1008] I decided the case of *Hursee Mohapatro v. Dinobundo Patro* (I. L. R., 7 Cal., 523), and I refer to them with much satisfaction as confirming the opinion I then expressed and still entertain. Moreover, when, even up to the present day,

officers of Government are directed to try in, what is beyond question, British India, inhabitants of all these Tributary Mehals whenever charged with any heinous offence, I cannot agree that there has been any consensus between the British Government and the Maharaja of Mohurbhunj that the territory of Mohurbhunj should be no part of British India.

The last public document is the sanad of Lord Canning of 1862. The right of adoption which it confirmed was one which I have already shown has been recognized by the British Government since 1829. MITTER, J., has further pointed out that similar sanads were granted to individuals who were undoubtedly British subjects.

No special importance can, in my opinion, be attached to the grant of such a sanad. It has not been contended that this sanad made any alteration in the previously existing status of the Raja, or that at any time there has been anything amounting to a cession of territory to the Raja; but it has been stated that this sanad is an indication that Government dealt with this territory as independent and not as British territory, and that it is evidence that it has at no time formed part of British territory. Such an interpretation is certainly not consistent with the Government orders of 1814, already quoted by me. But, for the reasons above stated, I can attach no force to that sanad.

Other papers, however—official correspondence—have been laid before us. So far from the Government having, as has been said, concurred in considering and treating this territory as no part of British India, I find that more than one Lieutenant-Governor of Bengal has not only insisted on its being under his Government, but has repudiated the idea of its being independent. There has certainly been no such admission, though other Lieutenant-Governors have allowed the matter to remain in doubt. The exemption of this territory from the [1009] ordinary legislation and the application to it of special legislation on special subjects seem to me, as I stated in my previous judgment, rather to show that it has always been regarded as under our dominion and Government, and I am confirmed in this opinion by the orders of the Governor-General in Council passed in 1814, which I have already quoted. There is no precedent that I am aware of, in which our relations with any foreign states have been regulated by legislation, or that which has been termed our 'paramount power' has been exercised in this manner. Legislative powers have been given by Statutes from time to time to be exercised over our own subjects and within our own dominions.

For these reasons I agree with MITTER, J., that Mohurbhunj, like other Tributary Mehals, is British India, but I regret to differ from him that all Acts extended to British India apply also to it. It appears to me rather these territories have been expressly placed beyond the ordinary legislation; and that, until this exemption has been specifically removed, the laws in force generally throughout British India are not in operation in those parts. That the Legislature recognized such a contingency will appear from the preamble to Act XVI of 1874.

I am further unable to find any distinction between Mohurbhunj and other Tributary Mehals as regards its relations with Government. As I have before stated, this was never asserted by the *Advocate-General* or the *Standing Counsel* when they appeared before CUNNINGHAM, J., and myself in the case of *Hursee Mohapatro v. Dinobundo Patro* (I. L. R., 7 Cal., 523); but because Mohurbhunj was separately dealt with in Reg. XII of 1805, and because the treaty or engagement with the Raja was not entered into until 1829, several years after those with the other chiefs of the Tributary Mehals, it is sought to make some distinction between them and Mohurbhunj.

The reason why Mohurbhunj was separately dealt with by Reg. XII of 1805 appears from the terms of the two sections (36 and 37) which refer to it and the other Tributary Mehals. The Regulation was for the settlement of the land-revenue of the District of Cuttack. Section 36 confirmed the [1010] settlements for the payment of a fixed annual quit-rent by the zamindars of the Cuttack Estates, all mentioned by name and since known as the Tributary Mehals of Cuttack; and as no such settlement has been made with the Raja of Mohurbhunj, s. 37 empowered the Collector of Cuttack to make a similar settlement with him. This settlement was the result of the treaty or engagement of 1829, which, as I have already pointed out, is precisely similar in its terms with the treaties or engagements entered into with the Rajas of all the other Tributary Mehals, except that of Keonjhar.

In conclusion, I must express my great regret at the unsatisfactory termination of this case. Not only has a bare majority of the Judges in a Bench of five overruled the opinions of four Judges that Mohurbhunj is in British India, but this has happened in a case tried *ex parte*. How far this may be considered binding is doubtful. But the result is the more particularly unsatisfactory, because the grounds upon which the decision of the majority has proceeded distinguish between Mohurbhunj and the other Tributary Mehals, and the relations between the Government and these mehals remain in the same position as they were before the hearing of this case. Lastly, the present case concerns British subjects under trial for an offence committed in Mohurbhunj, whereas the Government has assumed to itself the right of trying in Cuttack and other places out of the Tributary Mehals, residents of those mehals who cannot, in the view of the majority of my learned colleagues, be regarded as British subjects whenever any offence of a serious character has been committed in those mehals. That was the jurisdiction which I had to consider in the case of *Hursee Mohapatro v. Dinobundo Patro* (I. L. R., 7 Cal., 523): but this point is not covered by the judgments now delivered. How far the exercise of this power is justifiable I need not at present determine, but to me it seems to negative this proposition that the Indian Government and the Maharaja have, for a long series of years, concurred in considering or treating these territories as no part of British India.

NOTES.

[MOHURBHANJ—BRITISH INDIA—

See also (1881) 7 Cal. 553; (1882) 9 Cal. 288; (1889) 16 Cal. 667.]

The 21st April, 1882.

PRESENT:

MR. JUSTICE WHITE AND MR. JUSTICE MACPHERSON.

Hyder Ali.....Plaintiff

versus

Elahee Bux Maloom and others.....Defendants.¹

Jurisdiction — *Suit for profits of a ship* — *Co-owners in a ship* — *Partnership* —
Contract Act (IX of 1872), s. 239, illus. (c), and s. 265.

The fact that several persons are co-owners of a ship does not make them partners, and it is not necessary that a suit by one co-owner against the managing owner or ship's husband, for his share of the profits made by the ship before she has been sold, should be brought in the Court of the District Judge under s. 265 of the Contract Act, but such suit may be brought in the Court of the lowest grade competent to try it.

THIS was a suit to recover the sum of Rs. 1,000 from the defendant Elahee Bux Maloom, as the managing owner of a river brig, of which the plaintiff and defendants were proprietors, the plaintiff alleging that he and the defendants were partners. The suit was instituted in the Munsif's Court. The Munsif gave the plaintiff a decree for Rs. 376. The defendants appealed, and the Subordinate Judge dismissed the suit, on the ground that the partnership had been determined before the institution of the suit; and that, consequently, under s. 265¹ of the Contract Act, the Munsif had no jurisdiction to try the suit, which should have been brought in the Court of the District Judge. The plaintiff appealed to the High Court.

Mr. *Ameer Ali* and Baboo *Aukhil Chunder Sen* for the Appellant.

Baboo *Sharada Churn Mitter* for the Respondents.

Mr. *Ameer Ali* for the appellant contended, that the procedure [1012] provided by s. 265 of the Contract Act was optional and not compulsory—*Luchman Lall v. Ram Lall* (I. L. R., 6 Cal., 521), and *Jarah Ramasami v. Sathambakam Thirucengadasami* (I. L. R. 1 Mad., 340). No doubt, FIELD, J., had taken a different view in *Prosad Deo Mullick v. Russick Lall Mullick* (I. L. R. 7 Cal., 157); but the facts of that case were different. Besides,

* Appeal from Appellate Decree, No. 401 of 1880, against the decree of Baboo Mothoora Nath Goopla, First Subordinate Judge of Chittagong, dated the 19th January, 1880, reversing the decree of Baboo Jugut Bundhoo Dutt, Sadr Munsif of that district, dated the 1st September 1879.

¹[Sec. 265:—In the absence of any contract to the contrary, after the termination of a Right of partners to partnership, each partner or his representatives may apply to apply for winding up by the Court to wind up the business of the firm, to provide for Court after termination of the payment of its debts, and to distribute the surplus partnership. according to the shares of the partners respectively.

Explanation.—The Court in this section means a Court not inferior to the Court of a District Judge within the local limits of whose jurisdiction the place or principal place of business of the firm is situated.]

s. 265 does not apply. Section 239, illus. (c), expressly excludes the ownership in ships from the category of partnerships. There is a great distinction between partnership and joint ownership in a ship—Abbott on Shipping, p. 84.

The **Judgment** of the Court (WHITE and MACPHERSON, JJ.) was delivered by

White, J.—This is an appeal against a decision of the Subordinate Judge of Chittagong, allowing an appeal against a decree of the Munsif. The appeal was allowed on a preliminary ground, that ground being that, under s. 265 of the Contract Act, the suit ought to have been brought in the Court of the District Judge, and not in the Court of the Munsif. A proviso to that section directs that where a partnership is determined, and a suit is brought to wind up the business of the firm, the Court in which the suit is to be brought shall be the Court of the District Judge. This provision, which relates to the *forum* in which partnership suits of the above description are to be tried, has nothing whatever to do with the subject-matter of the rest of the Code in which it is found, but was probably introduced with a view to secure, as far as possible, that such partnership suits should be properly tried.

Some Division Benches of this Court are said to have differed as to the construction to be put upon this proviso, —one of them holding that it is compulsory to bring such a suit in the Court of the District Judge, another of them holding that it is optional. It appears to us unnecessary to consider whether that difference of opinion really exists, and if it does, to which opinion we should incline; because an examination of the subject-matter of this suit shows that the suit is not one relating to partnership between the plaintiff and the defendants, but to a co-owner-[1013]ship which exists between them in respect of a ship. The plaintiff calls himself a partner, but is really a part-owner of a river brig, which has been sold; and he sues the first defendant, who owns half the brig, and is the managing owner of the brig, a brig's husband as he is called in nautical language, for his share of the price of the brig, and of the net profits earned by the brig, before it was sold, and he has made the remaining part-owners parties defendants. There is no doubt that, to ascertain accurately what is due to the plaintiff, involves an account very much of the nature of a partnership account; but still the relation between the parties is not that of partners. There is a distinction between co-ownership and co-partnership, and that distinction prevails in a marked degree in the case of ships, which, as LINDLEY, J., says in his work on Partnership, "are by far the most important chattels usually owned in common." The Contract Act also recognizes this distinction, for in s. 239 of the Act, which defines partnership, there is an illustration (c) in these words,—"A and P are joint owners of a ship. This circumstance does not make them partners." Cases may sometimes occur in which a partnership exists between persons owning a ship, and the ship may be part of the assets of the firm; but in such a case some contract of partnership exists between the parties, or some joint business is carried on by them to which owning of ships is merely accessory. The present case is simply one of joint-ownership in a river brig, and the right which the plaintiff has to a share of the net price for which the brig was sold and of its net earnings before it was sold, arises from his interest as part-owner and not by reason of any partnership subsisting between him and

the defendants. For these reasons we are of opinion that the Subordinate Judge has misapplied s. 265 of the Contract Act, and that the Munsif had jurisdiction to try the suit. As the Subordinate Judge dismissed the appeal on a preliminary point, it will be necessary to remand the case.

We accordingly set aside his decree and remand the appeal to his Court, with directions to try the appeal upon the merits.

The costs of this appeal will abide the event of the remand.

Appeal allowed, and case remanded.

NOTES.

[CO-OWNERS AND CO-PARTNERS—

See also Re Hulton, Hulton v. Lister (1890) 62 L.T. 200 C.A.; *Davis v. Davis* (1894) 1 Ch. 393; *Moore v. Davis* (1879) 11 Ch. D. 261, 265.

The cases referred to in the judgment are those of *Helme v. Smith* (1831) 7 Bing. 709; *Green v. Briggs* (1817) 6 Hare 395.]

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HIGH COURT AT CALCUTTA, AND BY THE
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ON APPEAL FROM THAT COURT AND FROM
ALL OTHER COURTS IN BRITISH INDIA NOT
SUBJECT TO ANY HIGH COURT.

CALCUTTA—Vol. IX—1883.

ORIGINAL CIVIL.

The 11th July, 1882.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE WILSON.

Jumma Dass.....Defendant

versus

Eckford.....Plaintiff.

*Principal and Agent—Power-of-attorney—“Purchase, sell, endorse,
and transfer”—Meaning of “power to sell.”*

N. & Co., having a joint and several power-of-attorney from the plaintiff, authorizing them “to purchase, sell, endorse, and transfer for the plaintiff, and in the plaintiff’s name and on the plaintiff’s behalf,” all shares standing in his name in the books of any public company or society, entered into a contract embodied in bought and sold notes, agreeing to sell by order and on account of *N. & Co.*, to the defendant, twenty-five Muir Mill Cotton shares, and agreeing to buy, by order and for account of *N. & Co.*, from the defendant, twenty-five Muir Mill Cotton shares in three months’ time at an advanced rate; the bought and sold notes bearing the same date and being one transaction.

The transfer deeds were signed by a partner in the firm of *N. & Co.*, as attorney for the plaintiff, and *N. & Co.* received the purchase-money of the shares. Previous to the time fixed for the sale of twenty-five Muir Mill Cotton shares by the defendant to *N. & Co.*, the latter became insolvent. The plaintiff then brought a suit to recover the shares from the defendant.

Held by GARTH, C.J., that the transaction between *N. & Co.* and the defendant was not justified by the power-of-attorney, the contract not having been entered into “for and on behalf and in the name of the plaintiff” within the meaning of the power.

[2] That the transaction was either an actual loan, or a transaction in the nature of a loan, for the purpose of raising money.

Per WILSON, J., that the defendant took no title to the shares for two reasons, *viz.* :— (i) because a power to sell is only a power to sell in the ordinary course of business,—*i.e.*, for a money price; (ii) because it was the duty of the defendant, seeing that the shares were sold to him under a power, to see that he paid the price to the plaintiff or his attorney.

THIS was an appeal from a decision of WHITE, J.—

The plaintiff deposited with Messrs. Nicholls & Co., who were his agents, twenty-five shares in the Muir Mill Co., Limited, and gave to W. Nicholls and G. A. Thompson, two of the members of the firm of Nicholls & Co., a joint and several power-of-attorney, authorizing them (amongst other things) “for him and in his name, and on his behalf, to purchase, sell, endorse, assign, and transfer,” amongst other properties, all shares standing in his name in the books of any public company or society.

On the 24th January 1881, G. A. Thompson entered into a contract with the defendant, embodied in certain bought and sold notes, agreeing to dispose of the twenty-five Muir Mill Cotton shares. The bought and sold notes ran as follows :—

“Calcutta, January 24th, 1881.

Sold this day, by order and for account of Messrs. Nicholls & Co., to Jumma Dass Burmaidutt, twenty five Muir Mill Cotton shares, at Rs. 200 per share.

Delivery and payment to-day.

Brokerage from seller, Rs. 2 per share.

(Signature of Broker.)

Calcutta, January 24th, 1881.

Bought this day, by order and for account of Nicholls & Co., from Jumma Dass Burmaidutt, twenty-five Muir Mill Cotton shares, at Rs. 205 per share.

Delivery and payment on the 25th March 1881.

(Signature of Broker.)”

In pursuance of this contract, G. A. Thompson, professing to act as attorney of the plaintiff, transferred, under three transfer deeds executed by him in the name of the plaintiff, to the defend-[3]ant the twenty-five Muir Mill Cotton shares, and received the agreed price.

The defendant never attempted to register these shares in his own name until after the insolvency of Messrs. Nicholls & Co., which took place on the 8th February 1881, when it became evident to him that the repurchase of these shares by Nicholls & Co. could not be carried out.

The plaintiff brought this suit to recover from the defendant the twenty-five shares. The defendant contended that the power authorized Nicholls & Co. to do what they had done, and that the transaction was a sale. It appeared from the evidence of the broker who transacted the affair, given on behalf of the plaintiff, that his instructions from Nicholls & Co. were, not to sell the shares at the bazaar-rate, but to sell them and to buy them back; and that he did not mention a better price for the shares, because he had only authority to sell and buy back at the price mentioned, and had no authority to make an out-and-out sale: and also it appeared from the evidence of a former cash-keeper of Nicholls & Co., giving evidence on behalf of the plaintiff, that the transaction, on the receipt of the money from Jumma Dass, was entered in the cash-book of Nicholls & Co. under the head of “credit loan payable account.”

Mr. Phillips and Mr. Trevelyan for the Plaintiff.

Mr. Bonnerjee and Mr. T. A. Apear for the Defendant.

WHITE, J., was of opinion that the words “purchase, sell, endorse, assign, and transfer” should be read, on the authority of *The Bank of Bengal v. Fagan* (5 Moore’s I. A., 27), disjunctively; and that, on the authority of the case of *DeBouchout v. Goldsmid* (5 Ves., 211), these words would not convey a power to pledge or mortgage the shares;—that, from the evidence of the broker who

transacted the business, it was clear that he (the broker) had no authority to make an out-and-out sale, but had only authority to sell and buy back at the fixed prices which were settled between him and Thompson;—that, although from other evidence it was clear that the transfer deeds had all been executed in the name of the [4] plaintiff, yet there was no evidence to show that the defendant had agreed to buy, or that Thompson, as agent of the plaintiff, had agreed to sell, the shares to which the transfer deeds related. He further considered that the transaction partook much more of the character of a loan on the security of the shares, than of a *bona fide* sale of the shares; but declining to come to any finding on that point, rested his judgment upon the ground that the defendant had failed to show that Thompson had made any contract for the sale of the plaintiff's shares; it being a rule of law that an agent who seeks to bind his principal by a contract must make the contract in the name of the principal, and more especially where, as in the present case, the agent acts under a power-of-attorney which expressly directs that contracts connected with the power should be signed in the principal's name. He, therefore, decided the case in favour of the plaintiff.

The defendant appealed.

Mr. *Evans* (with him Mr. *T. A. Aplear*) for the Appellant. —The questions are whether the transaction is a sale or a mortgage? if it is a mortgage, whether the power allowed a mortgage? or if it be a sale, whether the reasons given by the Court below will be sufficient, *viz.*, that Nicholls & Co. had power to sell, yet they had power only to sell the shares for and on behalf and in the name of Eckford, and that Nicholls & Co., had not followed out this power. The remarks made by the Court below on *DeBouchout v. Goldsmid* (5 Ves., 211) are not correct; it was in that case decided that the words "sell, assign, and transfer" were to be read connectively and not disjunctively; whereas in *The Bank of Bengal v. Fagan* (5 Moore's L. A. 27), it was held that the words were to be read disjunctively or else conjunctively in a strict sense. Of these two judgments, the judgment of the Privy Council must be followed. I, however, can satisfy the Court that the transaction here is a sale and not a mortgage, and therefore it will not be necessary to argue on the points raised in those cases. Now, could Nicholls & Co. have asked for re-delivery of the specific twenty-five shares on repayment? or if they had been sold, could we have had an action for them? As [5] to whether the transaction is a sale or mortgage, the case of the *Yorkshire Railway and Wagon Co. v. Maclure* (L. R., 19 Ch. D., 478) strongly supports the view Mr. Justice WHITE took of the case; but that case has been overruled: see Weekly Notes for 20th May 1882, p. 75, where it was held to be a transaction of sale and hire, adopted, because the loan could not be carried out. There is nothing in the evidence to show that the excess of Rs. 5, at which the re-sale was to be made, was to be taken as interest. We are not proceeding on a contract, but on a transfer-deed, and by that transfer-deed the property is in us. With regard to the evidence given by the broker as to what he thought was the meaning of the contract, it has been decided that it is not right to look at such evidence to find out the intention of the parties when the contract was made —*Fleming v. Koepler* (I. L. R., 1 Cal., 245). In *The Bank of Bengal v. Fagan* (5 Moore's L. A., 27), the question was, did the property pass, and this is also the question in this case. If the property passed, nothing can take it out of the hands of a *bona fide* purchaser for value, and that takes us back to the question whether the power-of-attorney authorized what was done.

Mr. *Stokoe* (with him the Officiating Advocate-General, Mr. *Phillips*) for the Respondent.

The **Judgments** of the Court (GARTH, C.J., and WILSON, J.) were as follows :—

Garth, C. J.—The questions which have been raised on appeal, and which we have to determine, are : 1st, whether the transaction entered into between Messrs. Nicholls & Co., and the defendant was of such a nature as was justified by the power-of-attorney ? and 2ndly, whether it was entered into for and on behalf, and in the name of, Major Eckford within the meaning of the power ?

I think that both these questions should be answered in the negative.

It seems to me that the transaction in its nature was neither a sale nor purchase of the shares in question. It was either [6] an actual loan, or a transaction in the nature of a loan, for the purpose of raising money.

This appears, I think, very clearly from the evidence of Ramrutton Danye, the broker, who acted for Messrs. Nicholls on the one hand, and of Daidraj Argurwallah, the gomashita of the defendant, on the other. Ramrutton, although necessarily called by the plaintiff, was by no means a favourable witness to him. His object evidently was, and naturally would be, to make out that the transaction was one which Nicholls & Co. had a right under the power-of-attorney to carry out for the plaintiff. He was himself the broker employed by Nicholls & Co., and had seen the power-of-attorney before he entered upon the transaction. He says that, on several previous occasions he had obtained advances of money for the plaintiff upon transactions very similar to the present one : and it is probable that the form in which this transaction was carried out was only somewhat different from those which preceded it, in consequence of Ramrutton having observed that the power-of-attorney did not authorize a loan.

Ramrutton and Daidraj both say, that the sale and purchase of the shares was intended to be one transaction. Ramrutton expressly says, that, whatever the defendant might have offered him for the shares, he had no authority to sell them, except upon the terms of re-purchase. He had no authority, he says, to make an out-and-out sale. And it is obvious, on looking closely into the transaction, that this must have been so. The defendant was not a dealer in shares. He was simply a money-lender, and was only in the habit of taking shares by way of security. He knew nothing, nor did Daidraj, of the value of these shares, and he evidently took the statement of their value from Ramrutton, with reference, not to their price in the market, but to the sum which he was to receive on the re-purchase.

The price in the market, so far as we can judge from the evidence, was Rs. 250 or thereabouts, --certainly not less than that sum : and it is not likely, under these circumstances, that Ramrutton would have sold the shares to the defendant at Rs. 200, except upon the terms of re-purchase ; or that the defendant [7] would have sold them back again, unless he had been obliged to do so, at Rs. 205. The additional price of 5 rupees upon the re-purchase exactly represented interest at 15 per cent. per annum. I think it clear, therefore, that the transaction was not a *bona fide* sale or purchase, properly so called, but merely a device by Nicholls & Co. to obtain a temporary advance of money by a so-called sale and re-purchase.

I confess, I strongly suspect, from the evidence of Daidraj and Bhimraj, that the transaction was not entered in their books in the same way as previous transactions, because they had been informed by Ramrutton that, for some reason or other, the transaction was not to be called a loan ; and it is admitted that this was the first purchase which the defendant has ever made.

The defendant himself dared not present himself in the witness box, and I strongly suspect, that he or his gomasthas knew more about the fraud that was being practised upon the plaintiff than could be extracted from them in cross-examination.

Taking the transaction, however, as it is represented by the witnesses on either side, I consider that it was certainly not a sale or purchase or transfer of shares within the meaning of the power-of-attorney.

Thus far I have assumed that the transaction was one entered into for and on behalf of the plaintiff. But the next question which we have to determine should also be answered, in my opinion, against the defendant. It was upon this point that Mr. Justice WHITE decided the case in the Court below. He considered that whatever the real nature of the transaction was, it was not authorized by the power-of-attorney, because it was not carried out for or on behalf or in the name of the plaintiff.

It is clear from the evidence on both sides, that, at the time when the bargain was made, the name of the plaintiff was never mentioned, and the defendant's own case is, and his witnesses say distinctly, that they never knew the plaintiff in the transaction. From beginning to end they considered they were dealing with Nicholls & Co., and although they received the transfers, they did not look at them, and they were never aware, until after the insolvency, that the plaintiff's name appeared [8] on the transfers. So far, therefore, as the defence was concerned, it is clear that the bargain was not made with the plaintiff, and it is equally clear that, so far as the partners of Nicholls were concerned, they were dealing for themselves and for their own benefit, and not for that of the plaintiff.

The transaction was carried out by bought and sold notes, which are as follows :- (reads bought and sold notes).

Now it is an admitted fact in the case, that the firm of Nicholls consisted of four persons, Mr. Thompson and Mr. Nicholls to whom the power-of-attorney was given, and Mr. Locke and Mr. Hawes who had nothing to do with it; and therefore the contract was made with the defendant by four persons to whom the plaintiff had given no power-of-attorney, and whom he had not authorized to make any such bargain.

So far as I can see, if the plaintiff had chanced to hear of the transaction, and had applied to the defendant to re-sell to him the shares at Rs. 205 per share, on the day when the re-sale was to take place, the defendant might have refused to make the re-transfer upon the ground that the bargain was not made for the plaintiff or by his authority; and on the other hand, if the defendant had applied to the plaintiff to re-purchase at Rs. 205, he would have had no power to compel the re-purchase.

It is true, that the transfers of the shares were in the plaintiff's name, but those transfers were made in a transaction which was clearly unauthorized by the power, and which was not made for or on behalf or in the name of the plaintiff.

One very fair test, as it seems to me, whether the plaintiff ought to be bound by the transaction, is this. If the defendant had looked at the transfers, as he ought to have done, and had seen that they were transfers made of the Muir shares and on the plaintiff's behalf, and if he had then asked to see the power-of-attorney, ought he not, and should he not, at once as a reasonable man have seen, on looking at the power, that the transaction into which he was entering was one which the power-of-attorney did not warrant.

I think that this appeal should be dismissed with costs on scale 2.

[9] **Wilson, J.**—I agree in the conclusion at which the Chief Justice has arrived. I have had the advantage of seeing his judgment, but I prefer to rest my own decision upon somewhat narrower grounds than those relied upon in that judgment.

The plaintiff gave to two members of the firm of Nicholls & Co. a joint and several power-of-attorney, authorizing them, amongst other things, "for me, and in my name, and on my behalf, to purchase, sell, assign, and transfer shares in any public company." The firm of Nicholls & Co. consisted of four parties.

The attorneys or one of them, or Nicholls & Co., entered into a contract with the defendant, in the name of Nicholls & Co., embodied in bought and sold notes, whereby Nicholls & Co. agreed to sell to the defendant a certain number of shares in a company at a named price, and the defendant agreed to sell back a like number of shares in the same company at a future day to Nicholls & Co., at an enhanced price, the whole transaction being one transaction. In pursuance of this contract, one of the attorneys, professing to act as attorney, transferred the shares of the plaintiff to the defendant and received the agreed price.

I think the defendant took no title to the shares for two reasons.

First.—A power to sell is, I think, only a power to sell in the ordinary course of business,—that is to say, for a money-price. But the sale here was partly for a money-price and partly in consideration of the sale of like shares at a future day. On this ground, I think, the transaction was not within the power.

Secondly. Assuming that, after a contract had been made between Nicholls & Co. and the defendant, for the sale of shares, the plaintiff's attorneys might properly sell his shares in satisfaction of that contract (and if there were no other objection in the way I am inclined to think they might), still it was the duty of the defendant, when he found that the shares sold to him were the plaintiff's shares and were transferred only under a power-of-attorney executed by him, to see that he paid the price to the plaintiff or his attorneys. But the price consisted in part of money, in part of a contract [10] to re-sell similar shares, and that contract was not with the plaintiff nor with his attorneys, but with Nicholls & Co. It was, therefore, a contract of which the plaintiff could not, so far as I can see, claim the benefit in any way.

Appeal dismissed.

Attorney for the Appellant: Mr. Pittar.

Attorneys for the Respondent: Messrs. Sanderson & Co.

NOTES.

[POWER OF ATTORNEY CONSTRUCTION OF --

See the Notes to 10 Cal. 901 P.C. in the LAW REPORTS REPRINTS.]

[9 Cal. 10--11 C.L.R. 181]

APPELLATE CIVIL.

The 5th May, 1882.

PRESENT :

MR. JUSTICE CUNNINGHAM AND MR. JUSTICE TOTTENHAM.

Sreeputty Mirdha and another.....Defendants

versus

Kartick Singha.....Plaintiff.*

*Attachment—Execution of decree—Intervenor—Claim to attached property—
Cause of action—Civil Procedure Code (Act VIII
of 1859), ss. 246, 247.*

Where a person whose property has been attached in execution of a decree against another person, and whose claim under s. 246 of Act VIII of 1859 has been rejected, brings a suit under the provisions of s. 247 of Act VIII of 1859, it is no objection to that suit that, previously to the filing thereof, the decree (in execution of which the property had been attached) was satisfied by the judgment-debtor and the property released from attachment.

THE judgment of the Court below, as far as is material for the purposes of this report, is as follows : —

“ The only question to be tried in this case is, whether there was a cause of action for this suit, and the lower Court should have allowed the plaintiff a trial on the merits.

“ It appears that, in execution of a decree by the defendant No. 1 against the other defendants, the tank in dispute was attached and advertised for sale. The plaintiff intervened with a claim, and objected to its sale, on the ground that the tank was his own property and in his possession. The claim was not enquired into, but was disallowed under s. 247, Act VIII of 1859. In [41] fact, the petition of claim was not admitted by reason of its untimely presentation. The plaintiff, therefore, sued in the present case to establish his title to the tank and to have it released from attachment.

“ It transpired subsequently that the sale of the property did not take place ; it was virtually released from attachment in consequence of the judgment-debt being satisfied by the sale of other properties of the judgment-debtors, and so, at the time of the institution of the suit, which was after the execution-proceedings had come to an end, the attachment was not in existence ; and the plaintiff's prayer for release of the property, which has ever since remained in his possession, was perfectly without a cause, and the lower Court's order, disallowing that portion of the claim, was quite justifiable. But the lower Court declined to try the merits of the case, on the ground that plaintiff had no cause of action for the suit, and that decision has been made the subject of this appeal.

“ The plaintiff's petition of claim was disallowed under s. 247 of Act VIII of 1859, and the latter portion of that section (which says ‘ the order disallowing the investigation shall not be subject to appeal, but the claimant shall be left to prosecute his claim by a regular suit ’) clearly gave him a right of suit. The lower Court has said that ‘ that provision is not imperative, but permissive.’ But, if ‘ permissive,’ it permitted the plaintiff to institute a regular suit. The section does not say that no such suit shall lie unless the property is sold,

* Appeal from Appellate Decree, No. 419 of 1881, against the decree of Baboo Kadar Nath Mozoomdar, Second Subordinate Judge of Midnapore, dated the 12th November 1880, reversing the decree of Baboo Brojobehary Shome, Munsif of Ghatal, dated the 31st March 1879.

and hence the first Court's opinion that such was the intention of the law was quite unsupported. It seems to have been under the impression that a decision under s. 246, adverse to the plaintiff, would have given him a cause of action, and that a rejection of his petition under s. 247, not followed by the sale of his property, could not give him such cause. But s. 247, as I have said above, has made no such restriction on the right of suit. Suppose the plaintiff had instituted this suit immediately after his petition was rejected, and before the execution-proceedings were terminated, could it be contended in that case that he had no right of suit when the law expressly gave it to him? I think no such contention could be allowed. Then, suppose that the execution-proceedings were put an end to, and the property released before the suit would have been decided, would the suit stop and fail because the attachment was removed? I believe the suit would not fail on that account. It seems, therefore, quite clear to me that a suit under s. 247 would be independent of the sale of the property at-[12]tached. It is quite possible to imagine a case in which the execution-proceedings might be delayed over a considerable period, and the suit disposed of in the meantime. If a suit instituted before the release of the property would lie, I see no reason why it should be disallowed by reason of the decree-holder not bringing the property to sale, and causing it to be released at his own choice. The section of the law gave the plaintiff a right of action in unlimited terms, and the restrictions imposed on it by the lower Court have not been supported by any provision of law I am aware of. I, therefore, cannot agree with the lower Court in thinking that the plaintiff had no cause for this suit. That Court applied the principles of declaratory decrees provided for by s. 15 of the Act to this suit, but this case was not instituted under that section. Had it been so, it would have been of a quite different nature, and the principles laid down in the rulings quoted by the Court below, as well as in many others, should have been applied to it. But as it was a suit under s. 247 of the Act, those rulings could not be applicable. Questions of injury or inconvenience resulting from the attachment have not been made necessary to be considered in cases under this section, and, in my opinion, sale of the attached property would not be indispensable to give a cause of action under it. Even if the question of injury or inconvenience were to be considered in this case, the attachment of plaintiff's property by declaring it to belong to others has been injurious to his rights, for though the injury has not been immediate, a path was paved for future difficulties. The property was attached and advertised for sale as belonging to the judgment-debtors, those proceedings must have been known to the people at large, and if on any future occasion the plaintiff would be under any necessity of entering into a bargain regarding the property, the probability is ten to one that desirable or successful terms could not be secured. In this way the attachment of his property, though not followed by its sale, has been prejudicial to his rights, and a declaration of his indisputable title was, therefore, necessary to be obtained. For these reasons I hold that the plaintiff's suit was legally maintainable, and a trial on its merits must be held. As there is no evidence in the records, and the lower Court dismissed the suit on a preliminary point,—viz., want of cause of action,—which this Court must overrule, the case should be sent back to the Court below for trial on the merits."

On remand a decree was given in favour of the plaintiff, which was affirmed on appeal. The defendants appealed to the High Court.

[13] *Baboo Jadub Chunder Seal* for the Appellants.

Baboo Ashutosh Dhur and *Baboo Bama Churn Banerjee* for the Respondent.

The **Judgment** of the Court (CUNNINGHAM and TOTTENHAM, JJ.) was delivered by

Cunningham, J.—In this case the property of the plaintiff having been attached by the defendants, the plaintiff brought his claim under s. 246 of the old Code. That claim having been rejected without investigation, on the ground of the late date on which it was put in, plaintiff was left to prosecute his claim by a regular suit under s. 247. He has done so, and, after a contest

on the part both of the judgment-debtor and the attaching-creditor, has established his right to the property in suit. But an objection is taken to the decree, which was also taken to the suit, on the ground that, at the time when the plaintiff made his claim, the attachment had virtually ceased owing to the decree having been satisfied from other properties of the judgment-debtor.

We concur with the Court below in thinking that there is nothing in this circumstance to deprive the plaintiff of the remedy which the law provided for him. A very distinct shade of doubt would be thrown on his title by the attachment, and the seriousness of the evil is shown by the fact that the plaintiff's title has been earnestly contested by both the other parties to the suit. We think, therefore, that the plaintiff was entitled to sue.

The appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[CLAIM TO ATTACHED PROPERTY—

In circumstances such as in this case, the claimant is not bound to bring a suit:— (1893) 18 Bom., 241.

As regards the binding effect in the absence of a claim suit within the period of limitation, see 1 C. L. J. 296; 35 Cal., 202; 31 Mad., 347.]

[14] ORIGINAL CIVIL.

The 12th July, 1882.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE
CUNNINGHAM.

In the matter of the Indian Companies' Act of 1866 and of
the Medla Tea Co., Limited.

C. Kernot.....Claimant

versus

Walton.....Official Liquidator.

*Company—Articles of Association—Power to borrow—Borrowing
in excess of Power in Articles of Association—Ratification.*

Under the articles of association of a limited company, the directors had power, from time to time as they might see fit, without any previous consent of the shareholders, to borrow any sum of money not exceeding Rs. 50,000, on the bill, bond, note, or other security of the company, upon such terms as they might think proper; and had power, with the sanction of a special resolution of the company previously obtained at a general meeting, to borrow any sum of money not exceeding in the whole, together with the Rs. 50,000, the sum of Rs. 1,00,000.

A advanced sums of money to the company amounting in 1879 to over Rs. 80,000. No previous sanction was given to any of these advances. On the 4th October 1879, an extraordinary general meeting of shareholders was held, at which a resolution was passed sanctioning

a mortgage to K of the whole of company's property, except ~~an~~ a certain garden, to secure the payment of a sum, not exceeding Rs. 1,00,000, for advances already made and to be made, with interest at 7 per cent. This resolution was confirmed on the 16th of October, and the mortgage was executed on the 22nd of December 1879. Subsequently the company was ordered to be wound up, and K advanced a claim for Rs. 1,20,787.

Held, that there is a distinction between loans which a company is empowered to raise under its borrowing powers, and debts which, in meeting its current liabilities and in the actual carrying on of its affairs, the company, or its agents on its behalf, have contracted; and that the advances made by K did not amount to a borrowing within the meaning of the articles of association.

In re Cefu, Cileen Mining Company (L. R., 7 Eq., 88) and *Waterlow v. Sharp* (L. R., 8 Eq., 501) followed.

Held also, that the borrowing powers conferred by the articles of association justified a mortgage, the object of which was in part to cover previously incurred liabilities.

APPEAL from a judgment of WILSON, J.

This was a claim made by Dr. Kernot against the Medla Tea Company, Limited, for Rs. 1,20,787-11. The principal questions at the hearing were-- (i) as to the validity of the debt, and (ii) as to the validity of the security.

The facts were as follows :—

The Medla Tea Company, Limited, was formed on the 11th [15] of January 1875, and by art. 13 of the Company's articles of association the Directors had power, from time to time as they might see fit without any previous consent of the shareholders, to borrow any sum of money not exceeding Rs. 50,000, on the bill, bond, note, or other security of the Company, at such rate of interest and upon such terms as they might think proper; and further the Directors had power, with the sanction of a special resolution of the Company previously obtained at a general meeting, to borrow any sum of money not exceeding in the whole, together with the 50,000 rupees, the sum of Rs. 1,00,000.

Up to the end of the season of 1877, the Company was financed by Messrs. Thomas and Co., after which time they refused to finance the Company further. On the 4th of January 1878, a general meeting of the Company was held, at which the Directors were authorized to arrange for the further financing of the Company. On the 14th of January 1878, Dr. Kernot was made a Director, and he agreed to finance the Company, and advanced to the Company a sum of Rs. 30,000, which went to pay off the advances made by Thomas and Co. On the 13th of February 1878, the money advanced to the Company by Dr. Kernot amounted to Rs. 63,569-9-8, and this fact became known to the shareholders when the reports and accounts were issued to the shareholders at the end of 1878.

On the 10th of April 1879, at a general meeting of the shareholders, there were present six shareholders: Dr. Kernot, in the chair, held proxies for two shareholders, and four others; when the report and accounts were approved and passed, and a resolution carried, empowering the Directors, in addition to the sum of Rs. 50,000 mentioned in the 12th article of the memorandum of association, to borrow a further sum of Rs. 50,000 on such terms as they might think fit, making in the aggregate a sum of Rs. 1,00,000, for the purpose of the Company. This resolution was, however, never confirmed.

Dr. Kernot continued to finance the Company, and on the 20th of June 1879 the Company owed him the sum of Rs. 80,000.

On the 4th of October 1879, an extraordinary general meeting [16] of the share holders was held, at which a resolution was passed sanctioning a mortgage to Dr. Kernot of the whole of the Company's properties other than the "Maskowah Garden," to secure payment of a sum not exceeding Rs. 1,00,000 for advances already made and to be made, with interest thereon at 7 per cent. per annum. At this meeting Dr. Kernot was present, and represented one out of six others of his co-sharers present.

This resolution was confirmed on the 16th of October 1879, Dr. Kernot representing one of the seven other shareholders present at the meeting. Due notice of these two meetings had been given to the shareholders by circular and advertisement in the public papers.

On the 8th of November 1879, Dr. Kernot retired from the Directorship, and on the 18th December 1879 the debt due to him amounted to Rs. 87,353.

On the 22nd of December 1879, the Directors (there being only three Directors on the Board at the time) executed a mortgage of the Company's properties in favour of Dr. Kernot, and the rate of interest, which was formerly 10 per cent. on his advances, was, under the mortgage deed, lowered to 7 per cent.

On the 10th of January 1880, at a general meeting of the shareholders, Dr. Kernot was asked to rejoin the Board of Directors, and he consented to do so.

On the 13th of March 1880, at an ordinary general meeting of the shareholders, accounts up to the 31st December 1879 were passed.

On the 13th of July 1880, Dr. Kernot, through his attorney, served a notice on the Company, calling on them to repay to him the moneys advanced, within seven days, and demanding possession of the properties mortgaged to him.

On the 20th of July 1880, Dr. Kernot took possession under his mortgage, and the Company went into liquidation, one W. M. Walton being appointed Official Liquidator to the Company. Dr. Kernot then put in his claim, stating that, up to the 31st of May 1881, the sum of Rs. 1,20,787-11 was due to him for moneys advanced for the cultivation and production of tea at the garden mortgaged to him. It appeared from the books of the Company, that a shareholder named Campbell had objected [17] to Dr. Kernot financing the Company, to the borrowing of money for the use of the Company, and to the mortgage: but being always in the minority, his objections were, at the several meetings, overruled.

The Official Liquidator opposed the claim on the grounds:—(i) that the advances made by Dr. Kernot prior to the execution of his mortgage, in excess of Rs. 50,000, should be disallowed as not being a debt for which the Company was liable, the Directors having acted *ultra vires* with regard to their borrowing powers; (ii) that the mortgage being a mortgage of lands in the mofussil, Dr. Kernot's possession on default of payment was illegal, his remedy being to institute a regular suit, and having obtained a decree, to proceed in execution to sell the property; (iii) that the Company had given to Dr. Kernot a fraudulent preference, and that the mortgage was, therefore, invalid, and should be set aside.

Mr. Branson and Mr. Bonnerjee for Dr. Kernot.

Mr. Jackson and Mr. T. A. Apear for the Official Liquidator.

Wilson, J., in giving judgment, held: That the transactions of the Company, if valid, were valid on the ground of being within the scope of the

authority of the Directors, or on the ground of subsequent ratification. That the principles of law applicable to the latter ground showed—(i) that any act in excess of the memorandum of association is wholly invalid, and can never be ratified—*Ashbury Railway Company v. Riche* (L. R., 7 H. L., 653); (ii) that an act of the Directors, *ultra vires* of the Directors under the articles of association, but not beyond the powers of a majority as restricted by the articles of association, stands on a different footing, and that such an act can be ratified by a meeting of shareholders duly called—*Irvine v. The Union Bank of Australia* (L. R., 2 App. Cas., 375; s. c. I. L. R., 3 Cal. 280)—(which was a case decided on the construction of an Act of the Colony of Victoria, an Act similar to the Act in force in India); (iii) that if the articles of association restrict the powers not only of the Directors, [18] but of the majority of the shareholders, and those restrictions have not been observed, so that the act done is outside the articles of association altogether, and *ultra vires* not only of the Directors, but of the meeting which has done or sanctioned it, the act, provided it be within the scope of the memorandum, may be ratified, but the ratification must be that of the whole body of the shareholders—*The Phosphate Company v. Green* (L. R. 7 C. P., 43). That it was under the last head that the present case fell, and that the acts of the Directors were beyond the powers of the Directors and beyond the powers of a majority, because in dealing with the question of borrowing, art. 13 of the articles of association imposed two restrictions on borrowing, *viz.*, that it must be with the sanction of a special resolution previously given at a general meeting, and this expressly precluded a subsequent ratification by any majority of shareholders. That, therefore, so far as the borrowing in the present case was in excess, it could only be ratified by the whole body of shareholders, which, in the case of *The Phosphate Company v. Green* (L. R., 7 C. P. 43), was held to have been given by the tacit acquiescence of the shareholders, who had had full knowledge and opportunity to object. That, at the end of 1878, the Company had borrowed in excess of the borrowing powers Rs. 13,000, and that the resolution of the 13th of April not being a special resolution, the validity of the borrowing under it must depend on ratification. That although, in March 1880, the report and accounts were circulated to the shareholders, which, in April 1880, were adopted, yet there was clear evidence that Campbell, one of the shareholders, had dissented throughout from the whole of the transactions, and that it could not be assumed that he ever had intended to ratify any of the transactions which were done irregularly, and that the absence of assent by him was as sufficient as the objection of all.

He, therefore, found that the excess of borrowing beyond the powers defined in the articles of association was not good in the first instance, and had never been effectually ratified as to [19] all sums borrowed within the 50,000 rupees limit; but that as to all sums borrowed under the mortgage within the Rs. 1,00,000 limit, with all interest, the loan was valid.

That, as to the other points raised, no fraudulent preference had been made out, nor did the question as to the proceedings on the mortgage arise, inasmuch as it was not proposed to act on the power of sale.

From this decision Dr. Kernot appealed.

Mr. Branson (with him Mr. Bonnerjee) for the Appellant.—Inasmuch as, at a meeting of shareholders, the resolution was passed, is it not enough that the majority of the shareholders agreed? The matter is concluded by the case of *Irvine v. The Union Bank of Australia* L. R., 2 P. C., 366; s. c., I. L. R., 3 Cal., 280). In that case the advance was sanctioned at a general meeting by a majority of the shareholders present; it was found that the Directors had borrowed in excess of their powers, without their powers of borrowing

being extended; and it was held that the shareholders could acquiesce in the borrowing, and had done so at an extraordinary meeting by a resolution of the majority of the shareholders present at the meeting. If Dr. Kernot, even without a mortgage, had come forward to save the property from ruin, if on no other ground (though a salvage claim might be advanced), he would be entitled to recover his advances, for he was a trustee on behalf of the shareholders; see *Lowndes v. Garnett Mining Company* (33 L. J., Ch., 418). As to costs, they have all been occasioned by the contention of the other side, setting up a charge of fraudulent preference, and this point was decided in our favour.

The Court here called on the Officiating Advocate-General (Mr. Phillips), who appeared for the Official Liquidator.

The *Officiating Advocate-General*.—The Privy Council case can be distinguished from this case; but we say also that Dr. Kernot being a Director, and the borrowing being improper, he cannot take advantage of the presumption that everything was rightly carried out, which presumption out [20]siders dealing with a Company are usually entitled to make. As to the Privy Council case cited by the other side, the Company there had power to borrow money, with no limit to their borrowing powers; but the Directors had no such power, and that is the distinction between the two cases, for in the present case the Company had a limited power of borrowing, *viz.*, up to one lac, under the articles of association. In the Privy Council case they had power to extend their borrowing powers without altering their articles of association. Mr. Branson has endeavoured to show that there is no distinction between altering the articles and waiving any informality that may have taken place. *Ashbury Railway Company v. Riche* (L. R., 7 H. L., 653) decides, that a contract, being of a nature not included in the memorandum of association, is *ultra vires* not only of the Directors but of the whole Company, so that even the subsequent assent of the whole body of shareholders would have no power to ratify it. I submit that there must be a notice to the effect that the Directors had exceeded their powers, and that the meeting is convened to ratify the acts done; this was not done here. It is not enough to show that Campbell did not dissent; they must show that he assented. In *Irvine v. The Union Bank of Australia* (L. R., 2 P. C., 366; s.c., 1 L. R., 3 Cal., 280, at 287) no decision was come to on the passage cited by the other side, for nothing was allowed beyond the half of what was claimed. There was no decision except so far as a dictum of the Privy Council can be held to be so, because they held no ratification had taken place. If the act is beyond the power of the Directors, the whole body of shareholders must ratify it. An agent has no power to ratify, and the same rule applies to Directors. As to what ratification, what knowledge, or notice, is required, see s. 198 of the Contract Act, and also the remarks of Sir W. PAGE WOOD as to acquiescence in *In re Athenæum Society, ex parte Eagle Co.* (1 K. and J., 563), and in *In re Phoenix Life Assurance Co. Burges' case* (2 J. and H., 446), and *Spackman v. Evans* (L. R., 3 Eng. and Ir. App., 190-191); also *Houldsworth v. Evans* (L. R., 3 Eng. and Ir. App., 263-276-277). [21] [GARTH, C.J.—If it is a question of ratification by conduct, the ratification must be by all the shareholders; if a question of ratification at a meeting, it must be a ratification by a majority of the shareholders.] As to the point that the money having been received the Company are bound to repay it, it is too late to show that they have relieved the Company from liabilities. The principle laid down in *In the matter of the Indian Companies' Act of 1866 and of the Port Canning Company* (7 B. L. R., 601), cannot, on appeal, be, for the first time, applied to this case; and before

doing so, it is necessary that the liability should have been paid off. As regards s. 65 of the Contract Act, I say that a Limited Company is not 'a person' within the meaning of the section.

Mr. Branson in reply. - If the loan account does not include borrowing, then I stand in a better position, as I am a Director who, seeing that money was wanted, financed the Company to get the garden out of difficulties. As to a borrowing by Directors, see Thring on Joint Stock Companies, p. 83. This Company being a trading company, it would have a power to borrow and to give a mortgage as security for its debts. As to whether I am entitled to interest I cite *In re The German Mining Company* (1 De G. M. & N., 19) and *In re The British Provident Assurance Company, Lane's case* (1 De Gex. J. & S., 504, 513). As to whether the shareholders had sufficient information and notice of the matter when the ratification took place, the series of cases which follow *In re The German Mining Company* (1 De G. M. & N., 19) cited in the last edition of Lindley on Partnership, pp. 760, 761, viz., *In re The Norwich Yarn Company* (22 Beav., 113), *Baker's case* (1 Dr. & S., 55), *Troup's case* (29 Beav., 353), *Hoare's case* (30 Beav., 225), show that where the Directors of a company, acting *bond fide* and to the best of their judgment, advance money in order to carry on the business of the company, and spend the money for that purpose, they are [22] entitled to be reimbursed by the company. If this is a borrowing within the strict meaning of the word, a borrowing, such as the Directors had no power to make without the sanction of the shareholders previously obtained, it has been sufficiently ratified by the shareholders, for they ratified on the 4th and 16th October 1879, and on the 12th March 1880. They had knowledge of the matter in October 1878, for the report read then stated that Rs. 63,000 was due by the Company, and this, in *In re The Norwich Yarn Company* (22 Beav., 164-165), was held to be sufficient notice. [CUNNINGHAM, J. - Your affidavits clearly show that Mr. Campbell knew what was going on, so are not these cases, which go to show what is to be considered knowledge or notice, unnecessary? *In re The British Provident Assurance Company, Lane's case* (1 De Gex. J. & S., 504, 513), goes further than the case of *In re The Norwich Yarn Company* (22 Beav., 164-165); it shows that all the shareholders, both absent and present, are bound. Now, at the meeting of the 10th April, power was given to the directors to extend their borrowing; it was a general meeting of the shareholders, therefore Campbell knew that the Directors had been allowed to borrow Rs. 50,000 more. This resolution, it is true, was not confirmed, so I can only use this fact as evidence that Campbell knew what was going on. If the act of the Directors was not ratified, then I say the onus is on the party who denies it to come and show it was a bad transaction, and that the contract is *ultra vires*. Pollock on Contracts, p. 104. As to the point that there is in every company a power incidental to its existence to incur debts, see Price on *Ultra Vires*, pp. 215, 217. There is a distinction between loans which a company is empowered to raise under its borrowing powers and debts for current liabilities incurred by the company: see *Waterlow v. Sharp* (L. R., 8 Eq., 501), *In re Cefn. Cilcen Mining Company* (L. R. 7 Eq., 88).

The Officiating Advocate-General (Mr. Phillips) was allowed to address the Court on the new cases cited, and on points on which he had not addressed the Court before.

[23] The case *In re The British Provident Assurance Company* (1 De Gex. J. & S., 504, 513) is the case of an outsider, and Mr. Thring, in his book on Joint Stock Companies, pp. 83 and 90, points out this difference. *In re The Norwich Yarn Company* (22 Beav., 113) was decided before limited liability

companies came into existence. *South Durham Iron Company, Smith's case* (L. R., 11 Ch. D., 579), is as to whether Directors can shield themselves behind their own breach of duty ; but they must stand in a fiduciary position to their shareholders. As to the case of *In re The German Mining Company* (4 De G. M. & N., 19), the Company was established under a deed of settlement, and afterwards was registered under the Limited Liabilities Act, and the loans were all made before the registration of the Company. *In re Cefn. Cilcen Mining Company* (L.R., 7 Eq., 88), where two Directors incurred certain obligations to benefit the Company, and the obligations there were held not to be a borrowing, and supposing it to be a borrowing, it was not unauthorized. If the payments by Kernot are advances and not loans, then I must endeavour to show that Kernot, had no right to recover, because if the Directors could not recover, Kernot, who was also a director, could not do so either. As to the extent of affirmative powers in memorandums of association, see *North Stafford Steel Company v. Ward* (L. R., 3 Ex., 172).

The **Judgment** of the Court (GARTH, C.J., and CUNNINGHAM, J.) was delivered by

Garth, C. J.— The question raised in this appeal is, whether Dr. Kernot is entitled to any larger portion of his claim against the Medla Tea Company than has been allowed by the Court below, and to enforce that claim under a mortgage of the 22nd of December 1879, executed in his favour by three of the Directors of the Company in accordance with a special resolution passed on the 4th of October 1879, at an extraordinary general meeting, and confirmed on the 16th of October 1879.

[24] The mortgage recites that the Medla Tea Company, being in want of funds for and towards enabling them to work and carry on the tea gardens, Dr. Kernot had advanced various sums of money, and had received from and on their account various sums of money, leaving a sum of Rs. 87,353, including interest up to date, due to him : "that they had asked Dr. Kernot to lend and advance from time to time such further sums as might be necessary for carrying on the gardens : that the mortgagee had consented on the express understanding that the loan and interest should never exceed one lac, and that it was agreed that the mortgage should be security for all such sums as Kernot had paid, laid out, advanced, or expended, or might from time to time pay, lay out, advance or expend, or engage so to do or otherwise become liable for, on account, or on credit of the Company. The mortgage then follows in these terms, with the provision that the sum due to Kernot should not at any time exceed one lac with interest. There is a covenant for repayment seven days after demand, a covenant to pay forthwith all law charges between attorney and client incidental to this mortgage security or to any proceedings which may be had either for sale, or attempted sale, or otherwise, of the mortgaged premises for procuring or obtaining payment of any moneys thereby received. The rate of interest is 7 per cent. with annual rests. There is power to enter and take possession on default and carry on ; money advanced while so carrying on to be deemed advanced to the Company. Usual covenants, &c.

The mortgage was sealed and signed by three Directors—Hart, Longmuir, and Barlow.

In July 1880 Kernot demanded payment within seven days, or, in default, possession of the mortgaged premises ; and on the 28th of July took possession under the mortgage.

In December 1880 the Company went into liquidation, and Dr. Kernot advanced a claim for Rs. 1,20,787. In disposing of this claim the original

Court (17th September 1881) declared him entitled to charge the Company (i) with advances made before the 16th of October 1879, but so that the whole of the principal due in respect of such advances should not, at any time prior to the 16th of October 1879, exceed Rs. 50,000; (ii) with [26] advances subsequent to the 16th of October 1879, but so that the whole of the principle of such further advances should not, together with advances prior to the 16th of October 1879, exceed one lac; and ordered that the claim, as thus defined, should be allowed with interest at 10 per cent. to the 16th of October 1879, and thereafter at 7 per cent. on the aggregate amount; and that the rest of the claim be disallowed. If necessary, an account of sums laid out by Kernot in managing, &c., was to be taken, and the Liquidator was to retain his costs, claimant to bear his own costs.

From this order the claimant appeals on the following grounds :

1st.—That he was entitled to charge the Company in respect of advances made prior to the 16th of October 1879, not only to the extent of Rs. 50,000, principal, but to the entire extent of his advances :

2nd.—That he was entitled to charge the Company in respect of advances made subsequent to the 16th of October 1879, not only to the extent of Rs. 1,00,000, principal, inclusive of prior advances, but to the full extent of his advances :

3rd.—That the Company did not exceed their powers in borrowing beyond Rs. 50,000 :

4th.—That there was a ratification of the loans in excess of Rs. 50,000 :

5th.—That interest up to the 16th of October 1879 ought to have been allowed at the rate claimed :

6th.—That the claimant was ordered to pay his own costs :

7th.—That no part of the claim should have been disallowed.

There is no dispute as to the regularity of the proceedings of the 4th and 16th of October 1879, at which the mortgage was sanctioned, or as to the due execution of the mortgage itself, or as to the meeting of the 13th of March 1880. The only questions are : (i) How far the sum which the mortgage purported to secure, and which is now claimed by Dr. Kernot, is legally due to him from the Company? and (ii) How far the Directors had power to mortgage the property of the Company to secure the sum, whatever it may be, due to Dr. Kernot?

[26] For the purpose of determining these questions it is material to promise the following facts :—

The Company was registered in 1875. Its nominal capital was one and-a-half lacs, in 1,500 shares of Rs. 100 each. The objects of the Company are stated in the memorandum of association to be the purchase of certain tea estates, the manufacture and sale of tea, the leasing of the estates, and "the doing of all other such things as are incidental or conducive to the attainment of the above objects." Part of the estates purchased were bought from Mr. A. S. Campbell for Rs. 60,000, paid as agreed. Another portion was also bought from Mr. Campbell for Rs. 40,000 made up as follows :—

Paid on Mr. Campbell's P. N. to the holder	...	11,000
250 paid-up shares in Campbell's name	...	24,000
50 paid-up shares to Barlow, at Campbell's request		5,000
		<hr/> 40,000

The 60,000 and 11,000 were contributed by Messrs. J. Kingsley, R. S. Staunton, E. A. Thurburn, and J. Longmuir, in equal sums of 17,750, each of whom were allotted 177 shares of 100 rupees in respect of these contributions, and a further allotment of 100 paid-up shares. Thus the four contributors had 1,108 shares nominally worth Rs. 1,10,800, and the vendor and his nominee had 290 shares nominally worth Rs. 29,000.

Campbell was appointed manager, and it was agreed that if, within three years from January 1st, 1875, the shares were sold at 25 per cent. premium, 100 paid-up shares should be allotted to Campbell. This, with two shares allotted to Baroda Prosad Mitter, made up the 1,500 shares, which constituted the nominal capital of the Company. Of Thurburn's 277 shares, 138 were, at his request, allotted to his partner J. Thomas. Messrs. Thomas and Co., financed the Company, and, by the close of 1877, the Company was indebted to them for Rs. 36,688.

At a meeting of the Directors held on the 14th January 1878, it was announced, that Messrs. Thomas and Co., refused to finance the Company any longer; the Secretary was authorized "to make the necessary financial arrangements for 1878, not to pay more than 10 per cent. on advances." A statement was [27] submitted of liabilities and of certain debit entries carried forward to 1878-79, the estimated out-turn and a probable resulting debit balance for 1877 of Rs. 3,388.

On the 11th of January 1878 Kernot purchased Thomas's and Thurburn's 277 shares, and, at the meeting of the 14th of January 1878, Kernot and Longmuir were appointed Directors in the place of Thurburn and Kingsley. On 15th of January 1878 Kernot sold thirty shares to J. Hart, J. Majee, and J. M. Crowley, in equal lots of ten. It was then arranged that Kernot should finance the Company, and on the 16th of January he advanced Rs. 30,200, which was mainly appropriated to payment of the debt due to Thomas and Co.

On 12th of December 1878, at a meeting of the Directors, a statement was submitted, showing a probable debt at close of the year of Rs. 71,416. Another meeting of the Directors was held on the 14th of January 1879, at which Kernot showed a balance in his favour of Rs. 63,569, and an order was passed to get more power to borrow at the next share-holders' meeting. The ordinary general annual meeting was held on the 10th of April 1879, and it was resolved, that, in terms of the 13th article of association, the Directors are hereby empowered to borrow. This resolution does not appear to have been confirmed in the mode required by art. 51, and accordingly never to have become a special resolution.

At a meeting of the Directors in June 1879, it was recorded that the liability of the Company amounted to Rs. 80,061.

At an extraordinary meeting on the 4th of October 1869, the meeting sanctioned a mortgage to Dr. Kernot of the Company's property (except a specified garden) "to secure payment of a sum not exceeding one lac for advances already made or to be made, and interest at 7 per cent. This resolution was confirmed at the extraordinary meeting on the 16th of October. On the 8th of November, Kernot resigned his seat in the Board.

At a meeting of the Directors on the 13th of December 1879, the mortgage was laid on the table, and the debit balance was stated to be Rs. 85,846.

On the 22nd of December 1879, Longmuir, Hart, and Barlow [28] (holding 257 + 10 + 50 = 317 shares respectively) executed the mortgage.

On the 15th of February, Kernot resumed his seat at the Board, and was re-elected at the ordinary general meeting on the 13th of March 1880, and acted as such till the 10th of April, when he resigned on his departure for England.

These facts appear to establish that the Company was, from the outset, without any means of meeting the current expenses incidental to its business, payment of officers, outlay in plant, wages and food of coolies, etc., etc.; and that the course of business was, as it is we believe with the greater number of these Companies, that the concern should be 'financed,'—that is to say, that some agent in Calcutta or elsewhere should make the advances necessary to meet current expenses, selling and giving credit for all sums received for sales of tea, and striking a balance at the close of the half-year. The result of this arrangement was a debit balance against the Company of Rs. 36,000 odd at the close of 1877, when Messrs. Thomas and Co., gave up their connection with the Company, and it had risen to about 87,000 at the time when Dr. Kernot's mortgage was executed.

Dr. Kernot's account of the arrangement is as follows: "I say that there was an account-current between me and the Company; that I provided funds for the management of the Company's tea garden in Assam, and other purposes of the Company as required, all moneys received by the Company being paid over to me in reduction of my advances; that interest was charged on the balance due to me at 10 per cent. per annum; that from the nature of the business it was impossible to foresee what amount might be required at any particular time, and that the state of the balance was also liable to be affected by the time of arrival of consignments of tea and the prices of tea fetched at any sale. And I further say that the Company had to provide for the wages and rice for the coolies in the gardens, and the expenses of working in Assam; and the custom was for the manager to draw bills on the Secretary in Calcutta for moneys he required, which bills were negotiated with certain Marwari merchants or Kyahs at Debrogghur in Assam. And I [29] further say, that this custom is very general in Assam owing to the difficulty in remitting money; and also that when these bills were presented to the Secretary, it was necessary for preserving the credit of the Company that they should be at once taken up; and that new funds not being immediately forthcoming to finance the gardens, the coolies under engagement there would have also broken their engagements and run away, and the property would have gone. I also say that money was also frequently required for the heavy litigation in which the Company was involved, and I was compelled for the preservation of the property of all concerned to continue making the advances."

We believe that this statement is substantially true, and the point which we have now to decide is, whether the system of advances thus described was beyond the powers of the Directors so soon as the sum due from the Company to Dr. Kernot amounted to more than Rs. 50,000, no previous sanction having been given to the advances by any special resolution.

The articles of association embody those given in the first schedule to the Joint Stock Companies' Act, so far as they are consistent with the articles. Article 13 further provides, that the "Directors may, from time to time, if they shall see fit, without any previous consent of the shareholders, borrow any sum or sums of money, not exceeding in the whole Rs. 50,000, on the bill, bond, note, or other security of the Company, at such rate of interest and upon such terms as they may think proper; and the Directors may, with the sanction of a special resolution of the Company, previously given in general meeting,

borrow on mortgage of the Company's property or otherwise, any sum or sums of money, not exceeding in the whole, together with the said sum of Rs. 50,000, the sum of Rs. 1,00,000."

The Official Liquidator contends that the effect of this article was to render illegal and irrecoverable as against the Company all advances made by Dr. Kernot, previous to the 16th of October 1879, in excess of Rs. 50,000.

We think that this depends upon whether the advances so made can be regarded as a borrowing by the Directors with [30] the meaning of art. 13. If they were, there is certainly some difficulty in saying that the Directors had any power to contract the loans, or that the loans were ever legally ratified by the Company. But we have been referred to several cases, which do not appear to have been noticed by the learned Judge in the Court below, in which the English Courts have drawn a distinction between loans which a Company is empowered to raise under its borrowing powers, and debts which, in meeting its current liabilities and in the actual carrying on of its affairs, the Company or its agents on its behalf have contracted. In *In re Cefn Celyn Mining Company* (L. R., 7 Eq., 88), one Director had drawn bills which were accepted by another and endorsed by the Company to the Bank and discounted by the Bank. The proceeds were devoted partly to liquidating the Company's over-drawn account, about £200, and the residue to the purposes of the Company. At the date of the winding-up order, there was due to the Bank for bills so drawn, accepted, discounted and ultimately dishonoured £1,039. The Directors were precluded by their articles from borrowing more than £500, without special resolution. It was held by Stuart, V. C., that this transaction, though the benefit resulting to the Company was the same, was not borrowing and lending within the meaning of the articles of association, and that a debt due to a Bank by a Company which keeps an account with it is a debt, not a loan. The same view was expressed by Stuart, V. C., in *Waterlow v. Sharp* (L. R., 8 Eq., 503). There a Banking Company had allowed a Railway Company to overdraw to the amount of £65,000, which was headed 'loan account,' and it was contended that this was a loan and *ultra vires*. It was, however, held, that a cash credit with a Bank is not a loan, and that this was so notwithstanding that the cash credit was headed 'loan account.'

The principle there laid down was applied in a somewhat different way *In re The German Mining Company* (1 De G. M. & N., 19), *Ex parte Williamson* (L. R. 5 Ch., 313) and other cases, where it has been held that if money has been actually spent in defraying debts which [31] were legally recoverable from the Company, the person who advances the money can claim to stand in the place of the creditors who have been so paid.

Now in this case, from the first moment the Company started, it was worked on this system of advances by Messrs. Thomas and Co., who set off the sums advanced against the proceeds of the sales as they accrued. After a while Messrs. Thomas and Co., refused to go on, whereupon Dr. Kernot, apparently with the consent of the Directors, paid off the debt balance of Thomas's account, and continued to advance funds from time to time as necessity arose for the purposes of meeting the expenses.

It seems to us impossible to distinguish this case from those which were decided by Stuart, V. C.; and as we do not find that the principle upon which those cases proceeded has ever been overruled, we gladly avail ourselves of those authorities for the purpose of doing what appears to us the most palpable justice to Dr. Kernot. It has not been suggested before us that Dr. Kernot acted otherwise than in perfect good faith, or that the sums which he advanced

were not necessary for the carrying on the business of the Company or not properly expended in that business.

Then the validity of Dr. Kernot's mortgage has been impugned upon the ground that the power conferred by art. 13 to borrow on bond, mortgage or other security, or otherwise, did not justify a mortgage, the object of which was in part to cover previously incurred liabilities. We think, however, that the English cases—*The Birmingham Banking Company* (L. R., 6 Ch. Ap., 83) and the *Ins. of Court Hotel Company* (6 Eq., 82)—sufficiently dispose of this objection. There is nothing in the Companies' Act or in the articles of association, or memorandum of association, of the Company to render such a mortgage invalid. The system of 'financing' the current expenditure appears to have been from the outset the regular mode of transacting the Company's business, repeatedly brought to the knowledge of the shareholders, and the mortgage, to cover those advances made, appears to us to be one of those things which was expedient [32] and necessary under the circumstances for attaining the objects of the Company, which are declared by art. 4 to be included in the business of the Company.

The decree must accordingly be amended, so far as it disallows that portion of the principal debt due to Dr. Kernot which was incurred previously to October, 16th, 1879, in excess of Rs. 50,000, and it must be declared that the claimant is entitled under the mortgage to charge the Company with all advances made by him; but that he is only entitled to avail himself of his mortgage-security to the extent of a principal sum of one lac of rupees.

The fifth ground of appeal is as to interest, but we find that the decree allows 10 per cent., the rate at which we understand the advances to have been made.

The sixth ground is as to costs. As we hold the advances not to have been *ultra vires*, and as the Liquidator raised the objection of a fraudulent preference, we think that Dr. Kernot is entitled to his costs, especially having regard to the covenant on this point in the mortgage-deed. The order of the Original Court is modified accordingly, and Dr. Kernot is entitled to his costs in this Court and the Court below on scale 2. The Official Liquidator will have his costs here, as in the Court below, out of the estate.

Appeal allowed.

Attorney for the Appellant : Mr. Hart.

Attorney for the Respondent : Mr. Eggar.

NOTES.

[COMPANY LAW - DEBT INCURRED FOR MEETING (1) PREVIOUS DEBTS (2) NEW LIABILITIES - POWER TO BORROW]

The distinction drawn in this case is well established.

To raise debts for meeting new obligations, the borrowing must conform to the conditions limiting the exercise of power in that behalf contained in the Articles etc :—*Irvine v. The Union Bank of Australia*, 3 Cal. 287 P.C. and see the Notes to that case.

In the case of *Reversion Fund and Insurance Company Limited v. Maison Cosway Limited* (1913) 1 K. B. 361 the Court of Appeal (Buckley, L. J., Kennedy, L. J., Vaughan Williams, L. J., *diss.*) upheld the replacement of old debts by the Directors without conforming to the articles. "The defendant company had under its memorandum and articles of association power to borrow, but that power did not come into active existence until the Board of Directors passed a resolution for its exercise. The Directors never passed any such resolution, and Morhange had no authority to borrow money on behalf of the defendant Company." (p. 373). The plaintiff was held entitled to recover.

Lord Justice Buckley laid down the following propositions as established by the cases :—

First, if a corporation which has no power to borrow, or has exhausted its power of borrowing, does, nevertheless, borrow or purport to borrow, then such borrowing, being *ultra vires*, creates neither at law nor in equity any debt for money lent.

But *secondly*, if such a corporation having incurred debts, procures from some one, who is willing to find it, money which it employs in paying off those debts, that is a legitimate operation, and the transaction is not *ultra vires*: for, to that extent to which the money found by the lender is applied in discharging the debts of the corporation, there is, in effect, no further borrowing, because the money is employed in discharging debt, and there is therefore no increase of the corporation's indebtedness.

And *thirdly*, in that class of case, knowledge by the person advancing the money of the absence of authority to borrow is, not material. For, under such circumstances, there is, in substance, no borrowing; there is merely the replacement of one debt by another of the same amount. The existence or non-existence of borrowing power is, therefore, not material and, consequently, knowledge as to its non-existence is not material."']

[33] APPELLATE CIVIL.

The 12th July, 1882.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE AND MR. JUSTICE CUNNINGHAM.

The Administrator-General of Bengal.....Defendant

versus

Mirza Ahmed Begg.....Plaintiff.

Decree --Construction of decree --Mortgage-decree directing accounts, etc., to be taken and report given---Tender of principal and interest before Report --Refusal to accept tender and subsequent charge of interest.

A decree directed accounts to be taken of what was due for principal and interest under a mortgage, such interest to be allowed "up to the time of payment hereinafter mentioned or until six months from the date of the decree," whichever first should happen; and further directed the plaintiff to pay what should be reported due for principal and interest up to the date of payment, and cost, with interest at 6 per cent. from the date of taxation until payment, within six months after the Registrar should make his report.

The plaintiff tendered a sum sufficient to cover the principal and interest due, but insufficient to cover costs, at a time prior to the drawing up of the Registrar's report.

Held, that the payment of principal and interest "hereinafter mentioned" referred to a time after the Registrar had made his report, because the sum to be paid was a sum reported to be due by the Registrar, and that, therefore, a tender made before the Registrar's report was given was not a sufficient tender to stop interest from the date of the tender.

THIS was an appeal from a judgment of Mr. Justice WILSON, dated the 8th December 1881.

One Mirza Ahmed Begg brought a suit against one Newal Hozoor and the Administrator-General of Bengal on two several mortgages, for an account and sale, and for the appointment of a receiver. On the case coming on for hearing, the plaintiff, who was the second mortgagee, agreed to pay off the Administrator-General of Bengal, who was the first mortgagee; and Mr. Justice WHITE, on the 20th of December 1880, passed a decree directing an account to be taken of what was due to the Administrator-General of Bengal for principal and interest on his mortgage, "such interest to be allowed as provided by the mortgage up to the time of payment hereinafter mentioned, or until the end of six months from the date of the decree, whichever should first happen, and thereafter on the aggregate amount of such principal and interest at six per cent. per annum," and [34] directing an account of the principal and interest due in respect of a sum of Rs. 10,880, paid on the 16th of September 1878, for an assignment of a certain decree in the Court of the Subordinate Judge of the 24-Parganas, "such interest to be allowed at 12 per cent. per annum from the 16th of September 1878, up to the time of payment thereafter mentioned, or until six months of the date of the decree." The decree further directed the plaintiff's and the Administrator-General's costs of the suit and of all proceedings adopted by them, either in the Original and Appellate Court, or in the Court of the Subordinate Judge, to protect their interests under the said mortgages, to be taxed as between attorney and client; the costs of the present suit to be taxed under the heading class 2 ordinary causes. The plaintiff paying to the Administrator-General what should be reported to be due for principal and interest up to the date of payment and his costs with interest thereon at the rate of six per cent. per annum from the date of taxation until payment within six months after the Registrar should have made his report.

On the 19th of March 1881, the Administrator-General filed his statement of facts, showing that there was due to him Rs. 53,186; and on the 30th of March 1881, the plaintiff tendered to the Administrator-General Rs. 16,000, the amount of principal and interest due. The Administrator-General refused to accept the tender, on the ground that, under the decree, payment was not to be made until after the Registrar had made his report.

The plaintiff thereupon gave notice to the Administrator-General of his intention to pay the money into Court, and deposited the amount.

On the 5th of July 1881, the Registrar, in his minute, found that the Administrator-General was not bound to accept the tender, the tender being insufficient for the payment of costs, and therefore insufficient for the payment of the whole amount payable under the decree; and that the plaintiff was not entitled to claim the benefit of ss. 376 to 379 of the Civil Procedure Code, under

Deposit by defendant of amount in satisfaction of claim. * [Sec. 376. — The defendant in any suit to recover a debt or damages, may, at any stage of the suit, deposit in Court such sum of money as he considers a satisfaction in full of the claim.]

1 [Sec. 379. — If the plaintiff accepts such amount only as satisfaction in part of his claim, he may prosecute his suit for the balance, and if the Court decides that the deposit by the defendant was a full satisfaction of the plaintiff's claim, the plaintiff must pay the costs of the suit incurred after the deposit and the costs incurred previous thereto, so far as they were caused by excess in the plaintiff's claim.]

Procedure where plaintiff accepts deposit as satisfaction in part. If the plaintiff accepts such amount as satisfaction in full of his claim, he shall present to the Court a statement to that effect, and such statement shall be filed and the Court shall pass judgment accordingly, and in directing by whom the costs of each party are to be paid. The Court shall consider which of the parties is most to blame for the litigation.]

which the sum of Rs. 46,000 had been paid into Court;—*1st*, because deposit was made after decree; and *2nd*, because [35] although notice of the intention to deposit was given, yet no notice of the deposit having been made was served.

On the 13th of September 1881, the Registrar, in pursuance of the decree, reported that (i) there was due to the Administrator-General on his mortgage Rs. 40,573 for principal, and interest to the 19th of June 1881, being six months from the date of the decree, with interest thereon at the rate of 6 per cent. per annum, from the 20th of June 1881 until realization, as per account annexed to the report; and (ii) that there was also due to him a sum of Rs. 6, 594 for principal and interest to the 19th of June 1881, being six months from the date of decree, after debiting all sums received by him from the Court of the Subordinate Judge, as per account annexed to the report.

The plaintiff took exception to the report on the following grounds:—

First.—That the Registrar should not have allowed the Administrator-General interest on the principal sum claimed, after the 30th of March 1881, the date of the tender.

Second.—That the Registrar should have held that the tender was sufficient, and that the plaintiff had complied with ss. 376 to 379 of the Civil Procedure Code in giving notice of the deposit.

At the hearing of the exceptions to the report, Mr. Justice WILSON decided, that, in this country, a mortgagee claiming his money was not entitled as of right to six months' interest, but that the decree would entitle the mortgagor to stay interest by an early payment. that, as regards the question whether the tender was sufficient to stay interest (the money due for costs not having been tendered), the decree and mortgage premises standing as security for costs, the case of *Letts v. Hutchins* (L. R., 13 Eq., 176) was in point, and that, applying the principles of that case to the one then before him, the true rule was, that principal and interest having been tendered, interest should cease from the time of the tender. But the tender being insufficient to cover costs, the Administrator was entitled to proceed to recover them. The report was, therefore, ordered to be varied.

[36] The Administrator-General appealed.

The Officiating Advocate-General (Mr. *Phillips*, with him Mr. *Paulit*) for the Appellant. —I submit that I cannot be paid off until the costs of the suit are taxed, and that interest runs until taxation. The tender was not sufficient to stop interest, it being an incomplete tender of the whole sum due under the decree. The Court below was, therefore, wrong in varying the report by disallowing interest after the 30th of March 1881.

Mr. *Evans* (with him Mr. *Bonneville*) for the Respondent.—The words "time hereinafter mentioned" in Mr. Justice WHITE's decree cannot allude to the time in the Registrar's report appointing a time for reconveyance. If the decree does not tell us what our rights are as to the stoppage of interest, will a Court of equity interfere? [GARTH, C.J. —You had no right before the report was made to make a tender, but nevertheless you must be bound by the decree.] The case of *Letts v. Hutchins* (L. R., 13 Eq., 176) does not apply, as the mortgage was desirous of being paid off, and filed a bill for that purpose; and he was not in a position to demand six months' notice, or interest in lieu of notice; the real question is whether there is any right to six months' notice at all, there being no such stipulation in the mortgage. As regards the right of a mortgagor to repay before the expiration of the usual six months ordinarily allowed by decree, see *Chotoollall v. A. B. Miller* (7 C. L. R., 267).

The **Judgment** of the Court (GARTH, C.J., and CUNNINGHAM, J.) was delivered by

Garth, C.J. —We have had some difficulty in determining what is the true meaning of the decree in this case.

It may be that it was the intention of the learned Judge who made it to allow the plaintiff to pay his mortgage-money and interest when he chose; but we are bound to put a construction upon the language of the decree itself, and we think that the words "up to the time of payment hereinafter mentioned" [37] can refer to no other time of payment than that which is mentioned later on in that part of the decree which relates to the reconveyance of the property; and the time of payment there mentioned seems, according to the best construction that we can put upon the sentence, a time after the Registrar has made his report, because the sum to be paid is to be a sum reported to be due by the Registrar.

After the able arguments which have been addressed to us in this case, and the difficulty which we feel even now in saying what the decree really means, it is impossible to avoid the conclusion that the decree has not been drawn as clearly as it might have been. We only hope that the difficulty which we have had, and the expense which has been occasioned to the parties, will operate as a wholesome warning in the future.

It is true that the parties themselves are, to some extent, in fault, for having approved of the decree in its present shape; but each party may possibly have construed it in his own way, and been perfectly content with it according to his own construction.

The report, therefore, of the Registrar will be confirmed as it originally stood, and we think that each party must pay his own costs of this appeal on scale 2.

Appeal allowed.

Attorney for the Appellant: Mr. *Dover*.

Attorney for the Respondent: Baboo *Nobin Chunder Bural*.

NOTES.

[See also C. P. C. 1908 O. 34 r. 3; (1880) 7 C. L. R. 206; 267; *Hill v. Howlands* (1897) 2 Ch. 361.]

[7 Ind. Jur. 258]

[38] CRIMINAL REFERENCE.

The 25th May, 1882.

PRESENT:

MR. JUSTICE PRINSEP AND MR. JUSTICE O'KINEALY.

In the matter of the Municipal Committee of Dacca.

The Municipal Committee of Dacca

versus

Someer.

Bench of Magistrates, Power of—Beng. Act V of 1876, ss. 180, 215, 216—Omission to remove obstruction.

A notice was issued under s. 215, Beng. Act V of 1876, requiring A to remove an alleged obstruction. The requisition was not complied with, and A was prosecuted for non-compliance therewith, under s. 216, before a Bench of Honorary Magistrates.

Held, that the Court had power to inquire whether the alleged obstruction was, in point of fact, an obstruction or not.

THIS was a reference under s. 296 of Act X of 1872 from the Magistrate of Dacca. A requisition, in respect of an alleged obstruction, was, on the 28th of February 1882, issued on the accused Someer Tamakalla by the Secretary to the Municipal Commissioners of Dacca, under s. 215, Beng. Act V of 1876. The accused neither obeyed the order nor preferred an objection under s. 180 of the same Act. He was, therefore, prosecuted under s. 216 of the Act.

A Bench of Honorary Magistrates discharged the accused, because, in the opinion of one of their number, who visited the place, there had been no encroachment. The Magistrate referred the case to the High Court, it being his opinion that "a Court, trying a case under s. 216 of Beng. Act V of 1876, has no authority to inquire whether there was any encroachment justifying the issue of a requisition. That is an issue for the trial of which the law has provided in s. 180 of the said Act, which allows the person served to make an objection, and I submit that, on his failure to file any such objection, the requisition becomes absolute and must be obeyed, and that, when the [39] person is prosecuted for disobedience thereof, it is too late to open the question as to there having been any encroachment."

No one appeared on the reference.

The **Judgment** of the Court (PRINSEP and O'KINEALY, J.J.), was delivered by

Prinsep, J.—We are of opinion that the Bench of Magistrates had jurisdiction, in a prosecution under s. 216, Beng. Act V of 1876, to determine whether the order which had not been carried out was a proper order,—that is to say, in the present case, whether there had been any encroachment on the road which the accused was bound to remove on the order of a Municipal authority. It has been held, in an analogous case under s. 518 of the Code of Criminal Procedure, that, when prosecuted under s. 188, Penal Code, for neglecting to carry out an order of a Magistrate to remove a nuisance, that although that order, if properly made, cannot be questioned in any Court, the accused can, when prosecuted for disobedience of it, claim exemption from its operation on the ground that it was not an order which he was bound to obey, as being an order beyond the Magistrate's power and jurisdiction.

* Criminal Reference, No. 105 of 1882, and Letter No. 1331, from the order made by E. V. Westmacott, Esq., Officiating Magistrate of Dacca, dated the 11th May 1882.

The 19th June, 1882.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE O'KINEALY.

Debi Churn Boido.....Plaintiff

versus

Issur Chunder Manjee and another.....Defendants.

Suit for Possession—Ejectment—Onus probandi—Evidence—Previous Possession.

Where, in a suit for possession of land, the plaintiff proves merely that he has been in possession of the disputed land at some time within twelve years previous to the filing of the plaint, such evidence is not sufficient to throw upon the defendant the burden of proving his title to the land.

Wise v. Amrunnessa Khatoon (L. R., 7 L. A., 81) followed, and *Gour Paroy v. Wooma Soondnee Debia* (12 W. R., 172) cited.

[40] THIS was a suit for possession of two bighas of land, which, the plaintiff alleged, formed part of thirty-five bighas, for which his predecessors had obtained, on the 22nd of June 1858, 'a patta' from one Sumbhoo Chunder Ghosh. The plaintiff stated that he had been in possession of the disputed portion, but that the defendants dispossessed him by making excavations therein and by enclosing it within boundary-marks. The defendants contended that the disputed land formed part of their jamai land, and that the plaintiff was never in possession of it.

The Court of First Instance fixed two issues :—(i) "Whether the suit is barred by limitation ; (ii) whether the disputed land is covered by the plaintiff's patta or by the defendants' patta ;" and, having found both against the plaintiff, dismissed the suit with costs. The plaintiff appealed to the District Judge, the first ground of appeal being that the decision of the Munsif was against the weight of evidence. The Judge said :—"With reference to the first ground of appeal, this Court is clear that there was no satisfactory evidence before the Court to show that the land claimed belonged to the plaintiff's land. The plaintiff never had mentioned any measurement paper or dagh thereof, and never tried to get the landlord to produce any. Nothing that his witnesses have said could justify a decree in plaintiff's favour." He then dismissed the appeal with costs.

The plaintiff appealed to the High Court on several grounds, among which were the following :—(i) That the plaintiff's case, as laid in his plaint, being a case of forcible dispossession by the defendants, the learned Judge has committed an error in law to hold that the plaintiff having failed to prove the disputed land to be his pattai land, nothing that his witnesses have said could justify a decree. It is submitted that mere proof of possession within twelve years prior to suit in such a case is sufficient to shift the *onus* upon the defendants ; (ii) for that the sole contest between the parties being a boundary dispute as between themselves, the learned Judge should have given

* Appeal from Appellate Decree, No. 518 of 1881, against the decree of J. F. Browne, Esq., Judge of the 24-Parganas, dated the 11th January 1881, affirming the decree of Baboo Jogendro Nath Roy, Second Munsif of Diamond Harbour, dated the 27th April 1880.

a decree to the plaintiff upon mere proof of possession : (iii) for that, under s. 110 of the Indian Evidence Act, the *onus* of proving title is shifted on the defendants, if the plaintiff's prior possession be proved, which the learned Judge should have [41] found, the more so when he does not disbelieve the evidence of the plaintiff's witnesses."

Baboo Anund Gopal Palit for the Appellant.

Baboo Jadub Chunder Seal for the Respondents.

The following **Judgments** were delivered :

O'Kinealy, J.—In this suit the plaintiff claimed that the disputed parcel of land was situate within his jama, and that he had been lately dispossessed from it by the defendants. The defendants, on the other hand, contended, that the land formed part of their joto, and that the plaintiff had never been in possession. In the first Court the Munsif, coming to the conclusion that the plaintiff had not been in possession of the land within twelve years, dismissed the suit. The plaintiff appealed and on the case coming before the District Judge, he arrived at the conclusion that, as the plaintiff had never measured the land, nor produced any documentary evidence through his landlord, that the land had been measured by the latter, nothing that he could produce in the way of oral evidence would be sufficient to justify a decree.

In this Court it has been urged upon us, that, under s. 110 of the Indian Evidence Act, as the plaintiff had proved possession for some time within twelve years before the suit, that possession by itself shifted the onus of proving title from the plaintiff to the defendants, and that in this case the onus was wrongly placed. Further it is said that the plaintiff was not debarred by the non-production of documentary evidence from proving his title in whatever way he deemed best.

In support of the first contention the learned pleader has referred to *Gour Paroy v. Wooma Soonduree Debia* (12 W. R., 472), and he has intimated to us that this decision is to be supported on the ground that it is based upon English law. We are of opinion that this contention is unsound. The same question was before their Lordships of the Privy Council in the case of *Wise v. [42] Amrunnessa Khatoon* (L. R., 7 I. A. 81), and their Lordships held, that land to which a plaintiff is unable to make out a title cannot be recovered on the ground of previous possession merely, except in a suit under s. 15, Act XIV of 1859, now s. 3 of the Specific Relief Act (I of 1877), which must be brought within six months from the time of dispossession. This decision in our opinion settles the matter.

In regard to English law it may well be that the difference of opinion referred to in the case of *Asher v. Whitlock* (L. R., 1 Q. B., 1) will be settled in accordance with the decision in that case, but it is not quite certain that it would support the appellant's contention to the extent urged before us. The same point was also touched upon in the case of *Danford v. Mc Anulty* (L. R., 6 Q. B. D., 645), and there BRAMWELL, L. J., said :—"A man in possession of land has a right to call upon a plaintiff in ejectment to prove his title; if the plaintiff does prove a *prima facie* title, then the man in possession must prove his. The rule is the same in respect of chattels; an action is brought to recover a chattel, the plaintiff must show a title to the chattel before he can call upon the defendant to prove his title." But whatever may be the result of those cases, it is evident that, according to the law of this country, as authoritatively laid down by their Lordships of the Privy Council, mere anterior possession is not sufficient proof of title to dispossess a person in possession. We are, therefore, of opinion that this ground cannot succeed in second appeal.

In regard to the second point, we think that the appellant has made out a case sufficient to justify a remand. We are of opinion that the District Judge was not justified in restricting the plaintiff as to the manner in which he should prove his case, and that the case must go back in order that he should determine on the whole evidence on the record whether the plaintiff has a title to the land. Costs to abide the result.

Prinsep, J. -I also concur in remanding this case. On the question of onus in a suit to recover possession of immove-[43] able property not being a possessory suit under s. 9 of the Specific Relief Act, I have always held the opinion now expressed by my learned colleague, and in one case I was overruled by the learned Chief Justice and MORRIS, J. The judgment of the Privy Council which has just been referred to was not quoted in argument to us, and as that, in my opinion, settles the law, it does not become necessary, according to the usual rule, to refer the point for the decision of a Full Bench.

Case remanded.

NOTES.

[I. THE AUTHORITY OF THIS CASE

Though not expressly overruled, this case has to be treated as no longer authoritative. It purports to follow the dictum of the Privy Council in (1875) 7 L.A. 73 (81), "if the plaintiffs had wished to contend that the defendants had been wrongfully put into possession, and that the plaintiffs were entitled to recover on the strength of their previous possession without entering into a question of title at all, they ought to have brought their action within six months under s. 15 of Act XIV of 1859, but they did not do so." In this case, the plaintiffs had been dispossessed by *persons deriving title from the true owners*, and the observation should be confined to such cases, as pointed out in (1884) 8 Bom. 371, and not extended to cases of pure trespassers, having no valid title in themselves.

In the later Privy Council case of (1893) 20 Cal. 831 20 L.A. 99, their Lordships of the Privy Council observed, "*The possession of the plaintiff was sufficient evidence of title as owner against the defendant*" By section 9 of the Specific Relief Act (Act I of 1877), if the plaintiff had been dispossessed otherwise than in due course of law, he could, by a suit instituted within six months from the date of the dispossession have recovered possession, notwithstanding any other title that might be set up in such suit. If he could thus recover possession from a person who might be able to prove a title, it is certainly right and just that he should be able, against a person who has no title and is a mere wrong-doer, to obtain a declaration of title as owner, and an injunction to restrain the wrong-doer from interfering with his possession. The Appellate Court in accordance with the judgment above quoted, has dismissed the suit. Consequently, the defendant may continue to wilfully, improperly and illegally interfere with the plaintiff's possession, as the learned Judges say he has done, and the plaintiff has no remedy. Their Lordships are of opinion that the suit should not have been dismissed; and that the plaintiff was entitled in it to a declaration of his title to the land." (at pp. 842, 843).

In this case, it should be observed, the date of acquisition of the plaintiff's title was the 24th September 1885, the suit was brought on the 11th of September 1886 (see p. 837) and the cause of action as to dispossession was that four of the tenants, at the instigation of the defendant, had not attorned *at all* (p. 840). If the suit had been brought within six months of the dispossession, there was no necessity for entering into the question of title at all.

Even after this decision the Calcutta High Court followed the older cases that previous possession (except under s. 9 of the Sp. Relief Act, 1877) was not alone sufficient against defendants failing to establish their title—26 Cal. 579; 17 Cal. 256; 9 Cal. 39; 9 Cal. 130; though the opposite view had been taken in 7 Cal. 591 and has been taken in the latest case, 15 C. W.N. 163.

The later Privy Council case of *Perry v. Chissold* (1907) A. C. noted below removes all doubts. The other High Courts also have held differently from the Calcutta High Court, (1891) 13 All. 537 F. B. (MAHMOOD J. diss.) 6 Bom. 215; 8 Bom. 371; 20 Bom. 798; 25 Bom. 287; 23 Mad. 179 (O FARRELL J. diss.; SUBRAMANIA IYER'S judgment is quite in accordance with the English authorities like *Perry v. Chissold*) 9 O. C. 273; 11 O. C. 337; 10 Bom. L. R. 571; 26 Mad. 514.

II. NATURE OF THE POSSESSORY RIGHT—

A person in peaceable possession of land has, as against every one but the true owner, an interest capable of being inherited, devised or conveyed. In *Asher v. Whitlock* (1865) L. R. 1 Q. B. 1 “a man occupying without title purported by his will to settle the land so occupied, that settlement is effective as regards all persons not claiming under the true title, and governs the possessory title (which meanwhile may be perfected by lapse of time) exactly as it would govern a title good from the first.”

“It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by process of law within the period prescribed by the provisions of the Statute of limitations applicable to the case, his right is for ever extinguished, and the possessory owner acquires an absolute title.”—*Perry v. Glissold* (1907) A. C. 73 where such possessor was held entitled to compensation under the Land Acquisition Act.

“A person in possession of land without title has an interest in the property which is heritable and good against all the world except the true owner, an interest which unless and until the true owner interferes, is capable of being disposed of by deed or will, or by execution sale, just in the same way as it could be dealt with if the title were unimpeachable”;—24 All. 157; 27 All. 169; 29 All. 52.

On the strength of such a title, declaratory decrees have been granted and injunctions issued:—20 Cal. 831, P. C.

A possessory title perfected by adverse possession is a new title dependent on the negative provisions of the statute (s. 28 Limitation Act 1908) and therefore independent of the covenant of the dispossessed (*Trehborne v. Weir* (1892) 67 L. T. 735 C. A.; *Wilkes v. Greenway* (1890) 34 L. J. 673 C. A.) but subject to rights, not incident, but paramount to his estate:—*Re Nisbet and Pott's contract* (1906) 1 Ch. 386 C. A.

Possessory title is forced on the purchaser where an apparent defect of title is thereby cured. In *re Atkinson and Horsell's contract* (1912) 2 Ch. 1 C. A. affirming (1912) 1 Ch. 2, and following *Games v. Bonnor* (1881) 54 L. J. Ch. 517. The only exception appears to be that under an open contract mere possessory title for a short period is not deemed sufficient:—*Re Cussons Ltd.* (1901) 73 L. J. Ch. 296; *Jacobs v. Revell* (1900) 2 Ch. 858.

III. SUITS FOR POSSESSION AGAINST THE DISPOSSESSOR BASED ON MORE PREVIOUS POSSESSION WITHOUT PROOF OF TITLE—

The presumption as to possession is embodied in the Indian Evidence Act, s. 110. In a suit in ejectment, as the allegation is that the defendant is in possession though unlawfully, the presumption will apply in the first instance in his favour. The plaintiff has first of all to show his previous possession within 12 years (Art. 112) and of his subsequent dispossession being unlawful. Thus done, his possession is evidence of title within the rule that in an ejectment suit, the plaintiff must succeed on the strength of his own title and not on the weakness of the defendant's. The possession need not be good against all the world, enough if the defendant be shown to be a wrong doer. The contrary was laid down in *Doe v. Barnard*, 13 Q. B. 952 which “seemed to lay down this proposition, that if a person having only a possessory title to land be supplanted in the possession by another who has himself no better title, and afterwards brings an action to recover the land, he must fail in case he shews in the course of the proceedings that the title on which he seeks to recover was merely possessory.” But that case was expressly overruled by the Privy Council in *Perry v. Glissold* (1907) A. C. 73. See 10 Bom. L. R. 571; L. B. R. (1905) Ev. 7; 4 All. 206; 6 L. C. 806; 1 M. H. C. 85; 33 Mad. 173.

In a series of (unlawful) dispossessions, each prior possessor has a good title in ejectment against the subsequent dispossessor.—*Dalton v. Fitzgerald* (1897) 2 Ch. 90 C. A. “It must be remembered that the title conferred by possession is (apart from the Statute) a title only against wrong-doers.

A person who is lawfully dispossessed has no subsequent remedy against a third person not claiming through a wrong-doer. *Pollock & Wright on Possession* (1888) p. 99, citing *Buckley v. Gross* (1863) 3 B. & S. 566.]

[9 Cal. 43]

APPELLATE CIVIL.

The 5th April, 1882.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Luchmi Narain Singh.....Defendant No. 1

versus

Assrup Koer and others.....Plaintiffs.*

Limitation Act (IX of 1871), sched. ii, art. 15; and (XV of 1877), sched. ii, art. 11-- Suit to recover Property sold in execution--Civil Procedure Codes (Act VIII of 1869), s. 246 and (Act X of 1877), ss. 280, 281, and 282.

Certain property, which the plaintiff alleged to belong to her, was sold in execution of a decree obtained by the purchaser of the property at the auction-sale, against a third party. The plaintiff put in a claim to the property under s. 246 of Act VIII of 1859, which claim was rejected on the 6th of September 1873.

The plaintiff, on the 10th of January 1878, brought a suit to recover possession of the property sold. *Held*, that the suit was not barred under art. 11* of sched. ii of Act XV of 1877, which refers to the section in Act X of 1877, corresponding to s. 246 of Act VIII of 1859; and that the suit was not barred by art. 15,† sched. ii of Act IX of 1871, the suit not being one to set aside a summary order within art. 15 of the schedule to that Act.

Koylash Chunder Paul Chowdhry v. Preonath Roy Chowdhry (I. L. R., 4 Cal., 610) followed.

THIS was a suit to recover possession of 118 bighas of land with mesne profits.

* Appeal from Appellate Decree, No. 1939 of 1880, against the decree of J. F. Stevens, Esq., Officiating District Judge of Sarun, dated the 26th of July 1880, modifying the decree of Baboo Grish Chunder Chowdhry, First Subordinate Judge of that district, dated the 31st of March 1879.

† [Art. 11:—

Description of suit.	Period of Limitation.	Time from which period begins to run.
By a person against whom an order is passed under Sections 280, 281, 282 or 335 of the Code Civil Procedure, to establish his right to, or to the present possession of, the property comprised in the order.	One year	The date of the order.‡

‡ [Art. 15:—

Description of suit.	Period of Limitation.	Time when period begins to run.
To alter or set aside a decision or order of a Civil Court in any proceeding other than a suit.	One year	The date of the final decision or order in the case by a Court competent to determine it finally.]

The plaintiff alleged that part of the land in question stood in the name of her deceased husband, being his self-acquired [44] property; and that the remainder was acquired by herself in the name of the *pro forma* defendants, Nos. 3 and 4, who were her servants, at a time when her husband was insane; and that she took possession of these lands on her husband's death. That, in satisfaction of a decree obtained by the defendant No. 1 against the defendant No. 2, the defendant No. 1 attached and put up for sale 42 bighas of land belonging to her; that she thereupon put in two claims on the 12th of February and 1st of September 1873 respectively (presumably under s. 246 of the Civil Procedure Code) to two separate portions of the 42 bighas; but that these claims were disallowed on the 3rd of March and 6th of September 1873; and the defendant No. 1, on the 31st of March and 18th of September, sold the property under the Court and purchased them himself. On the 6th of September 1873, she then brought a suit to confirm her possession, and this suit was dismissed on the 6th of September 1873, on the technical ground that she was not in possession at the time of suit, and the decree was confirmed on appeal on the 23rd of July 1875.

That the defendant No. 1, in further execution of his decree, attached and brought to sale, on the 4th of July and 13th of November 1876, 74 bighas more of her properties, and at the sale himself became the purchaser; that she put in her claim to the 74 bighas mentioned (after delivery of possession had been given) for an adjudication under s. 269 of Act VIII of 1859, but the Court, on the 19th of February 1877, refused to entertain her claim, on the ground that the section was inapplicable; that she then brought the present suit on the 10th of January 1878 to obtain possession of the entire 118 bighas with mesne profits, stating that although her causes of action arose on different dates, *viz.*, on the 23rd of July 1875 and on the 19th of February 1877, she was entitled, under s. 44 of Act X of 1877, to join the several causes of action.

The defendants contended that the lands were the joint property of the plaintiff's husband and of the defendant No. 2, who were cousins, and that they were members of a joint family, and that the share of the plaintiff's husband, on his death, passed to the defendant No. 2, and that he was in possession at the dates of the different auction-sales; and that the suit was barred, it not [45] having been brought within one year from the date of either of the orders of the 3rd of March and 6th of September as provided for suits to set aside claims under s. 246.

The Subordinate Judge found that the husband of the plaintiff and the defendant No. 2 were not members of a joint family; that the land belonged to the plaintiff, and had been in her possession prior to delivery of possession to the defendant No. 1; that the plaintiff's claim to the 42 bighas first sold was barred by limitation, but that she was entitled to recover possession of the 76 bighas with mesne profits.

The plaintiff appealed to the District Judge as to that part of the lower Court's judgment which had declared her claim to the 42 bighas to be barred by limitation.

The Judge held, that the portion of s. 246 of the Civil Procedure Code, which provided a special rule of limitation, had been repealed by Act IX of 1871, and that the corresponding provision in that Act was not a re-enactment of the old rule; that the case of *Kóylash Chunder Paul Chowdhry v. Prónath*

Roy Chowdhry (I. L. R., 4 Cal., 610), had decided that the test to be applied in considering whether the provisions of art. 15, sched. ii, Act IX of 1871 applied to cases of this kind was, whether the relief sought could be given without setting aside the summary order: that, therefore, as no benefit could accrue to the plaintiff if the summary order refusing to release the property which had been attached were set aside, inasmuch as the property had since been sold, he set aside the judgment of the lower Court on the point which was in appeal before him. The defendant No. 1 also separately appealed on the ground that the case as regards the 76 bighas was barred under the special limitation provided by s. 269 of Act VIII of 1859. The District Judge dismissed the cross-appeal, on the grounds that the plaintiff's claims decided on the 1st of December 1876 and 19th of February 1877, being refused on the express ground that the provisions of s. 269 were not applicable, the special provision for limitation could not apply.

The defendant No. 1 appealed to the High Court.

[46] Baboo *Mohesh Chunder Chowdhry* for the Appellant, amongst other contentions, raised the point that the suit was barred under art. 11, sched. ii of Act XV of 1877, as regards the 42 bighas, because the suit was not brought within one year from either of the two orders passed under s. 246, dated the 3rd of March and 6th of September 1873. *Krishnaji Vithal v. Bhaskar Ramnath* (I. L. R., 4 Bom., 611), *Jetti v. Sayad Husein* (I. L. R. 1 Bom. 23n), and *Venkapa v. Chembasapa* (I. L. R., 4 Bom., 21), *The Collector of Ahmedabad v. Semaldas Bechardas* (9 Bom. II. C. R., 205).

Munshi *Mahomed Yusuf* for the Respondent.

The following **Judgments** were delivered by the Court (MITTER and MACLEAN, JJ.):—

Mitter, J.—We do not think that there is any ground for interference in this case. The Courts below have found that the plaintiff's husband was separate from the defendant No. 2, and that, after her husband's death, she was in possession of the disputed property until dispossessed. There is no ground upon which this finding can be questioned in second appeal. We must, therefore, accept it as correct. These two questions of law have been argued before us: 1st, that the plaintiff's suit is barred because a previous suit brought by her was dismissed. It appears that the previous suit referred to was dismissed not upon the merits, but upon the ground that the form in which that action was brought was not the correct form. She had alleged that she was in possession of the property in dispute, the Court found that she was not in possession, and simply upon this ground that suit was dismissed; therefore it cannot be said that that decision is any bar to the present suit under s. 13 of the Procedure Code. Neither is it a bar under s. 13. Section 43 is not applicable here, because the first suit was brought before the present Procedure Code was passed, and the rule of law laid down in s. 43 is laid down with reference to suits to be brought under the new Procedure Code. Under s. 7, Act VIII of 1859, the plaintiff was bound to include the whole of her claim arising out of the cause of action upon [47] which the first suit was brought, and there is no question that in the first suit she had included the whole of her claim. Therefore, there is no force in this contention. The next point of law that has been raised is, that the claim as regards a portion of the disputed land is barred because there were two orders passed under s. 246 against the plaintiff on the 3rd of March 1873 and 6th of September 1873 respectively, and the present suit is not brought

within one year from either of those two dates. It is contended before us that the present suit, being governed by the Limitation Act of 1877, is barred; but the article to which reference is made, *viz.*, art. 11, does not refer to an order passed under s. 246, but to an order passed under the corresponding section of the Act of 1877. The Limitation Act must be construed strictly; and we cannot therefore say that, under art. 11, the present suit is barred. Then as regards the question whether it was barred under the Act of 1871, the District Judge follows the decision of this Court in *Koylash Chunder Paul Chowdhry v. Preonath Roy Chowdhry* (I. L. R., 4 Cal., 610). Beyond citing some contrary decisions of the High Court of Bombay, nothing has been urged before us from which we could say that the decision upon which the District Judge relies is not in accordance with law. Under the circumstances, we will follow the decision of our own Court.

We dismiss this appeal with costs.

Maclean, J. The decision of this Court in *Koylash Chunder Paul Chowdhry v. Preonath Roy Chowdhry* (I. L. R., 4 Cal., 610), and others to the same effect are, no doubt, in conflict with some of the Bombay decisions, and I am by no means certain that I do not agree with the latter. But I am not at present disposed to dissent formally from the view of the law laid down in our Court. I, therefore, concur in dismissing the appeal.

Appeal dismissed.

NOTES.

[RIGHT TO ATTACHED PROPERTY]

The statutory changes should be noted, the Civil Procedure Code of 1859 contained provisions as to limitation in ss. 246 and 269. The Limitation Act of 1871 repealed that portion in s. 246 alone, and did not re-enact anything expressly in its place, there was only art. 15 providing for *altering or setting aside* a decision or order of a Civil Court in any proceeding other than a suit (same as art. 13 of the C. P. C., 1908). By art. 11, Limitation Act, 1877, provision was made for *establishing one's right to or to the present possession of the property*, in respect of orders under ss. 280, 281, 282 or 335, C. P. C. 1877. The present Limitation Act, arts. 11 and 11 A are more general in their terms.

The view of the Calcutta High Court was as stated in this case, 9 Cal. 43; 9 Cal. 230; 11 Cal. 673; 11 C. L. R., 113; 8 C. L. R., 51, *see now* (1901) 1 C. L. J., 296. The High Courts of Bombay and Madras held differently, 8 Mad. 124; 10 Bom. 604; 18 Bom. 260.]

[11 C. L. R. 143]

[48] APPELLATE CIVIL.

The 2nd June, 1882.

PRESENT :

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

Jagut Chunder Roy, *alias* Bashi Chunder Roy and others.....Plaintiffs
versus

Rup Chand Chango.....Defendant.

Landlord and Tenant—Notice to quit—Reasonable notice.

A tenant other than an occupancy ryot is entitled to a reasonable notice to quit. What is a reasonable notice is a question of fact, which must be decided in each case according to the particular circumstances and the local customs as to reaping crops and letting land. It is not necessary that the notice must expire at the end of the year.

*Appeals from Appellate Decree, Nos. 2431 and 2132 of 1880, against the decree of R. F. Rampini, Esq., Officiating Judge of Dacca, dated the 21st September 1880, reversing the decree of Baboo Surbanmud Dass, Second Munsif of that district, dated the 25th March 1880.

Janoo Mundur v. Brij Singh (22 W. R., 548), and *Rajendronath Mookhopadhyaya v. Bassider Ruhman Khondkar* (I. L. R., 2 Cal., 146; s.c., 25 W. R., 330) considered.

THIS was a suit for ejectment, after the issue of a notice to quit at the expiration of three months from the date of the notice. The defendant, who was a cultivating ryot, in his written statement, contended that the notice was not served on him, and that he had a right of occupancy. The Munsif gave the plaintiffs a decree. The defendant appealed, and on appeal contended that, being a cultivating ryot, he could only be ejected at the end of the year, and that the notice was, therefore, bad. The District Judge, upon the authority of *Bakranath Mandal v. Binodram Sen* (1 B. L. R., F. B., 25; s.c., 10 W. R., F. B., 33), *Bunwari Lal Roy v. Mahima Chandra Kunall* (4 B. L. R., App., 86; s.c., 13 W. R., 267), *Janoo Mundur v. Brij Singh* (22 W. R., 548), and *Rajendronath Mookhopadhyaya v. Bassider Ruhman Khondkar* (I. L. R., 2 Cal. 146; s.c., 25 W. R., 330), decided that the notice was bad, as it required the defendant to quit before the end of the year. The plaintiffs appealed to the High Court.

Baboo Chunder Madhub Ghose and Baboo Hem Chunder Banerjee for the Appellants.

[49] Baboo Bama Churn Banerjee for the Respondent.

The Judgment of the Court (McDONELL and FIELD, JJ.) was delivered by

Field, J.—In this case the District Judge was of opinion that the notice to quit was bad, merely because the period allowed did not expire at the end of the year. He relies upon certain cases quoted in his judgment. With reference to the case of *Rajendronath Mookhopadhyaya v. Bassider Ruhman Khondkar* (I. L. R., 2 Cal., 146; s.c., 25 W. R., 330) we have to observe that the question referred to the Full Bench was—“Whether a ryot, whose tenancy can only be determined by a reasonable notice to quit expiring at the end of the year, can claim to have a suit brought against him by the landlord dismissed on the ground that he has had no such notice,” etc. This assumed that the ryot in that particular case was entitled to a reasonable notice to quit expiring at the end of the year. No question was raised or decided as to whether, as a general principle, a notice to quit, in order to be reasonable, must expire at the end of the year. Then, in the case of *Janoo Mundur v. Brij Singh* (22 W. R., 548), PHEAR, J., said:—

“We perceive that it,” that is, the notice, “was served upon the defendant in the month of Pous, three whole months before the expiration of the year, and therefore was, in respect of time, reasonably sufficient notice to quit.” It appears to us that the learned Judge considered the notice to be reasonable in that case, not because it expired at the end of the year, but because it was a three months’ notice. The other cases quoted by the District Judge do not, in our opinion, establish the proposition that a notice to quit given to a tenant other than an occupancy ryot must, in order to be reasonable, expire at the end of the year. We think that the result of the cases is, that such a ryot is entitled to a reasonable notice. What is reasonable notice is a question of fact which must be decided in each case according to the particular circumstances and the local customs as to reaping crops and letting land. In the present case a three months’ notice was given, and there was no contention [30] that, at the time when that notice expired, any crop was upon the ground, the necessity of removing which would have made the notice under the circumstances unreasonable. Further, the notice did, as a matter of fact, expire within seven days of the close of the year, and the facts of the case, therefore, are very similar to the case of *Janoo Mundur v. Brij Singh* (22 W. R., 548).

We think, therefore, that the decree of the lower Appellate Court must be set aside and this appeal decreed with costs.

This judgment will admittedly govern Appeal No. 2432 of 1880.

Appeal allowed.

NOTES.

[NOTICE TO QUIT--

To a similar effect, are the rulings in 10 Cal. 502 ; 12 Cal. 93 (95) ; 82 (89) ; 20 Bom. 759 (763) ; 26 Cal. 761 (764) ; 8 C.W.N. 774 F.B. ; (1904) P.R. 5 ; 21 Cal. 720 ; 27 Cal. 570 ; 4 C.W.N. 210. But there must be reasonable notice, and nothing short of the statutory period when the statute fixes a term :—(1909) 5 T.C. 639 6 N.L.R. 17.]

[9 Cal. 50- 11 C.L.R. 297 7 Ind. Jur. 193]

APPELLATE CIVIL.

The 18th May, 1882.

PRESENT :

MR. JUSTICE WHITE AND MR. JUSTICE MACPHERSON.

Gyanendro Chunder Lahiri.....Plaintiff

versus

Kalla Pahar Hajee and anotherDefendants.

Hindu Law Adoption-- Simultaneous adoption.

A simultaneous adoption is not valid according to Hindu law. The adoption of one son alone is actually and in itself wholly sufficient to satisfy the purpose of the law ; the adoption of two is not within the scope of the power of adoption, and where such a thing is attempted, neither of the children is the legally adopted son of the deceased. Although the ceremonies of adoption may have been performed as regards each and also at the same time.

Mr. *Branson* for the Appellant.

Mr. *Evans* for the Respondents.

THE facts of this case sufficiently appear from the **Judgment** of the Court (WHITE and MACPHERSON, JJ.), which was delivered by

White, J.—This is an appeal by the plaintiff in the first Court against a decision of the Officiating District Judge of Rungpore, reversing a decree of the First Munsif of Gaibanda passed in favour of the plaintiff.

[51] The lower Appellate Court has found that the two widows of Kali Kristo Lahiri—namely, the defendant Shyama and one Brohmomoyi, who has since died,—adopted two sons at the same time under a written authority conferred upon each of them by Kali Kristo ; and that the son adopted by Brohmomoyi is the plaintiff, and the son adopted by the defendant Shyama is one Norendro, who, however, is not a party to the suit. The lower Appellate Court holds, according to Hindu law, that a simultaneous adoption is bad, and that the plaintiff has, therefore, no right to bring the suit.

* Appeals from Appellate Decree, No. 307 of 1881, and Nos. 687 to 697 of 1881, against the decree of T. D. Beighton, Esq., Officiating Judge of Rungpore, dated the 18th December 1880, reversing the decree of Baboo Gopi Mohun Mookerjee, First Munsif of Gaibanda, dated the 6th July 1880.

Against this decision the plaintiff appeals. As the point is one of great and general importance, we should have been glad to avoid deciding such a question in the present suit, which is only what is called a rent-suit. But as the ryot-defendant has never attorned to, or paid rent to the plaintiff, and the plaintiff has not proved that the relation of landlord and tenant ever subsisted between himself and the ryot, the plaintiff can only recover his share of the rent on proving his title, and this depends on the validity of the simultaneous adoption.

This question has been very ably and exhaustively argued by Mr. *Branson* for the Appellant and Mr. *Evans* for the Respondents. They placed before us, and discussed at great length, all the ancient and modern authorities on the subject, and we have come to the conclusion that a simultaneous adoption is not valid according to Hindu law.

PHEAR, J., in the case of *Sidessury Dossee v. Doorja Churn Sett* (2 I. J., N.S., 22), decided on the 14th of July 1865, came to the same conclusion. His reasons for the decisions are to be found in an elaborate judgment which that learned Judge gave in *Monemthounath Dey v. Ononthnauth Dey* (2 I. J., N.S. 24), in the previous February. The latter case was appealed to a Bench consisting of PEACOCK, C.J., TREVOR, J., and SUMBUNATH PUNDIT, J., who reversed, indeed, the judgment of PHEAR, J., but on another and a distinct ground. As regards the validity of simultaneous adoption, PEACOCK, C.J., says:—"It is not necessary to go to the extent to which the learned Judge below went, or to say [32] that a simultaneous adoption must be bad." In another case—*S. M. Money Dassee v. S. M. Prosonomoye Dassee* (2 I. J., N. S., 18), decided on the 20th of September 1866, the same question again arose before PEACOCK, C. J., and NORMAN, J., but was again not decided, the Court there saying:—"It is not necessary to say whether, if the widow had adopted two sons at the same time they would have been regularly adopted sons according to Hindu law and so capable of being heirs of the testator." The judgment of PHEAR, J., therefore, on this point, has never been overruled, although it has not been affirmed by an Appeal Court.

PHEAR, J., discusses the conflicting authorities with the greatest fulness and minuteness. Having read and considered that judgment, we think that the learned Judge has deduced the right rule from the authorities.

He lays down the rule in these words:—"The power to adopt rests solely upon the religious necessities, so to speak, of the father, and is limited by them. It does not extend to enabling him to do more than is, at the time of exercising it, reasonably sufficient to satisfy the purpose for which the law exists. Consequently, supposing the occasion for exercising the power to have arisen, one son and one alone can be adopted." The words 'reasonably sufficient' might be taken to mean what a reasonable man might think sufficient to ensure his happiness in a future world, but the context shows that the learned Judge really meant that the exercise of the power of adoption must be limited by the necessity of the case.

Applying that rule, it follows that, as the adoption of one son alone is actually necessary, and is in itself wholly sufficient to satisfy the purpose of the law, the adoption of two is not within the scope of the power; and that where such a thing is attempted, neither of the children is the legally adopted son of the deceased, although the ceremonies of adoption may have been performed as regards each and also at the same time.

Such being our opinion, the result will be that the adoption of the plaintiff is invalid. Our decision on this point will not affect the other son, who is

alleged to have been adopted with [53] the plaintiff at the same time, inasmuch as he is not a party to the suit, unless, indeed, his adoptive mother Shyama, who is a party, can be held to represent him in the present suit, upon which question we pass no opinion.

The appeal will be dismissed with costs.

This decision will govern Special Appeals Nos. 687 to 697, both inclusive.

Appeal dismissed.

NOTES.

[SIMULTANEOUS ADOPTIONS:-

In (1885) 12 Cal. 406 : 12 I.A. 198, this case was **affirmed** by the **Privy Council** on both the grounds that such adoptions were invalid and that the instrument of authority did not confer such a power. In (1892) 19 Cal. 513 : 19 I. A. 108, it was held that the instrument of authority in that case contemplated only such an adoption but that such an adoption was illegal as regards both the boys adopted. The further question there was whether the adopters were not bound by an *ikrar* made at the time of adoption, in favour of the adopted boys and whether such adopted boys might not take as *personae Designate* under the will. Both these were answered with reference to the facts of the case.]

[9 Cal. 53 11 C.L.R. 169 : 7 Ind. Jur. 196]

CRIMINAL REFERENCE.

The 13th July, 1882.

PRESENT :

MR. JUSTICE MACLEAN AND MR. JUSTICE NORRIS.

In the Matter of Dhunum Kazee and another.

The Empress

versus

Dhunum Kazee and another.

*Criminal Procedure Code (Act X of 1872), s. 263—Discretion of Court
Verdict of Jury—Forgery and abetment—Acquittal by Jury—Disagreement by
Judge—Principles guiding the Court's discretion under s. 263 of the Criminal
Procedure Code (Act X of 1872) : "Fraudulently and dishonestly uttering"—
Intention—Inference of fraud.*

Notwithstanding the large discretionary powers vested in the High Court under s. 263 of Act X of 1872, the Court will adhere generally to the principle of the Courts in England, *viz.*, that the Court will not set aside the verdict of a jury unless it be perverse and potentially wrong, or may have been induced by the error of the Judge, and when the Court is asked to do so on the ground that the verdict is against the weight of evidence, the question is, not whether the learned Judge who tried the case was or was not dissatisfied with the verdict, or whether he would have come to the same conclusion as to the jury, but whether the verdict was such as reasonable men ought to have come to.

Where a person, in the course of an action brought against him to gain possession of a property, uses a forged document for the purpose of supporting his title, though there may be no necessity for the use of it, such a user is clearly fraudulent.

* Criminal Reference, No. 9 of 1882 and Letter No. 599, from the order made by T. D. Beightón, Esq., Officiating Sessions Judge of Burdwan, dated the 7th June 1882.

A general intention to defraud, without the intention of causing wrongful gain to one person or wrongful loss to another, would, if proved, be sufficient to support a conviction : and such an intention is a necessary inference [54] which the Jury should be directed to draw, if they are satisfied that the accused has uttered a forged document as a true one, meaning it to be taken as such, and knowing it to be forged.

Under s. 263 of the Code of Criminal Procedure, a Court is authorized to ask the Jury such questions as are necessary to ascertain what their verdict really is ; but where the verdict although perhaps erroneous, is not ambiguous, it is the duty of the Judge to record it without further question.

ONE Dhumum Kazee was charged under s. 471 of the Penal Code with having, on or about the 1st of February 1879, fraudulently and dishonestly used in the Munsif's Court a certain hiba, knowing, or having reason to believe, the same to be a forged document ; and one Khorshed Kazee was charged, under ss. 471-109 of the Penal Code, with abetting the fraudulent and dishonest use of the forged document. The document purported to be executed in favour of the accused by their father, and purported to have been registered on the 14th April 1851.

The evidence clearly showed that the certificate of registration was a forgery. The accused, therefore, contended that the charge related exclusively to the forgery of the executant's name, and not to the forgery of the certificate of registration. The jury unanimously acquitted the accused, but the Judge disagreeing with the verdict of acquittal on the sole ground that the verdict was against the weight of evidence, submitted the case to the High Court under s. 263 of the Code of Criminal Procedure.

It appeared from the Judge's report sent to the High Court that, after the verdict was given, he asked the jury to give their reasons for the verdict, and that they replied " that there was no proof as to who forged the registration certificates, *i.e.*, whether they were forged by the father of the accused or the accused themselves : and no proof to show when the certificate of registration was forged, *i.e.*, whether before or after the hiba was filed in the Munsif's Court : and no proof that the accused knew that the certificate was forged : and that they, therefore, found that the registration certificate was a forgery, but not the executant's signature on the hiba."

Baboo *Umbica Churn Bose* for the Appellants.

Baboo *Ram Churn Mitter* for the Crown.

[55] The **Judgment** of the Court (MACLEAN and NORRIS, JJ.) was delivered by

Norris, J.—In this case the accused Dhumum Kazee was charged under s. 471 of the Penal Code with having, on or about the 1st of February 1879, at the Jehanabad Munsif's Court, fraudulently and dishonestly used as genuine a certain document, dated the 12th Falgun 1260, knowing or having reason to believe the same to be a forged document : and the accused Khorshed Kazee was charged under ss. 471-109 of the Penal Code with abetting the fraudulent and dishonest use of the forged document knowing or having reason to believe that the same was forged. The jury unanimously acquitted the accused. The Officiating Sessions Judge of Burdwan, before whom the accused were tried, disagreeing with the verdict of acquittal, has submitted the case to the High Court under the provisions of s. 263 of the Criminal Procedure Code.

In arriving at a conclusion as to what principles should guide me in the exercise of the discretion given me by s. 263 of the Criminal Procedure Code, I am not left without authority. In *The Empress v. Mukhtun Kumar* (I C.

L. R., 275 ; at p. 281), GARTH, C.J., says : " With regard to the first of these questions" (*i.e.*, how far the High Court is justified in a case referred under s. 263 of the Criminal Procedure Code in convicting the accused contrary to the express and unexplained finding of a jury) " it appears to me that, by that section, the Legislature intended to vest in the High Court a very large discretion, and that it would be improper for us, if not impossible, to lay down any fixed rule by which that discretion should be controlled ; the verdict of a jury, who are the legally constituted judges of facts, and have the advantage of seeing the case tried and of hearing the witnesses examined," (and, what is more important, cross-examined) " ought always in my opinion to command its proper weight ; and the more unanimous their verdict may be, and the less likely to have been influenced by prejudice or error, the more entitled it should be to our respect and consideration ; but there may be many occasions where, as it seems to me, little or no weight [36] should be attached to their verdict ; as for instance where, out of a jury of five, three are of one way of thinking and two of another, and the presiding Judge agrees with the minority, or where it is manifest from the conduct of the jury or otherwise that their minds have been influenced by a prejudice which had prevented them from forming a correct judgment. In the exercise, therefore, of my own discretion in cases coming before us under this section, I should not go so far as to hold with MACPHERSON and MORRIS, JJ. - *Queen v. Wazir Mundul* (25 W. R., Cr. Rul., 25)—" that the verdict of a jury should not be interfered with except where there is a gross and unmistakable miscarriage of justice ;" nor on the other hand, should I consider myself justified in deciding any case according to my own views of the evidence without giving the verdict of the jury its proper weight. Each case, in my view of the section, should depend upon its own circumstances."

In *Reg. v. Khanderao Bajirao* (I. L. R., 1 Bom., 10), WEST, J., says : " The section we have quoted (*i.e.*, s. 263, Criminal Procedure Code) lays down that the Court may acquit or convict without reference to the charges made against the accused ; in other words, the functions both of the Judge and jury are cast upon the Court, and this differentiates our position very widely from that of the Courts in England. Notwithstanding this difference, however, and the more onerous duties devolving in consequence on the High Courts in India, we still desire to be guided as far as may be by the analogies of the English law. It is a well recognized principle that the Courts in England will not set aside the verdict of a jury unless it be perverse and potently wrong, or may have been induced by an error of the Judge. We adhere generally to this principle notwithstanding our large discretionary powers : *first*, on the constitutional ground of taking as little as possible out of the hands to which it has been primarily assigned by the Legislature ; and *secondly*, because any undue interference may tend to diminish the sense of responsibility which it is desirable that a jury should cherish. We think, however, that, by our rectifying a jury's verdict in [37] a proper case, we shall increase not diminish, that sense of responsibility."

The principles which guide the English Courts in deciding whether a new trial should be granted upon the ground that the verdict was against the weight of evidence were discussed in the recent case of *Solomon v. Bitton* (L. R., 8 Q. B. D., 176), where the Court of Appeal said : " The rule on which a new trial should be granted on the ground that the verdict was unsatisfactory as being against the weight of evidence ought not to depend on the question whether the learned Judge who tried the action was or was not dissatisfied with the verdict, or whether he would have come to the same conclusion as

the jury, but whether the verdict was such as reasonable men ought to have come to."

The Judge, in his report referring the case to us, makes no complaint of the conduct of the jury on the ground of prejudice: he complains only that the verdict was against the weight of evidence, and he seeks to substantiate that complaint by calling attention to the answers given by the jury to certain questions put to them by him after they had returned their verdict. I shall presently refer to these answers.

Endeavouring to guide myself by the light of the principles laid down in the decision I have quoted, I have to ask myself,—Is this verdict, which is sought to be set aside, such as reasonable men ought to have come to? In order to answer this question it is necessary to consider what the prosecution were bound to prove against the accused in order to justify a conviction. It was incumbent upon the prosecution to prove (i) that the document alleged to have been used by the accused was in fact a forged document: (ii) that it was used by the accused: (iii) that, at the time it was used by the accused, they knew or had reason to believe that it was a forgery: (iv) that, at the time they used it, knowing or having reason to believe that it was a forgery, they did so fraudulently or dishonestly. If any one of these points was left in doubt, the jury were bound to acquit. A verdict of acquittal would be such as reasonable men ought to have come to.

[58] The document, which was alleged to have been a forgery, was a hiba-bil-owaz, or one of gift, purporting to have been executed in favour of the accused by their father Sadderuddin Kazee, and to have been registered by one Golam Russool, Kazee of Jehanabad, on the 11th April 1851. Saddruddin Kazee died some ten or twelve years since, leaving the two accused, a daughter and a widow, the mother of his three children, him surviving. If the hiba was genuine, the widow and daughter were disinherited: if it was a forgery, the daughter became entitled to one-fifth of seven eighths of her father's property upon his death. The daughter, after her father's death, married one Aminuddin Kazee. The prosecution alleged that both the father's execution of, and the Kazee's certificate of registration endorsed on, the hiba-bil-owaz were forgeries: but they did not charge either of the prisoners with the actual forgery. Nothing worthy of the name of evidence was forthcoming at the trial to prove that the father's signature was a forgery, and practically that point was abandoned by the prosecution. On the other hand there was an overwhelming body of evidence, proving beyond all doubt that Golam Russool's certificate of registration was a forgery, and I am abundantly satisfied that it was a forgery. Thus the first point necessary for the prosecution to establish was established. The use of the hiba by the accused was also proved by their own admissions. Point the second has thus been established.

In order to establish the third point, which for brevity I will call a guilty knowledge on the part of the prisoners, the prosecution sought to prove that, after Sadderuddin's death, his widow lived in commensality with the accused; that the daughter enjoyed the property equally with them; that Aminuddin had tried to sell his wife's share to the accused; that not only did they not mention the hiba, but carried on negotiations for the purchase, which only fell through by reason of the accused not offering a sufficient sum; that the accused, after the negotiations with Aminuddin had fallen through, knowing that he was treating for a sale to one Sheikh Budruddin, allowed the treaty to continue and said nothing about the hiba: that, after the sale to Budruddin had taken place, when he went to [59] take possession, Dhunum Kazee told him that his (Dhunum's) brother was in Calcutta and would not return for fifteen days,

when possession should be given : that, after the expiration of fifteen days, Dhunum told him that he would not give up possession : that when Budruddin sued the accused and their sister in the Munsif's Court, the accused, instead of producing the hiba, at once asked for fifteen days' time to put in their written statement, and, at the expiration of that period, asked for another adjournment, and subsequently for a third, and that it was not until after the third adjournment that the hiba was filed in the Munsif's Court. If these facts, or the more important of them, had been proved, I should have been of opinion that the jury, as reasonable men, ought to have come to the conclusion that a guilty knowledge on the part of the accused was established. But I am by no means satisfied that these facts, or the more important of them, were proved. They rested upon the testimony of Budruddin and Aminuddin. The former admitted that he had been imprisoned for three months for being in possession of stolen property : that he was on bad terms with the accused before his purchase from Aminuddin : that he had charged Khorshed with stealing a goat, which charge was dismissed : that since then he had had twenty or twenty-five civil suits with them. he also stated that Aminuddin was on bad terms with the accused. It is true that he says he still eats at the houses of the accused, but as I understand it is only in cases of the most bitter hatred that one Mahomedan will refuse to eat salt with another. Upon these admissions I am not satisfied with the truth of this witness's evidence. Aminuddin admits that he has had a suit with the accused, and that he is on bad terms with them, and that Budruddin used to assist him in his litigation with the accused : and though he says that three or four persons were present when he tried to sell the property to the accused, he cannot remember their names. I am not satisfied as to the truth of this witness's evidence. I am of opinion that the prosecution failed to prove a guilty knowledge on the part of the accused ; and if I can see my way to this conclusion, how much more probable is it that the jury who had a full opportunity of judging of the credibility of the witnesses [60] by observing their demeanour in the witness box, and how they went through their cross-examination, may have come to the same conclusion. It may, no doubt, be said, that the jury have not expressed any opinion upon the evidence of Budruddin and Aminuddin. It is sufficient to say in reply that their opinion was not asked, and as they found a general verdict of not guilty, I have a right to assume that this estimate of the evidence corresponded with the one I have formed.

This finding disposes of the case. I think it right, however, to deal with an argument that was advanced on behalf of the accused at the hearing before us. It was urged thus : "The accused had a good defence to Budruddin's action without having recourse to the hiba. That being so, even assuming that the hiba was forged and used by the accused with a guilty knowledge, yet, as there was no legal necessity for their using it, they cannot be said to have used it fraudulently or dishonestly." I am clearly of opinion that the use of the hiba under such circumstances was 'fraudulent.' The word 'fraudulently' is defined by s. 25 of the Penal Code thus : "A person is said to do a thing fraudulently if he does that thing with intent to defraud, but not otherwise." It is to be observed that this definition of 'fraudulently' differs entirely from that of 'dishonestly' as given in s. 24— "to do a thing dishonestly there must be the intention of causing wrongful gain to one person or wrongful loss to another"; and 'wrongful' gain is defined to be "gain by unlawful means of property to which the person gaining is not legally entitled"; and 'wrongful loss,' as "the loss by unlawful means of property to which the person losing it is legally entitled." A general intention to defraud without the intention of causing wrongful gain to one person or wrongful loss to another, would, if proved, be

sufficient to support a conviction. MAULE, J., says in *Reg. v. Nash* (2 Dearsly's C. C. R., at p. 500). "There may be an intent to defraud without the power or the opportunity to defraud," and at p. 503: "It is not necessary that any person should be in a situation to be defrauded." I am further of opinion that, in such a case as was put in argument before us, [61] the intent to defraud the party to whom the document was uttered (in this case Budruddin) was a necessary inference which the jury ought to have been directed to draw: *Reg. v. Hill* (8 C. and P., 274), and *Reg. v. Cooke* (8 C. and P., 582). Let a person's title to property be ever so good, yet if, in the course of an action brought against him to gain possession of the property, he uses by way of supporting his title, though there may be no necessity for the use of it, a forged document, such as this hiba, I am clearly of opinion that he uses it fraudulently.

It now only remains for me to notice the answers of the jury to certain questions put to them by the Judge after they had delivered their verdict. In reply to questions from the Court the jury stated as the reasons for their verdict: "There is no proof to show when the registration certificate was forged, *i.e.*, whether before or after the document A (the hiba) was filed in the Munsif's Court. There is also no proof as to who forged the registration certificate, *i.e.*, whether forged by the father of the accused or by the accused themselves; and in the former case that the accused knew they were forged. They find that the registration certificate is a forgery, but not the executant's signature on the document."

It was urged by the learned pleader who appeared for the Crown that these answers showed that the jury had come to very foolish conclusions upon the evidence, and that, in receiving their verdict, he ought to proceed upon the assumption that these foolish conclusions and these alone had induced them to return a verdict of acquittal. It may be that the conclusions are foolish, but I refuse to consider these answers at all, because I am of opinion that the Judge had no right to put the questions which called forth the answers. The Court is authorized by s. 263 to ask the jury such questions as are necessary to ascertain what their verdict is. In this case the jury had returned a plain, simple verdict of 'not guilty', it may have been erroneous, but it certainly was not ambiguous, and the duty of the Judge was to receive it and record it without asking any questions about it.

[62] For the reasons given above I am of opinion that the verdict of acquittal should stand.

Verdict upheld.

NOTES.

I. INTERFERENCE WITH VERDICT -

See 15 Bom. 452 at 486; 29 Cal. 128; 2 Cr. L. J., 357; 2 A. L. J., 475; 15 Cal. 269.

II. QUESTIONING JURY AS TO VERDICT—

Permitted to clear up ambiguities. —32 Cal. 759; 9 C. W. N., 220; Ratanlal, 442; 14 Bom. 115; 15 Bom. 452; 19 Bom. 735; 20 Bom. 115; 28 Bom. 412; 30 Mad. 469.

III. FORGERY—FRAUDULENT INTENTION

See also the following cases:—(1901) 5 C. W. N., 897 (900); (1906) 32 P.L.R. 1907; (1907) P. R. Cr. 1; (1894) U. B. R., (1892-96) Vol. I, 279 (284); 13 Bom. 506; 28 Mad. 90 **F.B.]**

[9 Cal. 62 : 11 C.L.R. 100]

APPELLATE CIVIL.

The 28th April, 1882.

PRESENT:

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Jugmohun Tewari and others..... Defendants

versus

Finch.....Plaintiff.

*Road Cess Act (Beng. Act X of 1871), ss. 5, 7, Part II, Schedule A, part ii—
Bhowli Tenures — Suit for rent.*

Section 5 of the Road Cess Act requires the holders of any estate or tenure, of which the annual rent shall exceed one hundred rupees, to lodge returns of all lands comprised in an estate or tenure; bhowli lands are, therefore, to be included in such returns.

Where such a return has not been made, the holder of the estate or tenure is precluded from suing for or recovering any rent due therefor.

THE plaintiff was the ticcadar of a certain mouza, and stated that the defendants hold under him in ticca kasht 7 bigas 8 cottas 5 dhurs of this mouza at an annual rent of Rs. 15-10-6-1-8, and also 18 bigas 5 biswas of bhowli and sair land, the rent of which was paid in produce: and that the defendants not having paid the rent for these lands for the year 1283 (1876), he brought this present suit to recover the rent due. The defendants denied that they held any bhowli lands, but alleged they were the holders of an ancestral ticca tenure, in which the sair lands were included, the rent of which was Rs. 22-1-3, and in proof of this produced the receipt for rent for former years.

The Munsif found that the defendants were the holders of the bhowli lands mentioned, and gave the plaintiff a decree for the greater part of the amount claimed by him. The defendants appealed to the District Judge, contending that the plaintiff [63] had failed to prove his allegations as to area, rates, and bhowli tenure. The District Judge found that the documentary evidence produced by the plaintiff sufficiently established the area, jumma, and rates of rent of the lands held by all the defendants, and that the receipts produced by the defendants did not show the quantity of land and the annual jumma thereof. He also held that no return under the Road Cess Act of 1871 was required to be made in respect of bhowli lands, there being no column set apart for such tenures in the printed forms; and he, therefore, dismissed the appeal.

The defendants appealed to the High Court.

Mr. Twidale and Baboo Mohesh Chunder Chowdhry for the Appellants contended that s. 7 of Beng. Act X of 1871 debarred the plaintiff from recovering any rent in respect of the alleged bhowli tenure, inasmuch as the tenure was not included in the return lodged in pursuance of the Act: and that the Judge was wrong in holding that the receipt produced did not show the annual jumma

*Appeal from Appellate Decree, No. 89 of 1881, against the decree of H. W. Gordon, Esq., Officiating Judge of Tirhoot, dated the 17th September 1880, affirming the decree of Baboo Ramyad Lall, Munsif of Tezpur, dated the 10th March 1879.

Baboo Bhowany Churn Dutt for the Respondent.

The **Judgment** of the Court (MITTER and MACLEAN, JJ.) was delivered by **Mitter, J.** --The plaintiff, who is the ticcadar of Mouza Malpore, brought this suit for arrears of rent for the year 1283. He alleged that the defendants held in that year 7 bigas 8 cottas 5 dhurs of land at a nukdi rent of Rs. 16-10½; 7 cottas 10 dhurs of land on which there were bamboo clumps, and the value of the landlord's share of the bamboos cut in the year was Rs. 51; and 18 bigas 5 cottas of bhowli lands, the value of the landlord's share of the putnee was Rs. 210 and odd. The plaintiff gave a deduction of Rs. 24 and odd annas as the amount paid by the defendants in that year.

The defendants denied holding any bhowli land, and alleged that they held a maurasi tenure in the village, the rent of which was Rs. 22-1-3, and that in this tenure the bamboo clumps mentioned in the plaint were included.

[64] The Munsif gave a decree in accordance with the allegations of the plaintiff, although he made some modification in the amount claimed. This decree has been confirmed by the District Judge. The defendants have preferred this appeal.

The defendants, in order to prove that their annual rent was Rs. 22-1-3, produced receipts for the previous years. The District Judge disposes of these receipts with the remark that they do not contain the quantity of land and the annual jumma of the defendants.

It has been contended before us that the District Judge is mistaken in thinking that the receipts do not show the annual jumma. We find that the contention is valid, because if they are genuine, they do show the annual jumma. But there was a question about their genuineness in the lower Courts, and the lower Appellate Court has expressed no opinion upon this point. But in the view which we take of the next objection urged before us, it becomes immaterial to inquire into the question of the genuineness of the receipts.

The next objection is, that the lower Courts are in error in awarding a decree for the rent of the bhowli lands, because, in the return which was made by the plaintiff to the Collector under the Road Cess Act (Beng. Act X of 1871), these lands were not included. It has been contended before us that the plaintiff is, upon this ground, precluded by s. 7 of the Road Cess Act of 1871 from recovering any rent on account of the alleged bhowli lands. The District Judge upon this point says, that it is generally understood that it is not necessary to enter the bhowli lands in the return, because there is no column in the form prescribed under Act X of 1871, in which such lands are to be entered.

We are of opinion that the opinion of the District Judge upon this point is contrary to the provisions of Beng. Act X of 1871. The form referred to by him is prescribed by s. 5 of the Act, which requires that the return should be made "of all lands comprised in an estate or tenure. The plaintiff was bound to enter in the column headed 'annual rent' the rent of all bhowli lands. The District Judge says that it was generally understood that the rents of the bhowli lands were [65] not required to be entered in the returns under Act X of 1871. But we find a clear direction for this insertion in the following extract from the rules framed by the Board of Revenue for the preparation of returns under Beng. Act X of 1871, Part II, Sched. A, part ii: "With reference to the manner in which uttbandee, bhowli, spunja, and bhag holdings, where rents

are paid partly in money and partly in kind, or wholly in kind, should be entered in the return, it will be better for the zamindar to enter the cash value on an average of the receipts of the past two years, or if there have been no such receipts during that period, then at an approximate estimate of what he expects his portion of the crop to be worth to him at market rates, together with cash paid, if any, as rent."

We are of opinion that the plaintiff is precluded by s. 7 of Beng. Act X of 1871 from recovering any rent for the alleged bhowli lands. That being so, it is unnecessary to enquire whether the receipts filed by the defendants are genuine, because the plaintiff is only entitled to recover the nukdi rent claimed by him, which is less than what is admitted by the defendants. The plaintiff admits the receipt of Rs. 24 and odd annas in the year 1283, and as this is more than the nukdi rent claimed or admitted, the suit must be dismissed. We reverse the decrees of the lower Courts, and dismiss the plaintiff's suit with costs.

Appeal allowed.

NOTES.

[See (1907) P. W. R. 51.]

[9 Cal. 65]

APPELLATE CIVIL.

The 18th May, 1882.

PRESENT.

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

Bandey Karim and others.....Judgment-debtors
versus

Romesh Chunder Bundopadhyia and another.....Decree-holders.

Limitation - Application for execution - Res judicata.

When a Court, upon an application for execution, has decided that the execution is barred by limitation, and that order has become final in consequence of no appeal having been preferred therefrom, such order will, upon a subsequent application for execution of the same decree, operate as a bar to execution.

[66] Moonshoe *Serajul Islam* for the Appellants.

Baboo *Doorgadass Dutt* for the Respondents.

THE facts of this case sufficiently appear from the **Judgment** of the Court (McDONELL and FIELD, JJ.), which was delivered by

Field, J.—The question in this case is whether, when a Court, upon an application for execution, has decided that the execution is barred by limitation, and that order has become final in consequence of no appeal having been preferred therefrom, such order will, upon a subsequent application made for execution of the same decree, operate as a bar to execution. The facts of the

* Appeal from Appellate Order, No. 42 of 1882, against the order of A. J. R. Bambridge, Esq., Judge of Moorshedabad, dated the 13th December 1881, affirming the order of Baboo Hem Chunder Mitter, Second Munsif of Berhampore, dated the 22nd August 1881.

present case are, that, on the 5th of March 1881, the Subordinate Judge made the following order: "It appears that the case is barred by limitation. The decree was passed on the 27th of July 1871, and this petition of execution states that an application for execution was made in 1878. Now it is clear that that application must have been made more than three years after the decree was passed. It is not shown that any step was taken to enforce the decree in the interval so as to save it from being barred by limitation. Case dismissed with costs." A review of this order was applied for on the 7th April 1881; and, on the 7th May 1881, the following order was passed:—"This is an application for review of an order disallowing an application for execution. The order disallowing sets out the grounds of refusal. This application does not set out any ground, save a vague and bold statement in explanation of laches all through from the representation of an incorrect application down to the disposal of it. I do not consider the creditor entitled to review of the order, and no case has been made for it. I disallow the application with costs." On the same date on which the review was applied for,—that is, the 7th of April 1881,—a fresh application for execution was presented, and the question which we have now to decide is whether this application of the 7th of April 1881 is barred by the order of the 5th of March 1881, which decided that the execution was barred by limitation, and against which no appeal was preferred. Both the lower Courts have decided this ques-[67]tion in the negative. They have proceeded upon the general ground that the principle of *res judicata* is not applicable to execution-proceedings. The question, whether the principle of *res judicata* is applicable to proceedings after decree, was discussed in the cases of *Hurrooondary Dassee v. Jugobundhoo Dutt* (I.L.R., 6 Cal., 203), *Rup Kumar v. Ram Kripal Shukul* (I.L.R. 3 All., 141), and *Delhi and London Bank v. Orchard* (L. R., 4 I. A., 127; s.c., I. L. R., 3 Cal., 47). We do not, on the present occasion, propose to go into this broad, general, and probably difficult question, whether the principle of *res judicata* as enunciated in s. 13 of the Code of Civil Procedure applies in all its generality to proceedings after decree. We limit our decision to the exact question which is raised in the present case, and that is, whether the Court, having once decided that the execution is barred by limitation, that decision is a bar to further execution. We think that it is a bar. In the case of *Mungul Pershad Dicht v. Grita Kant Lahari* (I. L. R., 8 Cal. 51; s.c., L. R., 8 I. A., 123), a seventh application for execution was filed on the 22nd of September 1877, and the High Court held that this application for execution was barred, because the decree was barred when a previous application for execution was made on the 5th of September 1874. The Judges said: "A decree once dead, no proceeding by means of an application out of time could revive it." Their Lordships of the Privy Council reversed this decision, and on this ground, that, on the 8th of October 1874, an order for attachment was made by the Subordinate Judge. The Privy Council said:—"That order was made by a Court having competent jurisdiction to try and determine whether the decree was barred by limitation. No appeal was preferred against it; it was acted upon, and the property sought to be sold under it was attached, and remained under attachment until the application for the sale now under consideration was made"; and further down, "the Subordinate Judge had jurisdiction, upon the petition of the 8th of October 1874, to determine whether the decree was barred on the 8th of October 1871, and he made an order that an attachment should issue. Ho, whether right or wrong, must be considered [68] to have determined that it was not barred. A Judge, in a suit upon a cause of action, is bound to dismiss the suit, or to decree for the defendant if it appears that the cause of action is barred by limitation. But if, instead of dismissing the suit, he decrees for the plaintiff,

his decree is valid, unless reversed upon appeal: and the defendant cannot, upon an application to execute the decree, set up as an answer that the cause of action was barred by limitation." Now the present case is the converse of that case. If, in the present case the Subordinate Judge had decided, on the 5th of March 1881, that the decree was not barred by limitation, the judgment-debtor could not, upon the application of the 7th of April 1881, be heard to say that the decree was barred by limitation: and by the same course of reasoning, inasmuch as the Subordinate Judge decided on the 5th of March 1881 that the decree was then barred by limitation, and as that order has become final, the decree-holder, cannot now, upon the application of the 7th of April 1881, be heard to say that it is not barred by limitation. Under these circumstances we must reverse the decree of the Courts below, and direct that the application for execution be dismissed.

The appellants will be entitled to their costs in both the Courts below.

Appeal allowed.

NOTES.

[See 14 Bom. 206; 14 C. W. N., 114; also the Notes to 8 Cal. 51 *supra*.]

[9 Cal. 68 : 11 C. L. R. 318 : 7 Ind. Jur. 194]

APPELLATE CIVIL.

The 21st June, 1882.

PRESENT :

MR. JUSTICE MACLEAN AND MR. JUSTICE MACPHERSON.

Ramcoomar Singh and another..... Defendants

versus

Kishari.....Plaintiff.

Registration Act (III of 1877), s. 17 — Kabuliats Act XVI of 1864, s. 13.

Neither s. 17 of Act III of 1877, nor the similar sections of the preceding Acts, have the effect of rendering a document, which was not compulsorily registrable under Act XVI of 1864, inadmissible in evidence, under the succeeding Acts, without registration.

Baboo Ankil Chunder Sen for the Appellants.

Baboo Doorqa Mohun Doss for the Respondent.

[69] THE questions raised in this appeal are set out sufficiently for the purposes of this report in the **Judgment** of the Court (MACLEAN and MACPHERSON, JJ.), which was delivered by

Maclean, J.— Two points have been urged in this appeal: the first is, that the kabuliats, which appears to have been executed in the month of May 1865, should not have been admitted in evidence (in a suit instituted in June 1881), as it was unregistered. The other point is, that rent has never been realized by the landlord under that kabuliats.

* Appeal from Appellate Decree, No. 2188 of 1880, against the decree of Baboo Mothoora Nath Gupto, Subordinate Judge of Chittagong, dated the 22nd June 1880, affirming the decree of Baboo Juggobundhoo Dutt, Sudder Munsif of that District, dated the 19th January 1880.

The contention on the first point is based on the language of s. 17 of Act III of 1877, which is to the effect that all documents mentioned therein shall be registered if they have been executed after the date on which Act XVI of 1864 and the other Registration Acts have come into force; and the effect which it is sought to give to that section is, that this lease of May 1865, having been executed after the date on which Act XVI of 1864 came into force, requires, under the Act of 1877, to be registered.

But it is beyond doubt that the document in question did not require registration when it was executed, for it was not until the Act of 1866 was passed that kabuliats or counterparts of leases were made compulsorily registrable.

The 17th section of the Act of 1866 contained language almost identical with the language of the 17th section of the present Act, so far as the point we are now considering is concerned. But we believe that it has never been held, that that section, or the similar section in any of the succeeding Acts, had the effect of rendering a document, which was not compulsorily registrable under the Act of 1864, inadmissible in evidence without registration under the succeeding Act.

We have been referred to the case of *Amjed Ali v. Ala Buksh* (9 W. R., 537), in which the document under discussion was a kabuliat executed while the Act of 1864 was in force. The suit was brought in 1867, while the Act of 1866 was in force, and we cannot think that if the contention now raised by the learned vakil for the appellants had been considered tenable, [70] it would have been overlooked either by the learned vakils who conducted that case, or by the learned Judges who decided it.

Our own view is, that this section in the succeeding Acts from 1866 to the present date had not the effect of altering the character of a kabuliat executed before 1866 as admissible in evidence without registration.

The other point, -namely, that no rent has ever been asked for or paid under the kabuliat in this case, is one which we think is of no force. The kabuliat is a distinct engagement to pay rent. The defendants contended in the Court below that they held on some tenure called a mokurari tenure. That was found against them, and the Subordinate Judge, sitting in appeal, has found, on the evidence of one of the defendants, that the appellant's predecessor and uncle actually paid rent by deductions from his salary. The contention that the kabuliat provided for payment in paddy, and that the deduction from salary must have been a deduction in cash, does not alter the fact that rent was paid. As to the argument that no rent was realized, that was a matter entirely in the option of the landlord for the time being.

The Appeal must, therefore, fail. It is accordingly dismissed with costs.

Appeal dismissed.

NOTES.

[To the same effect is (1893) 16 Bom. 92 (95); 8 All. 105; (1911) 10 I. C. 314-8 A. L. J. 619, where it is pointed out that the provisions of sec. 6 of the General Clauses Act 1897 would also apply.]

[9 Cal. 70 : 7 Ind. Jur. 195]

APPELLATE CIVIL.

The 12th July, 1882.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE BOSE.

Surjokant Nundi.....Plaintiff

versus

Mohesh Chunder Dutt and others.....Defendants.

Hindu law—Succession of adopted son of one daughter and natural son of another—Grandfather's estate.

The adopted son of one daughter shares equally with the natural son of another daughter in the inheritance left by his maternal grandfather.

Uma Sunker Motra v. Kali Komul Mozoomdar (I. L. R., 6 Cal., 256) followed.

IN this case the plaintiff alleged that his maternal grandfather, Gunga Prosad Dutt, was the owner of a four-anna [71] share in certain lakhiraj lands, and that he died leaving two daughters, Bishnupria and Aradhoni, and two grandsons, the plaintiff and his brother, the sons of Bishnupria, and leaving also a widow Bishnupria (his second wife), and by her two daughters, Ishuri Dasi and Bhubuneshuri Dasi, that, on Gunga Prosad's death, the widow took possession of his property, during which Bishnupria and Aradhoni died, the widow shortly after died, leaving her married daughter Ishuri Dasi and her widowed daughter Bhubuneshuri, her surviving, as well as the plaintiff and his brother: that Ishuri Dasi then took possession to the exclusion of the widowed daughter, but died without issue in 1279, the brother of the plaintiff, however, predeceasing her, and that he, the plaintiff, thereupon put forward his claim as next heir, but was opposed by the defendant No. 1, who alleged himself to be the adopted son of Ishuri Dasi, and he therefore brought this present suit on the 6th April 1878, to recover possession of the four-anna share formerly belonging to Gunga Prosad.

The defendant No. 1 contended that Gunga Prosad died leaving a son named Kashi Nath as his heir, and that, on his death, Bishnupria (Gunga Prosad's widow) took possession as the successor to Kashi Nath, and that Bishnupria died leaving her surviving her daughters Ishuri Dasi and Bhubuneshuri, Bhubuneshuri, not however being a widow at the date of the death of her mother Bishnupria, and that the husband of Ishuri Dasi and Ishuri duly adopted him as their son, and that his adopted father and himself successively had held adverse possession to the property for more than twelve years.

The Subordinate Judge found that the defendant was the duly adopted son of Ishuri Dasi, but that Gunga Prosad had no son named Kashi Nath; that Bhubuneshuri was a widow at the time of the death of her mother Bishnupria. He also found that Bishnupria inherited the property of her husband Gunga Prosad, and that as the plaintiff's mother predeceased the widow Bishnupria, Ishuri the married daughter was the only person who succeeded to Gunga Prosad's property after the death of Bishnupria, and as

* Appeal from Appellate Decree, No. 1402 of 1880, against the decree of T. M. Kirkwood, Esq., Judge of Mymensingh, dated the 23rd April 1880, reversing the decree of Baboo Kedar-nath Mozoomdar, Officiating Second Subordinate Judge of that District, dated the 12th February 1879.

Ishuri died in 1279, the plaintiff's cause of action was within time, and holding that the plaintiff being the [72] grandson of Gunga Prosad by his daughter, his claim to succeed to the property was preferable to the claims of the defendant No. 1, the adopted son of a daughter of Gunga Prosad, he decreed the suit in favour of the plaintiff.

The defendant appealed to the District Judge, who held, that the defendant No. 1, the adopted son, was entitled to share equally with the plaintiff in the properties of Gunga Prosad.

The plaintiff appealed to the High Court.

Baboo *Gurudas Banerjee* and Baboo *Prannath Pundit* for the Appellant.

Baboo *Rashbehari Ghose* and Baboo *Lalmohun Dass* for the Respondents.

The **Judgment** of the Court (GARTH, C.J., and BONE, J.), was delivered by **Garth, C.J.**—In this case we think it right to follow what we understand to be the rule laid down by the Full Bench in the case of *Uma Sunker Maitro v. Kali Komul Mozumdar* (I. L. R., 6 Cal., 256).

We find no special text or rule laid down in the books applicable to this case; and we, therefore, hold that the adopted son of a daughter shares equally with a natural son the inheritance left by his maternal grandfather. The lower Court's view is, therefore, correct.

The appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[ADOPTION—INHERITANCE—MATERNAL RELATIONS—

Similarly, it was held that the adopted son inherits to the maternal uncle:—(1883) 10 Cal. 232. Conversely, those relations inherit to the adopted son:—(1909) 33 Bom. 404.]

[9 Cal. 72 : 11 C.L.R. 320]

APPELLATE CIVIL.

The 5th June, 1882.

PRESENT:

MR. JUSTICE PRINSEP AND MR. JUSTICE FIELD.

Dwarkanath.....Plaintiff.

versus

Baburam Laskar.....Defendant.

Landlord and tenant—Suit for rent—Contract to pay for excess land after measurement—Notice—Rent Act (Beng. Act VIII of 1869), s. 14.

When a tenant contracts to pay rent at a certain rate for any such land as upon measurement may be found to be in excess of the estimated area, it is not necessary to serve him with notice under s. 14 of the Rent Act before instituting a suit for the rent of any additional land, nor is it necessary that he should be present at the measurement.

* Appeal from Appellate Decree, No. 2460 of 1880, against the decree of W. H. Page, Esq., Officiating Additional Judge of the 24-Parganas, dated the 20th September 1880, reversing the decree of Moulvi Abdul Hamid, Officiating Munsif of Baraipore, dated the 2nd March 1880.

[73] IN a suit for arrears of rent, road cess, and public work cess, it appeared that the defendant held his land on a maurasi and mokurari tenure, and that, in the kabuliati, the defendant agreed that, in case the lands mentioned therein were surveyed, and the quantity of such lands found increased, he would pay rent for the lands so found to have increased. The land had been measured and found to contain twenty-four bighas ten cottas. The defendant contended that he only held fourteen bighas, and that the land was not measured in his presence. The Munsif gave the plaintiff a decree for the whole amount claimed. The District Judge considered, on the authority of *Thekmee Beldar v. Ram Kishen Lall* (15 W. R., 71), that the suit was in substance a suit for rent at an enhanced rate; that notice was necessary; and accordingly reversed the Munsif's decision. The plaintiff appealed to the High Court.

Baboo Issur Chunder Chuckerbutty and Baboo Pran Nath Pundit for the Appellant.

No one appeared for the Respondent.

The following **Judgments** were delivered :—

Prinsep, J.—The District Judge has dismissed this suit, on the ground that this was a suit for enhancement, and no notice required by s. 14 of the Rent Law had been served. It appears to us that the terms of the contract between the parties, under which the tenancy of the defendant was created, dispenses with the necessity for such notice. The case is precisely similar to that decided by a Division Bench of this Court, consisting of MORRIS, J., and myself, in Appeal No. 759 of 1878. In that judgment we expressed ourselves to the following effect :—“ There is no provision as to the necessity of previous notice or even to the presence of the tenant at the time of measurement. The tenant unreservedly stipulates to pay at a certain rate per kani for any such land as upon measurement may be found to be in excess of the estimated area. [74] Under the contract the time of discovery of the excess land by means of measurement is the moment from which he engages to pay additional rent for such excess land. The view thus taken that the special terms of the ryot's kabuliati dispenses with the necessity of a notice in terms of the Rent Law is in accordance with the judgment of a Division Bench of this Court in *Ram Narain Lall v. Gnanbeer Singh* (19 W. R., 108).” In accordance with the precedent of that decision, we set aside the judgment of the lower Appellate Court, and restore that of the first Court. The plaintiff will receive the costs of this Court and of the lower Appellate Court.

Field, J.—I concur. I think that this case is not similar to the case of *Thekmee Beldar v. Ram Kishen Lall* (15 W. R., 71), upon which the District Judge relies. In that case there was no express agreement to pay additional rent for additional land. Nor is this case precisely similar to the Full Bench case of *Nistarini Dasi v. Bonomali Chatterji* (I. L. R., 4 Cal., 911). It is similar to Special Appeal, No. 759 of 1878, referred to by PRINSEP, J. In that case the patta or kabuliati was for a term of ten years, in the present case it is a maurasi kabuliati. Now, a maurasi lease is, according to the custom of this country, a permanent lease. It appears to me, therefore, that the written engagement in this case does, by necessary implication, specify the period of such engagement, and that the provisions of s. 15 of the Rent Law requiring a notice do not apply.

Appeal allowed.

[11 C.L.R. 502 : 7 Ind. Jur. 252]

[75] APPELLATE CIVIL.

The 13th July, 1882.

PRESENT :

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

Jaggamoni Dasi.....Plaintiff

versus

Nilmoni Ghosal and another.....Defendants.

Right of suit - Injunction - Property dedicated to religious purposes - Suit to restrain its use for other purposes.

The plaintiff's ancestor built a temple, a bathing-ghat, a room called 'Gungajatri ghur,' and a ghat close to it, to which persons on the point of death were removed, and certain ceremonies were performed. The defendants used the last-mentioned ghat for the purpose of landing goods.

Held, that if, when the plaintiff's ancestor erected the buildings, he intended to grant to the Hindu community merely a right of easement over the property, and not to transfer the ownership therein to the community, the plaintiff was entitled to maintain a suit to restrain defendants from using the ghat for trading purposes.

Mr. *Henderson* and *Baboo Soroda Churn Mitter* for the Appellant.

Baboo Gurudas Banerjee for the Respondents.

THE facts of this case sufficiently appear from the **Judgment** of the Court (McDONELL and FIELD, JJ.), which was delivered by

Field, J. - The plaintiff in this case makes the following allegations in her plaint: that her father, the late Gunga Narain Dutt, purchased certain brohmutter land on the bank of the river Hooghly, and during his lifetime built thereon certain *mundirs*, or temples, dedicated to Ishwar Siva, a bathing-ghat, and a room called gungajatri-ghur, and close thereto another ghat, called an *antorjohi*-ghat, about six feet in breadth; that, ever since the above ghat was built, sick persons, who have lost all hopes of recovery, have been brought to the aforesaid gungajatri-ghur, and, when on the point of death, have been removed to the said ghat, where the rites of *antorjohi* have been performed according to practice and the Hindu Shastras; [76] that the plaintiff is her father's executrix and the manager of his property; that the defendants have recently used the ghat for the purpose of landing goods from their boats; that, in consequence of their doing so, the sick persons brought to the river-side have been subjected to annoyance, and the object with which the ghat was built has been frustrated. The plaintiff, therefore, asks the Court to declare that the ghat was intended and dedicated for the purposes already mentioned, and further asks that the defendants be restrained from using such ghat for the purpose of loading and unloading articles of trade.

The Munsif gave the plaintiff a decree. There was then an appeal to the District Judge of the 24-Parganas, who was of opinion that the plaintiff is not entitled to maintain this suit. He says. - "It is quite clear that the

* Appeal from Appellate Decree, No. 468 of 1881, against the decree of J. F. Browne, Esq., Officiating Judge of the 24-Parganas, dated the 23th December 1880, reversing the decree of Baboo Dwarkanath Mitter, Munsif of Scaldah, dated the 24th February 1880.

plaintiff cannot claim exclusive possession, as the ghat is a public *antorjoli*-ghat, intended for the celebration of the *antorjoli* ceremony by dying persons of the Hindu persuasion. The proper course for the plaintiff to adopt is to 'ring to the notice of the Magistrate that the defendants, by carrying on the occupation of landing goods at a public ghat intended only for *antorjoli* purposes, have interfered with the comfort of those members of the community who are entitled to use the ghat for a particular purpose. The Magistrate then, if he concur in the finding on facts arrived at by the Munsif in his very careful judgment, will be in a position to take action against the defendants under the provisions of s. 521 of the Criminal Procedure Code."

It is now contended before us that the District Judge is in error in holding that the plaintiff is not entitled to maintain this suit: and it appears to us, for reasons which we are about to state, that this contention is correct. An application for an injunction must be made by a person who has a sufficient interest in the subject-matter, and the question then arises whether the plaintiff has a sufficient interest in the subject-matter of this suit. There is here no deed of endowment, and no evidence has been taken as to the exact purpose and object of this so-called endowment. The first question which suggests itself is whether the plaintiff's father, in building these temples, this *antorjoli* room, and this ghat, intended to give to the Hindu [77] community a right of easement over the soil, or intended to transfer the ownership of the buildings as well as the ownership of the soil to such community. It by no means necessarily follows that, because the plaintiff's father erected this ghat and this *antorjoli*-room, and allowed the Hindu community to use them for the purposes set out in the plaint, he intended to divest himself of the ownership of the soil, &c. In the case of *Lade v. Shepherd* (2 Str., 1004) the plaintiff had built upon his own property a street which had ever since been used as a highway. The defendant, who had land contiguous thereto and separated therefrom only by a ditch, made a bridge over this ditch, the end of which bridge rested on the Highway. The plaintiff brought an action of trespass against the defendant, and it was insisted for the defendant that, by the plaintiff's making this street, there was a dedication of it to the public, and therefore, however, he might be liable to an indictment for nuisance, yet the plaintiff could not sue him as for a trespass on his private property. It was held that the dedication was to the public, so far as the public had occasion for it, which was only for a right of passage, but that it was never understood to be a transfer of the absolute property in the soil. So in the present case it might be said that there was a dedication to the public, so far as the public had occasion to use this ghat and this room for the purposes set out in the plaint: but that it never was understood to be a transfer of the absolute property in the soil. The case just cited has been referred to as an authority in the more recent case of *St. Mary Newington v. Jacobs* (L. R., 7 Q. B., 17). In the case now before us there is no suggestion that any sevait was appointed: and this being so, the donor, that is, the plaintiff's father, would, according to Hindu law, be the sevait. If a sevait had been appointed it might be said that the ownership of the soil had been transferred to such sevait, but inasmuch as it does not appear that any sevait was appointed, it may well be reasonable to suppose that the ownership in the soil continued in the plaintiff's father. A case has been referred to—the case of *Baroda Prasad Mostafi v. Gora Chand Mostafi* (3 B. L. R., A. C., 295; s.c., 12 W. R., 160): that [78] was a suit for obstructing a public road. PEACOCK, C. J., said:—"The plaintiff sues defendant for obstructing a public road, without showing that he has sustained any particular inconvenience in consequence of that obstruction. If he can maintain this suit, any member

of the public can do so, and the defendant may be ruined by innumerable actions by persons who have not sustained a farthing of damages. It is said that the plaintiff has a right to sue, because he was one of the persons who dedicated the road to the public; but it is not because he gave the road to the public that he is necessarily entitled to be the guardian of the public and to sue whenever there is any obstruction to the public which causes him no inconvenience beyond that which is sustained by every other member of the public." The learned Chief Justice then proceeded to point out that there was a sufficient remedy provided by s. 308 and the following sections of the then Code of Criminal Procedure, Act XXV of 1861. Similar provisions are now to be found in s. 521 of the present Code of Criminal Procedure. Now we think that it is not possible in this case to say that this ghat and this room were public thoroughfares or public places within the meaning of s. 521. The dedication, if dedication there were, was not for the use of the whole public but for the use of a particular community, a particular portion of that public,—that is, persons professing the Hindu religion, and, in a more restricted way, for such members of that community, as are at the point of death. In this view it appears to us that the case before us is to be distinguished from the case of *Baroda Prasad Mostafi v. Gorachand Moostafi* (3 B. L. R., A. C., 295; s.c., 12 W. R., 160.), and we may further observe that, in that case, no question was raised as to the ownership of the soil, and no reference was made to the class of cases of which *Lade v. Shepherd* (2 Str., 1004) may be taken to be an example. In this view it appears to us that the first question which arises in this case is whether the plaintiff's father, when he erected these rooms and this ghat, intended to grant to the Hindu community merely a right of easement over this property, or to transfer the ownership in the ghat and the soil to that community. If it be found that there was no [79] intention in the donor to transfer the property in the soil, there can be no doubt that the plaintiff is entitled to maintain the present suit. But we think that even if it be found that there was a dedication, the effect of which was to transfer the ownership in the soil to the Hindu community, the plaintiff, as the representative of the donor, may well be entitled to maintain the present suit, there being apparently no sevait or trustee; and the object of the suit being, not to resume the grant, but to effectuate the intention of the grantor by preserving the property to the uses for which he presumably granted it.

We must, therefore, set aside the decree of the Court below and remand the case for decision upon the merits, with reference to the observations which we have made in this judgment. The costs of this appeal and of the Courts below will abide the ultimate result.

Case remanded.

NOTES.

[Dedication of the land to certain purposes can co-exist with other uses :—(1864) 6 All. 497; (1906) 33 Cal. 1290. 1 C. L. J. 343; 10 C. W. N. 1044. Such rights as in this case are not easements.—17 All. 87, 23 Bom. 666. As to when proof of special damage is required to maintain a suit, see (1899) 27 Cal. 793. Generally as regards the right of one member to bring a suit in such cases, (1905) 2 C. L. J. 431; 418; 460; (1893) 20 Cal. 810.]

[9 Cal. 79]

APPELLATE CIVIL.

The 21st April, 1882.

PRESENT :

MR. JUSTICE WHITE AND MR. JUSTICE MACPHERSON.

Issur Chunder Doss.....Plaintiff

versus

Juggut Chunder Shaha and others.....Defendants.

Limitation Act (XV of 1877), sched. II, arts. 49 and 123— Suit for Specific moveable property—Suit for a legacy.

A testator bequeathed certain specific moveable property to A. B applied for and obtained a certificate under Act XXVII of 1860 on behalf of the testator's widow, and took possession of the property bequeathed. A appealed, and the case was remanded for retrial. On the 27th of March 1873, the former order was cancelled and a certificate was granted to A. On the 19th of August 1873, B was directed to deliver up the property to C, who had purchased it from A. On the 22nd of March 1878, C instituted a suit to recover the property.

Held, that the suit was barred under art. 49† of the Limitation Act.

Article 123 ‡ of the Limitation Act only applies to cases in which the property sought to be recovered is not only a legacy, but is also sought to be recovered as such from a person who is bound by law to pay such legacy, either because he is the executor of the will or otherwise represents the estate of the testator.

[80] BY his will dated the 29th Cheit 1277 (11th April 1871), one Kasi Chunder Shaha bequeathed all his property, both moveable and immoveable, to one Juggut Chunder Roy. Kasi Chunder Shah died on the 5th Bysack 1278 (17th April 1871), and an inventory of his property was prepared under Act XIX of 1841.

* Appeal from Appellate Decree, No 1118 of 1880, against the decree of W. F. Meres, Esq., Officiating Judge of Tippera, dated the 5th April 1880, affirming the decree of Baboo Kahi Dass Dutt, Second Subordinate Judge of that district, dated the 23rd November 1878.

† [Art. 49 :—

Description of suit.	Period of limitation.	Time from which period begins to run.
For other specific moveable property, or for compensation for wrongfully taking or injuring or wrongfully detaining the same.	Three years ...	When the property is wrongfully taken or injured, or when the detainer's possession becomes unlawful.]

‡ [Art. 123 :—

for a legacy or for a share of a residue bequeathed by a testator, or for a distributive share of the property of an intestate.	Twelve years ...	When the legacy or share becomes payable or deliverable.]
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One Chunder Moni Shaha, the brother of Alladmoni, the widow of Kasi Chunder, applied for a certificate on her behalf under Act XXVII of 1860. Juggut Chunder objected, but an order granting a certificate was made upon security being furnished. Two persons, named Mothur Mohun Poddar and Rai Chand Poddar, became sureties under a bond, dated the 17th Srabun 1278 (1st August 1871), by which they pledged certain immoveable property. Chunder Moni then obtained possession of all Kasi Chunder's property. Juggut Chunder appealed to the High Court against the order granting the certificate, and the case was remanded for retrial. On the 27th of March 1873, the District Judge cancelled his former order and granted a certificate to Juggut Chunder; and on the 19th of August made an order directing Chunder Moni to deliver up Kasi Chunder's properties to the plaintiff, who had purchased them from Juggut Chunder on the 5th Kartic 1282 (21st August 1875). On the 22nd of March 1878, the plaintiff instituted the present suit against Chunder Moni, Mothur Mohun, Rai Chand and Juggut Chunder, to recover the properties left by Kasi Chunder (which consisted of moveable properties only), and for a declaration that the properties pledged by Mothur Mohun and Rai Chand were liable for his claim.

The Subordinate Judge dismissed the suit, holding that it was barred under art. 49 of the Limitation Act, and the decision was upheld by the District Judge.

The plaintiff appealed to the High Court.

Baboo *Doorga Mohun Doss* and Baboo *Okhal Chunder Sen* for the Appellant.

Mr. *Evans*, Baboo *Chunder Madhub Ghose*, and Baboo *Boykant Nath Dass* for the Respondents.

[81] The **Judgment** of the Court (WHITE and MACPHERSON, JJ.), was delivered by

White, J.— The lower Appellate Court has decided the question of limitation correctly, and has correctly applied art. 49 of the second schedule of the Limitation Act. It appears that the specific property sought to be recovered is specific moveable property, and came into the possession of Chunder Moni Shaha, the first defendant, in the year 1871, under an order of Court, which directed that he should hold that property on giving security subject to the order of the Court. On the 19th August 1873, the same Court ordered that he should deliver up the property to the plaintiff or his vendor. This order he disobeyed. Up to the date of this order, it may be taken that his detention of the property was lawful. But from the moment the latter order was made, his possession of the property became unlawful. Article 49 says, that in a suit for specific moveable property the period of limitation is three years running or commencing from the time that the obtainer's possession became unlawful. The present suit, therefore, comes strictly within that article, and not having been brought until the 22nd of March 1878, is clearly barred.

It is contended that art. 123, which provides twelve years for the receiving of a legacy is applicable, because this specific property was originally bequeathed to the plaintiff's vendor under a will. But the answer to this argument is, that the property to which this suit relates is not sought to be recovered as a legacy, but as property which belongs to the plaintiff, and has been unlawfully detained by the defendant No. 1. Article 123 only applies to cases in which the property sought to be recovered is not only a legacy, but is

also sought to be recovered as such from a person who is bound by law to pay such legacy, either because he is the executor of the will or otherwise represents the estate of the testator.

We dismiss the appeal with costs.

Appeal dismissed.

NOTES.

[LIMITATION—ART. 123—

This case has been approved of by other Courts, and Art. 123 has been held to be applicable only from the person who lawfully represents the estate of the deceased.— 12 Mad. 489; 14 Bom. 236; Bom. P. J. (1891) p. 212; 5 Bom. L. R. 355 (365); 16 Mad. 60; 19 All. 169.]

[12 C.L.R. 1]

[82] FULL BENCH.

The 11th July, 1882.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE MITTER,
MR. JUSTICE WILSON, MR. JUSTICE TOTTENHAM,
AND MR. JUSTICE MACLEAN.

Prokash Chunder Dass.....Defendant

versus

'Tarachand Dass and others.....Plaintiffs.'

Registration Acts (VIII of 1871 and III of 1877)—Sale-certificates, Registration of.—Construction of Act—Maxim “Optimus legis interpret consuetudo.”

Sale-certificates granted under the provisions of s. 259 of Act VIII of 1859 are not documents the registration of which is compulsory under the provisions of s. 17 of the Registration Act of 1871.

THIS was a reference to a Full Bench by McDONELL and FIELD, JJ.

The question referred was, whether a sale-certificate, dated the 23rd June 1873, and granted under the provisions of s. 259 of Act VIII of 1859, is a document of which the registration is compulsory under the provisions of s. 17 of the Registration Act (VIII of 1871).

Mr. *Branson*, Baboo Kuli Mohun Doss, and Baboo Bussunt Coomar Bose for the Appellant.

Mr. *Branson*.—The question here is between the auction-purchaser and a third party. I contend that a sale-certificate cannot be admitted in evidence unless it is registered. According to the reported cases, a sale-certificate under the Act of 1859 does require registration, and there appears to be only one case in which it has been held that registration was unnecessary, and that is in an unreported case—*In the matter of Srinath Banerjee* (Rule No. 1277 of 1879), decided by PRINSEP and MORRIS, JJ.—The case of *Benodi Lal Ghose v. Tamizuddin* (7 C. L. R., 115) did not in [83] words decide that registration of sale-certificates was necessary; but the Court admitted, for the sake of argument, that it was necessary whilst deciding

* Full Bench Reference made by Mr. JUSTICE McDONELL and Mr. JUSTICE FIELD, dated the 10th March 1882, in Appeal from Original Decree, No. 233 of 1880.

the case on other grounds. The cases which show that a certificate of sale must be registered are, an extra-judicial ruling of the Madras High Court (6 Mad., H. C. Rep., App., xxxix), *Srinivasa Sastri v. Seshayyagangar* (I. L. R., 3 Mad., 37) *Mulji Bèchar v. Anupram Bèchar* (7 Bom., H. C. A. C., 136, 137), *Pandhu Malhari v. Rakhmabai* (10 Bom., H. C., 435), *Lalbhau Lakhmidas v. Naval Mir Kamuludin Husen* (12 Bom., H. C., 217), *In the matter of Khaja Patthanji* (I. L. R., 5 Bom., 202), *Ichharam Kalidas v. Gorindram Bhowani Shankar* (I. L. R., 5 Bom., 653), and *Karan Singh v. Kamal* (I. L. R. 2 All., 96).

[GARTH, C. J. If a purchaser at an auction-sale before taking out his certificate, brought a suit against his judgment-debtor for possession, would not a decree obtained in that suit be sufficient evidence of his title? Perhaps as between the parties to the suit, but certainly not as between the judgment-creditor and third parties. The case of *Harkisandas Navandas v. Bai Ichha* (I. L. R., 4 Bom., 155), lays down that a purchaser shall have no remedy against his judgment-debtor unless he has obtained a certificate of sale; and the case of *Basapa v. Marya* (I. L. R., 3 Bom., 133) lays down that a purchaser at a sale cannot apply to the Court for possession before obtaining a certificate. The case of *Mulji Bèchar v. Anupram Bèchar* (7 Bom., H. C., A. C. 136, 137), decided in November 1870, whilst Act XX of 1866 was in force, which required sale-certificates to be registered, and required the Court to send notice also to the Registry Office, was the first case in the Bombay Courts which decided that sale-certificates should be registered. In the next Registration Act (VIII of 1871), s. 12 of the old Act was omitted, and the question then again came before the Courts, and the extra-judicial decision reported in 6 Madras High Court Reports, App., xxxix, and decided on the 8th September 1872, was to the effect that registration was necessary. The question was again raised in the case of *Pandhu Malhari v. Rakhmabai* (10 Bom., H. C., 435), and a like decision came to; and again, 1875, [34] in the case of *Panha Khumaji v. Fatta Upaji* (12 Bom., H. C., 179), it was held that the registration of sale-certificates was optional. Then Act III of 1877 was passed: that Act had no clause directing the Court to send notice to the Registry Office, but this clause was added by s. 107 of Act XII of 1879. Act X of 1877, in s. 316, omits the words which are the basis of the decisions of the Bombay Courts, the present case falls under the old Code. Then in point of time comes the case of *Ichharam Kalidas v. Gorindram Bhowani Shankar* (I. L. R., 5 Bom., 653), decided on the 21st September 1881, which incidentally decided that sale-certificates are compulsorily registrable. [GARTH, C. J. We know the Bombay cases are all to that effect, but it becomes a question whether we in Bengal should follow them, inasmuch as if we did so we should upset innumerable titles, which have been thought to be safe for a very long period back.] There are also the cases of *Kanhua Lal v. Kaladin* (I. L. R., 2 All., 392), and *Srinivasa Sastri v. Seshayyagangar* (I. L. R., 3 Mad., 37), which decide that certificates of sale must be registered. The maxim *optimus legis interpret consuetudo* will not help the matter. For where a Statute, speaking on some points, is silent as to others, usage may well supply the defect, especially if it is not inconsistent with the statutory directions where any are given; or where the Statute uses a language of doubtful import, those acting under it for a long course of years may well give an interpretation to that meaning. But usage can be binding only as affording contemporary interpretation.—See *Magistrate of Dunbar v. Duchess of Roxburghe* (3 Cl. & F., 354).

Mr. Evans, Baboo Boma Churn Banerjee, and Baboo Joy Gobind Shome for the Respondents.

Mr. *Feans*.—To hold that sale-certificates require registration, would be to upset the rule of unwritten law which has been in force in the Courts in Bengal for many years. That such certificates do not come under s. 17 of the Registration Act, was clearly the opinion of the Inspector-General of Registration; see Stephens on Registration, p. 12. The case of *Morecock v. Dickins* (2 Amb. Rep., 681) shows that the Court will not upset a practice; and in *Thumbarumy Moodelly v. Hoosain Borthen* (1. L. R., 1 Mad., 1), where from the year 1858 the Madras Presidency, and from 1861 the Bombay Presidency, had erroneously, in contravention of the law of India as declared by the earlier decisions, adopted, with regard to mortgages by conditional sale, doctrines which the English Courts of Equity had applied to mortgages in England, the Judicial Committee expressed a doubt as to whether they should follow the earlier decisions, which appeared sound, or the new course of decisions that had sprung up in Madras and Bombay, which appeared unsound. A sale certificate is not 'an instrument' within the meaning of cl. 2, s. 17 of Act VIII of 1871; it is not an instrument executed by the parties within the meaning of the section. As sale-certificates are not regarded by the Stamp Act as conveyances, this shows an intention on the part of the Legislature not to look upon them as instruments *inter partes* requiring registration. The case referred by the Board of Revenue, No. 2 of 1875 (8 Mad. H. C., 112), shows the *ratio decidendi* in the case reported in 6 Mad. H. C. Ruling, App., xxxix. It was only the peculiar words in s. 259 of Act VIII of 1859, which were the grounds of the decision. Act VIII of 1859 is a Procedure Act; and when therein a document is said to be taken and deemed to be a transfer, it merely means that it is a transfer for the purpose of the procedure of the Court. The case of *Mussamut Buhans Koonnar v. Lalla Buhoree Lall* (10 B. L. R., 159) has decided that the possessor of a sale-certificate, who is in possession, is in such a strong position that, under s. 260 of Act VIII of 1859, he can hold the property against any suit brought against him. *Doonga Naran Sen v. Baney Madhub Mozoomdar* (1. L. R., 7 Cal., 199) pointed out that the words of s. 259 do not contemplate that nothing would pass to a purchaser at a sale by the Court unless a certificate were issued; and that the order would be sufficient to pass the title, the certificate being merely evidence that the [36] property so passed; if this is so, a certificate cannot be called an instrument under which the transfer was made. *Abdool Aziz Biswas v. Radha Kanto Kobray* (1. L. R., 5 Cal., 226) is a case as to the registration of a certificate under Reg. VIII of 1819, but it raises a query whether a sale-certificate under Act VIII of 1859 requires registration or no. Certificates of sale would never have been taken to fall within s. 17 of the Registration Act, except for the purview of s. 259 of the Code. Is there any compulsion in these words in s. 259?

The **Opinion** of the Full Bench was delivered by

Garth, C.J.—If we were called upon to decide this question merely upon the language of the Registration Act of 1871 and the Code of 1859, and without regard to the practice which has prevailed in this province, it is possible that we might take the same view of it as the other High Courts, or at any rate, out of respect for their opinion, we should not adopt a contrary view without considerable reluctance.

But, in point of fact, we are now asked to put a construction upon these Acts with reference to the registration of sale-certificates, which is directly at variance with that which has been recognized and acted upon by the people of Bengal for many years past. We are not aware of a single instance in which this Court has held that such certificates ought to be registered; whilst, on the other hand, both on the Appellate and on the Original Sides of the Court, such instruments have been admitted in evidence without registration.

And this practice moreover appears to have received the sanction of the Government of Bengal from a very early period.

In a letter written by Mr. Secretary Eden to the Inspector-General of Registration, on the 19th of September 1868, the Government laid it down as an instruction to Registration Officers, that certificates given on sales for arrears of revenue did not require registration. It is stated in that letter, that such instruments did not come under s. 17 of the Registration Act; and that if they come within that Act at all, it [87] was under s. 42, which requires the Court, and not the parties, to register the instrument.

These certificates were, of course, of much of the same nature as certificates under sales in execution: and we believe that, upon the strength of this authority, and the practice which has prevailed in accordance with it, many thousands of purchasers at execution-sales have omitted to register their sale-certificates in the belief that they were acting in accordance with the law; and if we were now to hold that registration was necessary, the consequences would be most unjust and disastrous.

We think, therefore, that, in this instance, we may very properly act upon the well-known legal maxim "*optimus legis interpret consuetudo*." When a legislative measure of doubtful meaning has, for several years, received an interpretation, which has generally been acted upon by the public, Courts of Justice should be very unwilling to change that interpretation, unless they see cogent reasons for doing so. And this argument, of course, applies more strongly where, as in the present case, the measure relates not to any general principle of law, but to some technical or fiscal rule, such as the registration of documents, and where the interpretation which has been put upon the measure is in case of the general public.

There is undoubtedly much force in the remarks of Mr. Justice FIELD in the last paragraph of the reference which we are now answering, that the two main objects of registration,—namely, the authentication of documents, and the publicity given to dealings in land, are both, to a great extent, unnecessary in the case of sale-certificates.

And the result of recent legislation has been to show, either that the Government of India never intended these certificates to be registered, or that, having intended it, they have now found reason to change their minds.

In the Civil Procedure Code of 1877, s. 316, which provides for certificates of sale being given, the words in the former Code are omitted, that "the certificate shall operate as a transfer." Then, by the Registration Act of the same year, provision is made in s. 89, that such instruments shall be registered [88] by the Courts, and not by the parties. And lastly, by the Transfer of Property Act (s. 2, sub-section *d*), the provisions which make registration necessary are not to extend to "any transfer in execution of a decree of a Court of competent jurisdiction."

We think it right, for these reasons, to answer the question which has been referred to us, in the negative.

NOTES.

[I. REGISTRATION OF SALE CERTIFICATES -

Similar to this decision were those in 5 All. 81; 568; 7 Mad. 118, while a contrary view was taken in 1 Bom. 155; 2 All. 392; 3 Mad. 37. Doubts were set at rest by VII of 1888 which inserted an additional clause, and which is retained in the Registration Act of 1908, sec. 17 sub-cl 2 (xii). It runs, "Nothing clauses (b) and (c) of sub-section, 1 applies to any certificate of sale granted to the purchaser of any property sold by public auction by a Civil or Revenue Officer." See also (1893) P. R. 14; (1903) P. L. R. 36.]

II. OPTIMUS LEGIS ETC.—

See the Notes to 8 Cal. 593; also (1892) L. B. R. (1872-92) Vol. I, 574 (577).]

[9 Cal. 88 : 11 C.L.R. 326]

APPELLATE CIVIL.

The 24th March, 1882.

PRESENT:

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Duli Chand and others..... Plaintiffs

versus

Rajkissore..... Defendant.

*Mokurari lease--Covenant to forfeit lease if rent be unpaid --
Payment of rent after suit but before decree--Relief against
forfeiture - Beng. Act VIII of 1869 s. 52.*

Section 52 of Beng. Act VIII of 1869 is applicable both to cases where the right to cancel a lease arises under the provisions of the Act, and to cases where the right arises under agreement between the parties.

But, the object of the section being to prevent a forfeiture, if the rent be paid within the time specified by the section, the Courts will grant relief against a forfeiture where the rent is so paid.

THIS was a suit brought to cancel a mokurari lease under s. 52 of Beng. Act VIII of 1869, and for the payment of certain arrears of rent. It appeared that twelve annas of a certain mauza had been leased out in 1263 (1856) to the defendant under a mokurari patta by Ram Imaman and Mussamut Bhatto, the proprietors of the mauza, at an annual jama of Rs. 2,022, out of which the defendant was to pay as Government revenue Rs. 668-1-6, and the balance to the proprietors; the mokurari being granted on payment of Rs. 3,750 as nuzarana. The lease contained a stipulation that if the mokuraridar and her heirs failed to pay the mokurari rent for any year in full, then the proprietors should have the power to deduct the rent due from [89] the nuzarana-money, and, after payment of the balance of the nuzarana-money to the mokuraridar, to cancel the mokurari lease and take seer possession of the land leased.

The proprietors of the land sold twelve annas of the mauza leased as aforesaid to Ram Rutton Neoghi, under a kobala dated the 11th of January 1871; and on the 15th of September 1873, the right and interest of Ram Rutton Neoghi was sold by auction and purchased by one Dindyal Lal (a deceased brother of the plaintiffs) in satisfaction of a decree obtained by Dindyal Lal against Ram Rutton Neoghi.

Dindyal Lal brought two suits against the defendant for arrears of rent; and, on the 13th of April 1875 and the 30th of May 1877, obtained decrees against her. On the latter of these decrees nothing had been paid.

Dindyal died on the 8th of March 1878, and his widow relinquished her life-interest in the property to the brothers of Dindyal, the plaintiffs.

The plaintiffs then served the defendant with the following notice:--
"Please deduct Rs. 3,750, the nuzarana-money of the mokurari property, from the arrears of rent and decretal-money, which are still due by you, or receive in cash Rs. 619-1-3, which forms the balance of the nuzarana-money

* Appeal from Original Decree, No. 239 of 1880, against the decree of Baboo Matadin, Subordinate Judge of Gya, dated the 13th July 1880.

after the deduction of the rent, and give up possession of the said mouza. We shall take seer possession and collect the rent." On the 21st Jait 1286 F. (27th May 1879), the defendant refused to comply with their demands, and the plaintiffs, thereupon, on the 9th of June 1879, brought the suit for the purposes above stated.

The defendant admitted the mokurari lease, but contended that she had paid the Government revenue, and that this should, therefore, be deducted from the annual jama, and claimed the benefit of s. 52, Beng. Act VIII of 1869; and stated that, on the 10th of June 1879, she had deposited the rent for the years in dispute under ss. 46 and 47 of Act VIII of 1869; and had further, on the 20th of June 1879, deposited in Court the decretal money due; and further contended that as the mokurari lease was descendible to children, and she only had a life-interest in it, the claim to have the lease cancelled was not good.

The Subordinate Judge held that the mokurari could not be [90] cancelled, as the amount of rent due at the time of suit was paid in full after the institution of the suit and before decision, and dismissed the suit, each party bearing their own costs.

The plaintiffs appealed to the High Court.

Mr. C. Gregory and Baboo Amarendra Nath Chatterjee for the Appellants.

Baboo Kabi Mohun Dass and Baboo Kashi Kant Sen for the Respondent.

The **Judgment** of the Court (MITTER and MACLEAN, JJ.) was delivered by

Mitter, J. - This suit was brought by the plaintiffs for the cancellation of a mokurari lease. It was based upon the terms of the mokurari lease. These terms are to the following effect: "If the said mokuraridar and her heirs fail to pay the mokurari rent for any year in full, then we, the proprietors, and our heirs, shall have the power to deduct the rent due to us from the nuzarana-money, and after paying the balance of the nuzarana-money to the mokuraridar and her heirs, and cancelling the mokurari patta, take seer possession of the share in the said mauza." It was stated in the plaint that, for seven successive years, this condition of the lease was broken, and the full amount of rent for each of these years remained in arrear at the end of each year; that the plaintiffs' predecessor in title obtained a decree for rent on the 31st May 1877, which, up to date of suit, had not been satisfied. That decree was for Rs. 1,444-5-4. The prayers of the plaint were: *first*, that the mokurari patta may be cancelled and set aside; *secondly*, that, after deducting Rs. 3,130-14-3, the principal amount of the arrears of rent, the balance, Rs. 619-1-9 of the nuzarana-money be awarded to the defendant, or that the plaintiff be declared to be at liberty to deposit the said money in Court after deducting the total amount covered by the decree for arrears of rent due to the plaintiffs from the defendant, or that any other order as the Court think proper may be passed on the subject; and *thirdly*, that, by dismissing the defendant, the plaintiffs may be put in seer possession of the property. It appears that, after the [91] suit was instituted, the defendant satisfied the decree of the 31st May 1877 by depositing the money due under it into Court. In this state of facts the lower Court, under the provisions of s. 52 of Beng. Act VIII of 1869, dismissed the plaintiffs' suit for the cancellation of the lease. It is contended before us in the first place that the provisions of s. 52 would not apply, because that section only refers to suits for the cancellation of leases which may be brought by the landlord under the provisions of the Rent Act for the cancellation of

leases. Now this question came up before the Judicial Committee of the Privy Council in the case of *Dul Chaud v. Meher Chand Sahu* (12 B. L. R., 439). That was also a suit by a landlord to cancel a mokurari lease in pursuance of a similar agreement contained in the lease. The Court of First Instance found in favour of the landlord upon the question of non-payment of rent, but dismissed the claim for cancellation upon the ground that the claim was barred by limitation. The High Court set aside the decree of the lower Court with reference to the claim for the cancellation of the lease, and awarded a decree in terms of s. 78, Act X of 1859. (Section 52 of Act VIII of 1869 is word for word the same as s. 78 of Act X of 1859). Against the decree of the High Court the landlord appealed, contending that he was entitled to a decree declaring the lease to be unconditionally cancelled. The Judicial Committee observed that it was contended before them that "the latter part of s. 78 only applied to cases where the statutory power was given by this Act to cancel leases, and not to cases where the right to cancellation accrued in consequence of covenants in the lease itself. But their Lordships are of opinion that that would be placing too narrow a construction upon an Act which may be termed, upon the whole, a remedial one; and they see no sufficient reason for limiting what is the *prima facie* and natural meaning of its terms to the extent contended for. Their Lordships are, therefore, of opinion that the High Court was right in its determination on the point in question."

This is, therefore, clear authority for the proposition that, whether the right of cancellation arose from the provisions of the Act itself, or whether it arose under any agreement between [92] the parties, s. 78 of Act X of 1859 was applicable to a suit of this nature. Therefore s. 52, Act VIII of 1869, which now takes its place, is similarly applicable to the present suit. Under that section, if the arrears of rent due under the decree of the 31st May 1877 had not been paid up by the defendant, no doubt, the Court might have awarded a decree in favour of the plaintiffs for the cancellation of the lease; but then that decree could not have been executed, if, under the provisions of the 2nd para. of that section, the arrears of rent had been paid into Court within fifteen days from its date. In this case, it is not disputed that the arrears due under the decree of the 31st of May 1877 were deposited in Court as soon as the suit was brought. Therefore it is quite clear that, after the arrears were paid, there could not be a decree for cancellation of the lease, notwithstanding the express stipulation in the lease. It is contended before us that there is a distinction between this case and the Privy Council case quoted above, and the case decided by this Bench - *Mahomed Amir v. Dianut Ali* (9 C. L. R., 185): and the distinction pointed out is this, that, under the conditions of the lease in this case, the defendant would be entitled to get back the nuzarana. But so far as the point before us is concerned, it seems to us that that distinction is immaterial. The object of the rule of law laid down in s. 52, Act VIII of 1869, and also in the cases cited above, is to prevent forfeiture if the rent be paid; and a Court of Equity grants this relief against forfeiture, because it considers that it would be too hard upon the tenant if such a condition as this were strictly enforced. Having regard to the reason of the rule, we do not think the distinction pointed out would make any difference as to the applicability of s. 52. We think that the decision of the lower Court is correct and dismiss this appeal with costs.

- - -

Appeal dismissed.

NOTES.

[This was followed in (1882) 9 Cal. 808 · 12 C. L. R., 389.]

[9 Cal. 93]

[93] APPELLATE CIVIL.

The 17th June, 1882.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE BOSE.

Gya Persad, *alias* Lal Persad, and another.....Defendants*versus*

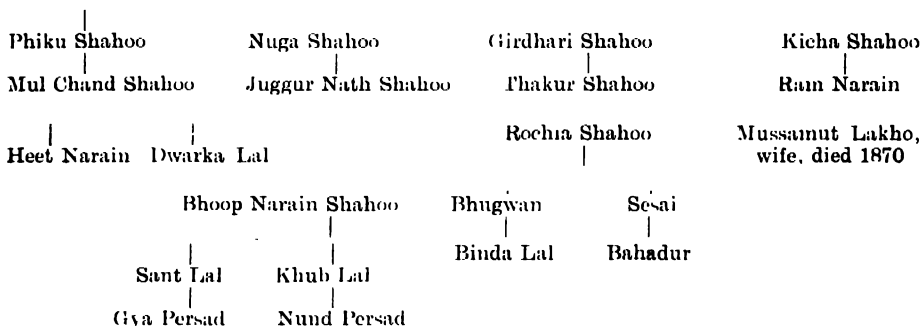
Heet Narain and others.....Plaintiffs.

Adverse possession—Limitation—Alienation by Hindu widow—Limitation Act (XV of 1877), sched. ii, art. 141.

A title by adverse possession for more than twelve years accrues even during the lifetime of a Hindu widow, but if possession arises directly from any invalid alienation on her part, special provision is made for the right to sue on the part of the reversioners within twelve years from her death and the accrual of their title.

THIS was a suit to recover possession of certain houses with mesne profits. The following genealogical table will show the relation of the parties :—

CHETAN SAHOO.



Two of the houses, numbered 3 and 6, had originally belonged to Ram Narain Sahoo, who died without issue in 1852, leaving Mussamut Lakho, his widow, him surviving; the remaining houses at that time were the property of Bhoop Narain Sahoo. In 1859, one Sheo Golam Bhagut obtained a decree against Bhoop Narain, and in 1862 the houses belonging to him were sold in execution of the decree and purchased by Sheo Golam, who subsequently sold them to one Sheo Narain Sahoo. On the 23rd of July 1863, Sheo Narain sold the houses to Mussamut Lakho, who paid for them out of moneys belonging to Ram Narain's [94] estate. After Ram Narain's death, his widow entered into possession of his estate, and made over the houses 3 and 6 to Bhoop Narain Sahoo as her reversionary heir, and waived her life-interest therein. Bhoop Narain remained in possession of the other houses. Mussamut Lakho died in 1870 without having obtained possession of any part of the property. The present suit was instituted in 1876 by Heet Narain Sahoo and Dwarka Lal Sahoo against Gya Pershad, Nund Pershad, Binda Lal and Sosai. The defendants pleaded that the suit was barred by limitation, on the ground that the plaintiffs' cause of action arose when Mussamut Lakho was dispossessed

* Appeal from Appellate Decree, No. 2090 of 1880, against the decree of J. F. Stevens, Esq., Officiating Judge of Sarun, dated the 29th July 1880, affirming the decree of Baboo Grish Chunder Chowdhry, First Subordinate Judge of that district, dated the 22nd July 1879.

or kept out of possession, which was more than twelve years from the date of suit. The Subordinate Judge held, that the time of limitation must be computed from the date of Mussamut Lakho's death, and that the suit was not barred. This decision was upheld by the District Judge.

The defendants appealed to the High Court.

Moonshee Mahomed Yusoof and *Baboo Roghunundan Pershad* for the Appellants.

Baboo Mohesh Chunder Chowdhry for the Respondents.

The **Judgment** of the Court (PRINSEP and BOSE, JJ.) was delivered by

Prinsep, J.—The sole point for our decision in this case is whether the suit is barred by limitation. The plaintiffs sued to recover certain property as having been bought in the name of Mussamut Lakho by Ram Narain Sahoo, and that, on the death of Lakho, they are entitled to succeed as her heirs. It appears that this property is now held by the heirs of Bhoop Narain Sahoo, who is a relative of both the plaintiffs and of Ram Narain, but subordinate as regards rights of inheritance to the plaintiffs. In April 1859, one Sheo Golam Bhagut obtained a decree against Bhoop Narain, in execution of which, in 1862, he sold the properties now in suit, Sheo Golam being himself the purchaser. He then sold his rights to one Sheo Narain Sahoo, who again, in July 1863, sold to Mussamut Lakho.

[95] In November 1865, Lakho applied to execute this decree and got possession of this property; but nothing resulted from this application, for, on the following June, it was struck off for default. In November 1870 Lakho died, and the present suit has been brought on the 9th of April 1876,—that is to say, nearly fifteen years from the date of original purchase.

It is contended by the defendants, appellants, that, inasmuch as neither Lakho, nor her husband Ram Narain, has, at any time, been in possession of this property, and as more than twelve years have passed since their right accrued, during which the previous proprietor Bhoop Narain and his sons have held possession, the present suit is barred. On the other hand, it is argued on behalf of the plaintiffs, that limitation would commence to run only from the death of Lakho Koor,—that is to say, from November 1870. The rule which has been followed by this Court seems to be that a title by adverse possession for more than twelve years accrues even during the lifetime of a Hindu widow, but if possession arises directly from any invalid alienation on her part, special provision is made for the right to sue on the part of the reversioners, within twelve years from her death and the accrual of their title. Under such circumstances we think that the plaintiff's claim is barred by limitation; but with regard to the houses 3 and 6, the suit is, on the defendants' own statement, not so barred; because they admit that she entered upon possession of these houses and made them over to the ancestors of the defendants as her reversionary heirs. Under such circumstances limitation would commence to run as against the plaintiffs only at her death. As regards these two houses, therefore, the order of the lower Appellate Court will be maintained, in other respects the order will be set aside. The plaintiffs will get possession of two-thirds of those two houses, Nos. 3 and 6. Costs in proportion.

Appeal allowed in part.

NOTES.

[HINDU WIDOW'S ESTATE—ALIENATION—LIMITATION]

This case is open to criticism upon the facts as reported. The statement of the law is correct, as then understood, and as to this, see the Notes to 8 Cal. 142; 11 Bom. 317 (319). The husband died in 1852 when he owned two houses and these two, the widow "made over to Bhoop Narain Sahoo as her reversionary heir and waived her life-interest therein" (p.94). Thus as regards this property there was an acceleration of the reversion and if so, the actual reversioner at her death would have no right of suit. The other point, as regards limitation, which had commenced to run even before her purchase during widowhood is correctly decided.]

[11 C.L.R. 423]

[96] CRIMINAL MOTION.

The 6th July, 1882.

PRESENT :

MR. JUSTICE MACLEAN AND MR. JUSTICE MACPHERSON.

In the matter of the Petition of Havalдар Roy and another

Havalдар Roy and another

versus

Jagu Mean.

Appeal from decision of Bench of Magistrates—Summary Procedure—Criminal Procedure Code (Act X of 1872), chap. xxvii.

No appeal lies to a District Magistrate from the decision of a Bench of Magistrates composed of an Assistant Magistrate with second class powers and two or more Honorary Magistrates, in a case tried under chap. xxvii of the Criminal Procedure Code.

Mr. M. M. Ghose for the Petitioners.

Mr. Kilby for the Opposite party.

THE facts of this case sufficiently appear from the **Judgment** of the Court (MACLEAN and MACPHERSON, JJ.), which was delivered by

Maclean, J. The petitioners were tried before a Bench of Magistrates at Jugdespore on a charge of an offence under s. 352. The Bench was composed of an Assistant Magistrate with second class powers and three Honorary Magistrates. The former and two of the latter signed the judgment convicting the petitioners, and sentencing them to pay a fine of Rs. 5 each.

An appeal was preferred to the District Magistrate, who dismissed the appeal of Wahid Ali and enhanced the sentence of Havalдар Roy by addition of two months' rigorous imprisonment.

On motion made by counsel, the proceedings have been sent for and counsel heard on both sides. The first question for our decision is whether any appeal lay to the District Magistrate. This question is raised on behalf of the appellants [97] themselves. In fact, they now assert that their appeal was improperly lodged. Had the sentence not been enhanced, we should not have entertained this objection. The case was tried under the summary procedure (chap. xviii), and if the Bench was invested with first class powers, there would be no appeal: see s. 274 of the Code of Criminal Procedure. Under para. 1 of Government Orders published in *Calcutta Gazette*, 1873, pages 17 and 662, any Bench of two or more Honorary Magistrates, sitting with a salaried Magistrate exercising not less than second class powers, is vested with first class powers. The case before us was, therefore, tried by a Bench vested with first class powers under that rule. The Deputy Legal Remembrancer has laid before us some orders of Government dated 31st March 1882, modifying other orders dated 31st January 1878, relating to the constitution of Benches in Shahabad. As to the orders of 31st January 1878, we have no information. Those of 31st

* Criminal Motion No. 169 of 1882, against the order of the Jugdespore Bench of Magistrates (provided over by Mr. T. Inglis), Assistant Magistrate of Shahabad, dated the 22nd April 1882.

March 1882 justify us in holding that the Jugdespore Bench under the presidency of a Magistrate (salaried) exercising second class powers, has jurisdiction to try all cases under s. 222 of the Code of Criminal Procedure,—that is, cases triable summarily by a first class Magistrate.

We think, therefore, that the District Magistrate was not competent to hear an appeal against the sentence of the Bench, dated 22nd April 1882. We accordingly set aside the order of 3rd May directing that Havaldar Roy be imprisoned for two months. Counsel for the petitioners does not press his case as to the order of the 22nd April, with which, therefore, we do not interfere.

Order set aside.

[12 C.L.R. 316]

[98] APPELLATE CIVIL

The 29th June, 1882.

PRESENT :

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

Beepen Chunder Shiekdar and others.....Judgment-debtors
versus

Purreshnath Biswas and others.....Decree-holders.

*Sale in execution of decree —Irregularity —Substantial injury — Civil
Procedure Code (Act X of 1877), s. 293.*

At a sale in execution of a decree the property was knocked down to a bidder at Rs. 260. The bidder was unable to make a deposit, and the property was immediately put up for sale and re-sold for Rs. 50. *Held*, that the judgment-debtor had sustained such substantial injury as would justify the Court in setting aside the sale, notwithstanding that the judgment-debtor might, under s. 293 of the Civil Procedure Code, have recovered the difference between the original bid and the price at which the property was sold.

Baboo Issur Chunder Chuckerbutty for the Appellants.

Baboo Kabi Churn Banerjee for the Respondents.

THE facts of this case sufficiently appear from the **Judgment** of the Court (McDONELL and FIELD, JJ.), which was delivered by

Field, J. —This is an appeal against an order of the Munsif refusing to set aside a sale. The application to set aside the sale was made on the ground that there had been substantial irregularity in publishing the sale-proclamation, and that the judgment-debtor in consequence of such irregularity, sustained substantial injury. The irregularity is said to consist in this, that the sale-proclamation was not published in the village. Three of the persons, whose names were inserted in the peon's report as having been present when the sale-proclamation was published, were called on the part of the judgment-debtor, and they denied that any sale-proclamation had been published in their presence. The other witnesses to the publication of the sale-proclamation were not called on behalf of the decree-holder; and [99] there is in fact no evidence to show that the sale-proclamation was

* Appeal from Original Order, No. 41 of 1882, against the order of Moulvi Mahabbat Ali, First Munsif of Goalundo in Furreedpore, dated the 15th December 1881.

published, and no evidence to rebut the testimony given by the above three witnesses. Under these circumstances, we must hold that the sale-proclamation was not published according to law.

Then as to the question of substantial injury, the Munsif, assuming the value of the property to be not more than Rs. 175, argues that the judgment-debtor sustained no substantial injury, because when the property was put up for sale, it was knocked down upon a bid of Rs. 260. In consequence of no deposit being made by the person who had made this bid, the property was immediately put up again and sold. The Munsif thinks that, because the judgment-debtor might, under the provisions of s. 293 of the Code of Civil Procedure, have recovered the difference between Rs. 260, the amount of that bid, and Rs. 50, the sum for which the property was ultimately sold, he cannot be said to have sustained substantial injury. This assumes that the property was sold for Rs. 260 at the sale, which was sought to be set aside. We think the Munsif was not justified in assuming this. It might be quite possible that the person who made this bid was a man of straw, and that the difference could never have been recovered from him. At any rate, under the provisions of s. 293, the judgment-creditor (as well as the judgment-debtor) could have applied to realize this difference; and, if he had succeeded in doing so, he would have deprived the debtor of the argument that he had sustained substantial injury. We think it would not be equitable to say that the judgment-debtor was bound to realize this difference, and that until he had tried to do so, or succeeded in doing so, the amount for which the sale was really effected ought to be taken to be the amount of this first bid, and not the amount for which the property was actually sold. There is evidence that the property was worth Rs. 175. There is no evidence that it was fairly valued at Rs. 50, for which amount it was sold at the sale sought to be set aside; and, under these circumstances, we think that the judgment-debtor did sustain substantial injury. We, therefore, reverse the Munsif's decree and set aside the sale with costs.

Appeal allowed.

NOTES.

[SALE—DEPOSIT—

As to when the sale is concluded, see also (1912) 35 All. 65; (1911) 15 C. W. N. 350.

As regard, the consequences of a failure to make the deposit upon the sale itself, see also 16 Cal. 33; 14 Mad. 227; 28 All. 233 (*contra*, 39 All. 273).]

[100] APPELLATE CIVIL.

The 20th June, 1882.

PRESENT:

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Wazir Mahton and another.....Judgment-debtors

versus

Lulit Sing and another.....Decree-holders.*

*Execution---Limitation Act (XIV of 1877), sch. ii, art. 179,
para. 2—"Appellate Court."*

The meaning of paragraph 2 to art. 179 † of the second schedule of Act XV of 1877 is, that, where there has been an appeal, the period of limitation is to run from the date when the Court to which that appeal has been preferred passes an order disposing of the appeal.

The words "Appellate Court" signify the Court or Courts to which the appeal, mentioned in the article, has been preferred.

THIS was an application for execution of a decree. It appeared that, on the 19th December 1877, the plaintiffs (decree-holders) obtained a decree against the defendants in accordance with an arbitration award. The defendants, pending suit, deposited a sum of Rs. 140 in Court in satisfaction of this decree; and afterwards applied to have the judgment set aside on review. Their application being rejected, they then appealed to the District Judge against the decree of the 19th December 1877. The District Judge dismissed the appeal on the 10th May 1879, and the judgment-debtors again appealed to the High Court. This appeal was, however, dismissed on the 12th March 1881.

The decree-holders, on the 23rd June 1881, applied for execution of their decree.

The judgment-debtors contended that the decree of the first Court having been passed in conformity with the award, no appeal would lie against it; and that, therefore, limitation ran from the date of the original decree, and not from the date of the final appeal from the decree; and that the plaintiffs should not be allowed costs and interest on the sum of Rs. 140 deposited in the Court. The Subordinate Judge of Patna held, that limitation ran from the final decree of the 12th March 1881, and that, therefore, the application was in time. He also held that [101] the plaintiffs were entitled to interest and costs on the Rs. 140, and disallowed both the objections.

* Appeal from Appellate Order, No. 5 of 1882, against the order of H. Beveridge, Esq., Judge of Patna, dated the 28th October 1881, confirming that of Baboo Paresch Nath, Banerjee, First Subordinate Judge of that district, dated the 3rd September 1881.

† [Art. 179:—

Description of application.	Period of limitation.	Time from which period begins to run.
For the execution of a decree or order of any Civil Court not provided for by No. 180 or by the Code of Civil Procedure, section 230.	Three years; or where a certified copy of the decree or order has been registered, six years.	(Where there has been an appeal the date of the final decree or order of the Appellate Court.)

The judgment-debtors appealed to the District Judge, who upheld the decision of the lower Court.

The judgment debtors appealed to the High Court.

Mr. *E. Twisdale* for the Appellants.

Baboo Saligram Singh for the Respondents.

The **Judgment** of the Court (MITTER and MACLEAN, JJ.) was delivered by

Mitter, J. Two objections have been urged against the decision of the lower Court. The first is that the application for execution is barred under art. 179 of sched. ii, Act XV of 1877. It appears that the decree of the first Court was passed on the 19th December 1877, in accordance with an arbitration award. An appeal was preferred by the defendants, against whom the decree was passed, they contended that the decree should not have been in accordance with the award. The Appellate Court, after entering into the objection raised by the defendants, came to the conclusion that no appeal lay against the decree of the first Court, because it was in accordance with the award of the arbitrators appointed in the case. There was a second appeal preferred by the defendants, and the Court upheld the view of the lower Appellate Court that there was no appeal. The judgment of this Court is dated the 12th March 1881. On the 22nd June 1881, the present application for execution of the decree was filed. It is contended that, under art. 179, the application being filed more than three years from the date of the decree of the 19th December 1877, is barred. We do not think that this contention is correct, because the 2nd para. of art. 179 says, "Where there has been an appeal, the date of the final decree or order of the Appellate Court,"—that is to say, where there has been an appeal, three years are to be counted from the date of the final decree or order of the Appellate Court. There is no question that in this case there was an appeal: although both the Appellate Courts held that [102] no appeal would lie. The case, therefore, comes within these words of art. 179, *viz.*, "where there has been an appeal." The next question is whether there is any decree or order of the Appellate Court. There were orders no doubt of the Courts to which the appeals were preferred rejecting the appeals on the ground that no appeal would lie. The words "Appellate Court," in our opinion, here mean the Court or Courts to which the appeals mentioned in the section have been preferred. The meaning of this clause, therefore, in our opinion, is, that where there has been an appeal, the period is to run from the date when the Court to which that appeal has been preferred passes an order disposing of the appeal. That being so, it is quite clear that the present application is within time. The second objection taken is this: It appears that the defendants, while the original suit was pending in the first Court, deposited Rs. 140, alleging that that was all that was due from them to the plaintiffs. The decree subsequently passed was for a larger amount. Then, in the petition for execution, the plaintiffs (decree-holders) calculate interest upon the whole of the amount decreed from the date of the decree to the date of the application. The defendants object, on the ground that the plaintiffs (decree-holders) were bound to take out the money which was deposited in Court immediately on the passing of the first decree, and that there was nothing to prevent the decree-holders from withdrawing this money from the Court then, and therefore, in calculating interest, this amount should have been deducted from the amount of the decree on the date of the decree. The learned pleader for the respondents fully admitted that this is a reasonable contention. We are also of that opinion. The decree-holders, therefore, in calculating the interest from the date of the decree should take the

amount decreed minus the amount deposited as the principal. With this modification in the decree of the lower Court we dismiss the appeal with costs.

As the appellants have failed in their main ground, they must pay the respondents the costs of this appeal.

Appeal modified.

NOTES.

LIMITATION ORDER IN APPEAL NATURE OF THE ORDER—

Even if the order be only *rejecting* the appeal (16 Cal. 250; 7 All. 887, *contra* 6 All. 438) or *abating* the appeal (1 C. L. J. 17n; *contra* 20 All. 124; 9 C. W. N. S. N. 67), the order is still the order of the Appellate Court within the Limitation Act, 1908, Art. 182; the present Act removes the difficulties which arise under the previous Act as regards *withdrawal* of appeal. See also (1906) 30 Mad. F.B. 16 M. L. J. 293 (291); 1 M. L. T. 233; (1902) 5 O. C. 143 (115).]

[103] CRIMINAL MOTION.

The 19th July, 1882.

PRESENT :

MR. JUSTICE WILSON AND MR. JUSTICE O'KINEALLY.

In the matter of the Petition of Prayag Singh and others.

The Empress

versus

Prayag Singh.

Jurisdiction—Protection of property Criminal Procedure

Code (Act X of 1872), s. 518.

A Magistrate has no jurisdiction to make an order under s. 518 of the Code of Criminal Procedure merely for the protection of property.

THIS was a motion to set aside an order of the Assistant Magistrate of Nawada, directing Prayag Singh and others to remove a bund, which they had erected across a stream called the Goukhana, and ordering that the water-course remain open until Prayag Singh and others should establish their right to close it in the Civil Court. The matter had been referred to the Sub-Deputy Collector for investigation and report, and his statement of the facts was as follows:—"The real facts of the case are, that there is a stream called Goukhana, which, issuing from the *Chur* of Haswa, passes through Panchor, Bugoor Bayra, Sukra, and Kahooara, and falls into the River Dhanarje. About a chain above the boundary of the Government estate Sukra, a *pyne* from the village Mea Bigha joins on to this stream. As the *pyne* of Mea Bigha is a little higher than the bottom of the stream, it requires a deal of deepening to take a sufficient quantity of water to the village Mea Bigha. But the maliks of Mea Bigha, instead of deepening their own *pyne*, placed in September last a dam across the main stream to take the water into their *pyne*. As this dam would not allow a drop of water to go to the Government

* Criminal Motion, No. 152 of 1882, against the order of E. N. Baker, Esq., Assistant Magistrate of Nawada, dated the 14th January 1882.

estate Sukra, and would injure the cultivation of that estate, the tohsceldar reported the matter to Mr. Shirecore, the then Sub-Divisional Officer, on the 28th September last, and an order was passed on the same day directing the maliks of Mea Bigha to remove the dam at once, or to [104] file objections if they had any. The maliks wrote in reply to the notice on the 30th September, that they would file objections within fifteen days, but they filed no objections, and the dam was cut open. They again, on the 11th December 1881, placed a dam across the main stream, and kept about a dozen of lathials to guard the dam, so that the Sukra men might not cut it open. The maliks of Mea Bigha admitted that they had placed the dam and pleaded justification alleging that the bund is a very old one, and that they have been preserving it for generations." Several witnesses were examined before the Sub-Deputy Collector, who came to the conclusion that the proprietors of Mea Bigha had no right whatever to maintain the bund. He then went on to say: "As for most of the lands so injuriously affected by the dam the ryots pay rent in money, I apprehend a serious breach of the peace if the dam is not removed. Under the circumstances I consider it essentially necessary that the defendants Prayag Singh and other maliks of Mea Bigha be directed under s. 518, Criminal Procedure Code, to cut open the dam at once, and not obstruct the main course of the stream more than a day or two in the week. The defendants may also, I think, be prosecuted under s. 430, Indian Penal Code, for causing mischief by placing a dam across the irrigation channel of Sukra, the consequence of which has been a serious damage to the agriculture of that estate."

On the strength of the Sub-Deputy Collector's investigation and report, together with a visit made by him to the place where the bund had been erected, the Assistant Magistrate made the order now sought to be quashed.

Baboo *Umbica Churn Bose* and Babu *Pran Nath Pundit* for the Petitioners.

The **Judgment** of the Court (WILSON and O'KINEALY, JJ.) was delivered by

Wilson, J. -The order of the Assistant Magistrate must be set aside as made without jurisdiction. The order under s. 518 can only be made when it is necessary to prevent obstruction, annoyance or injury to the person or injury to human life, [103] health, or safety or a riot or affray. Such an order cannot be made merely for the protection of property.

In the present case, taking the Assistant Magistrate's finding at the highest, it cannot amount to more than this, that the bund in question diminishes the supply of water to the land lying at a lower level.

Order quashed.

NOTES.

[To the same effect are the rulings in 13 C. W. N. 188 ; 8 C. W. N. 373. As regards the exercise of revisional powers, see also (1891) 19 Cal. 127 ; 21 Mad. 45 , 2 C. W. N. 572 ; 5 C. W. N. 329 ; 26 All. 141 ; Weir II, 94.]

[9 Cal. 105: 11 C. L. R. 125: 7 Ind. Jur. 254]

APPELLATE CIVIL.

The 1st June, 1882.

PRESENT :

MR. JUSTICE CUNNINGHAM AND MR. JUSTICE TOTTENHAM.

Laljee Lall.....Defendant

versus

Hardey Narain.....Plaintiffs.

Cause of action—Jurisdiction—Contract—Promissory Note—Place of performance—Code of Civil Procedure (Act X of 1877), s. 17, illus.

Where a promissory note is executed in one district, and it is agreed that the amount of the note shall be paid in another, the Courts of the latter district have jurisdiction to entertain a suit on the note.

The illustrations to s. 17 of the Code of Civil Procedure afford no safe guide as to what is meant in the Code by the term "cause of action."

Gopi Krishna Gossami v. Nil Komul Banerjee (13 B. L. R., 131; S.C., 22 W. R., 79), *Muhammad Abdul Kadar v. E. I. Railway Co.* (L. L. R., 1 Mad 377), and *Vaughan v. Welton* (L. R., 10 C. P., 48) followed.

IN this case the material portion of the judgment appealed from was as follows:—

"This is a suit to recover money due on a promissory note, dated the 3rd of October 1876. The defendant denies its genuineness, and contends that this Court has no jurisdiction to entertain this suit. The first point to be determined is, whether this Court has jurisdiction to entertain this suit. The facts stand thus:—The plaintiff is a banker in the district of Monghyr, where he has his principal place of business and his books of account; where he had, on other occasions, made payments for the defendant; and where, as an agent of the defendant, he paid [106] for him Government revenue, &c. But the note in suit was said to have been executed in the district of Durbhunga. No money was paid on it, it being in lieu of two others and for other sums due on other accounts. The plaintiff further contends—a contention which the defendant denies—that the defendant promised to pay the money at his central place of business at Monghyr. In this state of facts, and under the rule laid down in the case of *Gopi Krishna Gossami v. Nil Komul Banerjee* (13 B. L. R., 461; S.C., 22 W. R., 79), and *Lucknow Chaud v. Zorawar Mull* (8 Moore's I. A., 291), I think this Court has jurisdiction to entertain the suit. 'The practical rule as to jurisdiction,' says Mr. Justice MARKBY in the former case, 'which has gained the most general acceptance, is that which allows the plaintiff to bring the suit either in the Court of the place where the contract was made, or in that of the place where it was to be performed.' Where no place of performance is prescribed by the agreement, Mr. Justice BIRCH points out, 'what we have to look to is the intention of the parties. If from the surrounding facts and the acts of the parties we can ascertain what place was in their contemplation the place of performance, the Courts of that place have jurisdiction.' Here, beyond doubt, the contract was made at Durbhunga, but leaving

* Appeal from Original Decree, No. 263 of 1880, against the decree of Baboo Jogesh Chunder Mitter, Officiating Second Subordinate Judge of Bhagalpore, dated the 31st July 1880.

out of our consideration for a moment the alleged agreement of a payment at Monghyr, let us see what the intentions of the parties were. Here the plaintiff is a banker: his central place of business is at Monghyr, where he receives money due to him and pays what is due from him. The notes in lieu of which this note was executed were paid at Monghyr; other payments that were made for the defendant were also made at Monghyr. It was apparently an accidental circumstance that this note was executed at Durbhunga. The accounts of the defendant were kept by the plaintiff at Monghyr. The Government revenue that is paid by the plaintiff for the defendant is paid at Monghyr. These facts prove beyond the shadow of a doubt that the intended place of performance was at Monghyr. If again to those facts we add the presumption that the obligor is bound to seek the obligee and tender the money at the residence of the latter, I think there can be no reasonable doubt that the place of fulfilment thought of by the parties was at the plaintiff's banking firm at Monghyr. The plaintiff, however, goes further. He sets up an oral agreement, and proves by the evidence of his witnesses that it was specially agreed that the performance should be at Monghyr. Taking also the light afforded by the conduct of the parties as evidenced by the correspondence between them, that agreement seems to be probable, as otherwise the plaintiff could not have asked for payment at his own place of business."

The learned Judge then found that the note sued on was genuine, and decreed the plaintiff's claim, whereupon the defendant appealed to the High Court. The plaint, which was filed on the 17th of September 1879, described the defendant as a resident of the city of Durbhunga, and the note sued on ran as follows:—

"On adjustment of accounts as per former note-of-hand, and on account of payment of Government revenue, &c., the sum of Rs. 34,500 (thirty-four thousand and five hundred) is found due to you by me. I shall pay this amount, principal, with interest at 11 annas per cent. per mensem, within one year, and shall then take back this note-of-hand. For this purpose I execute this note-of-hand, that it may be of use when required. I acknowledge the note-of-hand for Rs. 34,500, which I have executed.

LALJEE LALL."

Mr. Branson and Baboo Chunder Madhub Ghose for the Appellant.

Mr. Evans, Baboo Mohesh Chunder Chowdhry, and Mr. Twisdale for the Respondent.

The following authorities were referred to:—For the appellant:—*Winter v. Way* (1 Mad. H. C., 200, Beng. Reg., II of 1803, and *Sieveling Droop & Co. v. Focke* (9 W. R., 215). For the respondent:—*Hills v. Clark* (14 B. L. R., 367), *Gopi Krishna Gossami v. Nil Komul Banerjee* (13 B. L. R., 461; s.c., 22 W. R., 79), *Hadjee Ismail v. Hadjee Mahomed* (13 B. L. R., 91), *Mulchand Joharimal v. [108] Suganchand Shirclus* (I. L. R., 1 Bom., 23), *De Souza v. Coles* (3 Mad. H. C., 384), and *Sami Ayyangar v. Gopal Ayyangar* (7 Mad. H. C., 176).

Cur. ad. vult.

The **Judgment** of the Court (CUNNINGHAM and TOTTENHAM, JJ.) was delivered by

Cunningham, J.—This action is brought on a promissory note made at Durbhunga in the Mozufferpore District, but payable (as the evidence appears to us sufficiently to prove that the parties intended) in the Monghyr district. A plea is raised to the jurisdiction of the Bhagalpore Court, on the ground

that the cause of action, within the meaning of s. 17 of the Code, did not arise within the local limits of its jurisdiction. This raises the question whether, when a contract is made in one place for fulfilment in another, a suit for the breach can, under s. 17 of the Code, be brought in the District where performance was intended to take place and the breach occurred, or whether the cause of action includes not only the breach on which the suit is brought, but the contract and other circumstances which, together with the breach, go to constitute the plaintiff's right to sue.

Conflicting decisions have been given by the English Courts as to the meaning of the corresponding words in the Common Law Procedure Act, 1852, s. 18, the latter of the two just mentioned views being taken in *Sichel v. Borch* (33 L. J., Ex., 179), *Althusen v. Malgorejo* (L. R., 3 Q. B., 310), and *Cherry v. Thomson* (L. R., 7 Q. B., 573); the former in *Jackson v. Spittal* (L. R., 5 C. P., 542), and ultimately by agreement in *Vaughan v. Weldon* (L. R., 10 C. P. 48).

On the Original Side of this Court the provisions in the Letters Patent enabling a suit to be brought, "with the leave of the Court," if the cause of action has arisen wholly or partially within the local jurisdiction, has been understood as suggesting the inference that "cause of action" means, for the purposes of suits on the Original Side, the contract as well as the breach: [109] and this view appears to have been taken on the Original Side of the Bombay, and until recently, of the Madras High Court: see *Sujan Chand Shydas v. Mulchand* (12 Bom., 123). But on the Appellate Side there are decisions which we consider binding upon us, under which the rule laid down has been that the cause of action may, for the purposes of giving local jurisdiction to a Mofussil Court, be deemed to arise at the place where performance ought to take place, and where the breach occurs, a construction which corresponds to that agreed to by the English Judges in *Vaughan v. Weldon* (L. R., 10 C. P. 48), adopting the decision of the Judges of the Common Pleas, in *Jackson v. Spittal* (L. R., 5 C. P., 542) as to cases under the Common Law Procedure Act, 1852.

In *Gopi Krishna Gossami v. Nil Komul Banerjee* (13 B. L. R., 461; s.c., 22 W. R., 79) a contract was made at Serampore, for certain transactions to be carried on in Calcutta, it agreeing to advance funds on condition of repayment with interest within a certain date. The money was paid partly in Serampore and partly in Calcutta. A suit was brought in the Hooghly Court for recovery of the balance of the sum advanced, and it was urged that, as the whole of the cause of action did not arise within the local jurisdiction, an action would not lie. MARKBY and BIRCH, J.J., held, that the action might be brought in the place where the money was to have been paid, referring to the decision of the Privy Council in *Lachmee Chund v. Zorawar Mull* (8 Moore's I. A., 291), in which it was held that the central place of business of the contracting firm, being the place where the books were kept, the accounts would have to be balanced, and the payment of the balance, if any, made, was the place where the plaintiff's action lay. This view was also taken by a Full Bench at Agra, *Prem Shook v. Bhakoo* (3 Agra, 242). The same view was adopted in *Hills v. Clark* (14 B. L. R., 367), where JACKSON, J., held that where a contract was made in Moorshedabad for seed to be delivered in Nuddea and to be paid for, on delivery, by an order to be sent to plaintiff at Moorshedabad on receipt of the goods, a suit for non payment would lie in the Moorshedabad [110] Court. In this case the authorities were considered and reliance appears to have been placed on the views expressed by HOLLOWAY, J., in *DeSouza v. Coles* (3 Mad., H. C., 384).

The same view was taken by MORGAN, C.J., and INNES, J., in *Sami Ayyangar v. Gopal Ayyangar* (7 Mad., H. C., 176). In that case the defendant executed in the Tanjore District a mortgage of land situated in the Trichinopoly District. In order to make it enforceable, the deed required registration in the Trichinopoly District. The suit was brought to compel the defendant to register, and it was held that though the contract was made in Tanjore, the cause of action had arisen in Trichinopoly, inasmuch as, from the nature of the act to be performed, it was the place of the fulfilment of the obligation. It is true that in this case the obligation on which the action was brought arose directly from a statutory requirement, instead of as in the case before us, from contract; but this does not in our opinion affect the application of the rule laid down.

In *Muhammad Abdul Kadar v. E. I. Railway Co.* (L. L. R., 1 Mad., 377), KERNAN and KINDERSLEY, JJ., adopted, even in a case on the Original Side of the Court, the rules laid down in *Gopi Krishna Gossami v. Nil Komul Benerjee* (13 B. L. R., 461; S.C., 22 W. R., 79), and *Vaughan v. Weldon* (L. R., 10 C. P., 48). We consider ourselves accordingly bound by authority, unless it can be shown that the state of the law has been altered by subsequent legislation. As to this it is contended that the illustrations given to s. 17 of the Code of Civil Procedure are to be read as adopting and sanctioning the view that the cause of action embraces the contract as well as the breach, and that, consequently, where the contract is made in one place and the performance is to take place in another, no local jurisdiction arises.

This is not in our opinion the proper inference to be drawn from the illustration. The Legislature has, in the Code of Civil Procedure, thought fit not to define "cause of action." This omission may have arisen from the circumstances that different views were held in different Courts on the point, and that the [111] framers of the Act did not consider it desirable on that occasion to lay down one uniform rule. At any rate, there is no definition of "cause of action," nor any illustration immediately directed to pointing out where the cause of action arises and where it does not. This being so, it appears to us that the illustrations are intended merely to illustrate the rules laid down in the section, 1st, that a suit may be brought either where the cause of action arose, or the defendant resides or carries on business; and 2nd, that where there are several defendants, the action may be brought either where the cause of action arose or any one of the defendants resides or carries on business, provided the leave of the Court be obtained or the other defendants acquiesce.

In both instances the illustrations appear to us to avoid the question as to what constituted "cause of action" by giving facts which, on any theory, would be held to constitute it: and the utmost that, in our opinion, can fairly be inferred from their language, is that there is no intention to show that the narrower definition is the one sanctioned by the Code. This, however, falls entirely short of laying down a rule on the subject, and leaves the matter where it previously was.

We therefore do not consider that the illustrations have modified the previously existing state of the law, and this being so, we are bound to follow the previous judgments of the Court, which appear to lay down the more convenient rule and to be sanctioned by the concurrence of several of the other High Courts and the resolution of the English Judges in *Vaughan v. Weldon* (L. R., 10 C. P., 48).

As to the question of the payments alleged by the defendant and the other points raised in appeal, we concur in the view taken by the original Court.

The appeal must, therefore, be dismissed with costs.

Appeal dismissed.

NOTES.

[JURISDICTION—CAUSE OF ACTION— WHERE IT ARISES—

In 1888, by the Civil Procedure Code Amendment Act VII of 1888, sec. 7, an explanation (III) was added to sec. 17, defining where the cause of action arose in respect of contracts. In the C. P. C. 1908, sec. 20, the explanation was omitted, as by clause (c) thereof suits may be instituted wherever the cause of action arose, whether *wholly or in part*. The lucid and exhaustive exposition of the subject, in *Hukm Chand on Civil Procedure* (1900), Vol. I, may be consulted, with reference to what is the place of performance; and what is the cause of action.

See also (1902) 25 All. 48 : 22 A. W. N. 179 ; (1890) 15 Bom. 93 : (1877) 11 Bom. 649 ; (1911) 34 All. 49 ; (1911) 16 C. W. N. 325 ; (1903) 32 Cal. 881 ; 146 , 31 Mad. 223.

Much of the value of those cases has been lost by the alteration in the C. P. C., 1908, above noted.]

[12 C.L.R. 41]

[112] APPELLATE CIVIL.

The 11th May, 1882.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE O'KINEALY.

Gauri Prosad KoondhooDecree-holder

versus

Reily.....Judgment-debtor.*

Execution of decree — Mesne profits how estimated— Amount stated in plaint — Estoppel.

When, in a suit for possession of land and mesne profits at a rate stated in the plaint, a decree is passed which directs that the amount of mesne profits be ascertained in execution of the decree, the plaintiff is not limited to the amount or rate stated in his plaint, though it may be used as evidence against him in favour of the defendant.

Baboojan Jha v. Bijnath Dutt Jha (I. L. R., 6 Cal. 172 ; S.C., 7 C. L. R., 539) explained.

THE facts of this case are fully set forth in the following judgment of the lower Appellate Court : —

“The first point raised by this appeal is, whether the appellant can recover mesne profits to an amount exceeding that claimed in his plaint and decreed to him. In the plaint mesne

* Appeal from Appellate Order, No. 306 of 1881, against the order of J. P. Bradbury, Esq., Officiating Judge of Furrceepore, dated the 18th August 1881, affirming the order of Baboo Kishna Nath Roy, Sudder Munsif of that district, dated the 14th August 1880.

profits are claimed for the period from Barsakh 1281 (April- May 1874) to the 6th of Choitro 1282 (18th March 1876), and their amount is declared to be Rs. 11-11 11, at the rate of Rs. 21-8-8 per annum. The Munsif decreed the plaintiff's (appellant's) claim to possession of 117 out of the 121 plots in suit, and that "the plaintiff do get wasilat from 1281 to this day (the 15th of September 1876 - 31st of Bhadro 1283), and the amount of wasilat is to be ascertained in execution of this decree." The decree of the Munsif was affirmed successively by the Judge and the High Court. In execution, the decree-holder seeks to recover mesne profits at the rate of Rs. 317 a year. The Munsif, on the authority of *Gooroo Doss Roy v. Bungshee Dhar Sen* (15 W. R., 61), which, as he observes, was a case precisely similar to the present, has refused to allow mesne profits at a rate in excess of that claimed in the plaint, and for the period subsequent to the 31st of Bhadro 1283 (15th of September 1876), and assessed the mesne profits payable under the decree at Rs. 52-8 0, with interest at 6 per cent. from the 16th of September 1876 until the 14th of August 1880, the date of such assessment. The aggregate thus awarded is Rs. 76-7-0. Unquestionably the cases of *Gooroo Doss Roy v. [113] Bungshee Dhar Sen* (15 W. R., 61), and *Baboojan Jha v. Byjnath Dutt Jha* (I.L.R. 6 Cal. 472; S.C., 7 C. L. R., 539) do lay down that the plaintiff, in the absence of special circumstances, cannot recover damages in the nature of mesne profits in excess of the sum claimed in the plaint; but the Munsif has awarded a sum in excess of that claimed by his decree. The claim was for a period terminating on the 6th of Choitro 1282 (18th of March 1876), whereas the Munsif decreed mesne profits up to and inclusive of the 31st of Bhadro 1283 (18th of September 1876). By a cross appeal, the respondent denies the appellant's right to mesne profits *in toto*, but that question is concluded by the affirmation of the Munsif's decree on a first and second appeal. That decree distinctly awards mesne profits up to the date of the decree. It is now settled that if the decree is silent on the subject of mesne profits subsequent to the date of the institution of the suit, the Court executing the decree cannot assess or give execution for such mesne profits: *Sadasiva Pillai v. Ramalinga Pillai* (15 B. L. R., P. C., 383). The same principle of the inability of the Court executing a decree to add to it precludes it from assessing or giving execution for mesne profits accruing due subsequently to the date of the decree, where the decree is silent on the point. The plaintiff, appellant, is, therefore, debarred from recovering in execution, mesne profits for the period beginning with the 1st A-shar 1283. His remedy is a separate suit.

"With regard to the period anterior to that date I conceive that he is bound by his own assessment of the mesne profits, as the Munsif has pointed out he has ample means of knowing or ascertaining their amount before action brought, and he estimated the amount at Rs. 21 odd annually. No special circumstances exempting him from the operation of the rule enumerated in *Gooroo Doss Roy v. Bungshee Dhar Sen* (15 W. R., 61), and *Baboojan Jha v. Byjnath Dutt Jha* (I.L.R. 6 Cal., 472; S.C., 7 C. L. R., 539) are suggested, much less proved; and I therefore uphold the Munsif's decision on the question of the annual rate at which the mesne profits are to be assessed. The respondent, in cross appeal, takes exception to the aggregate mesne profits awarded, on the ground that, having dismissed the appellant's claim to four of the plots in dispute the annual amount of mesne profits should be proportionately reduced; but I do not understand the High Court rulings I have quoted to go so far as to lay down that, in no instance, can the plaintiff recover in [114] excess of the rate claimed. In each of those cases the plaintiff recovered the full amount claimed, and in this instance the Munsif does not decide that the claim made in execution is groundless and exorbitant, but merely that, exceeding the amount laid down in the plaint, it cannot be awarded. The appellant is clearly entitled to recover at least the amount awarded to him. Had the amount been specified in the decree nothing in excess of the sum decreed could be recovered; but the Munsif having reserved the assessment of mesne profits for the execution of the decree, was, I conceive, competent to assess and award any sum not exceeding the aggregate of the annual rate declared in the plaint for the period for which the decree gave mesne profits.

"The respondent further contends that the Munsif ought not to have given interest on the mesne profits. The Munsif seems to have considered s. 211, Civil Procedure Code, as sanctioning the award of interest. At least he quotes that section and the explanation thereof, but its application is clearly confined to cases where the Court has provided in its decree for the payment of interest, which this decree did not do. I consider, however, that the appellant is entitled to interest independently of the express provisions of any Act, on the principle expounded in *Lachhy Narain v. Kally Paddo Banerjee* (I. L. R., 1 Cal., 882) and the authorities there cited, and that, whether the decree provides for such interest or not. In *Lachhy Narain v. Kally Paddo Banerjee* (I. L. R., 4 Cal., 882) the decree appears to have been silent on the subject of interest, which was nevertheless awarded. Finally, both the appellant and respondent appealed regarding costs. The Munsif disallowed the costs of both. I do not, however, comprehend why the plaintiff is not to get proportional costs. I am not prepared to say, and I do not understand the Munsif to say, that he has been guilty of fraud. He may yet succeed in recovering mesne profits at the higher rate for the period posterior to the 31st Bhadro 1283. I accordingly direct that the appellant do recover the costs of the enquiry into and ascertainment of the amount of mesne profits in the Court below. Such costs to bear the same proportion to the whole of the costs incurred by him as the amount of mesne profits awarded to him bears to that claimed. In the result I dismiss the cross-appeal of the respondent with costs."

The decree-holder appealed to the High Court.

Baboo *Girija Sunker Mozoomdar* for the Appellant.

Baboo *Kashi Kant Sen* for the Respondent.

[115] The **Judgment** of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

Prinsep, J.—The point we are called upon to decide in this appeal is, whether the plaintiff having stated the amount of mesne profits claimed at a certain sum of money, and the decree having directed the amount to be ascertained in execution, the plaintiff, decree-holder, is estopped from claiming any excess of the amount stated in his plaint.

As an authority for the affirmative of this proposition the case of *Baboojan Jha v. Byjnath Jha* (I.L.R., 6 Cal., 472; s.c., 7 C. L.R. 539) has been cited. We have consulted the learned Judges who passed that judgment, and we are authorized by them to state that they did not then intend to enunciate any general rule for adoption in such cases. We are therefore at liberty to deal with this case on its own merits.

It appears to us that—as stated by DWARKANATH MITTER, J., in the case of *Pearce Soonduree Dossee v. Eshan Chunder Bose* (16 W. R., 302).—the decision in the original suit having declared the amount of mesne profits should be determined in execution, the Courts are not precluded from varying or altering the decree in that suit. This was the conclusion arrived at by a Full Bench of this Court—*Mosoodun Lall v. Bheekare Singh* (6 W. R., Mis., 109) and affirmed by their Lordships of the Privy Council in numerous cases: see *Pillai v. Pillai* (I. L. R., 2 I. A., 219), *Forester v. Secretary of State for India* (I. L. R., 4 I. A., 137), *Gokuldass v. Murli* (I. L. R., 5 I. A., 78). We are, therefore, of opinion that, in executing such a decree as that now before us, the plaintiff is not estopped from proving that he is entitled to a larger sum as mesne profits than that claimed in his plaint. This is in accordance with s. 11 of the Court Fees Act, which declared that, in suits for mesne profits, or for immoveable property and for mesne profits, if the profits or the amount decreed are or is in excess of the profits claimed, the decree shall not be executed until the difference of fee has

been paid. It also appears to be the view adopted by their Lordships of the Privy Council in the case of [116] *Pakharuddin Mahomed Ahsan Chowdhry v. Official Trustee of Bengal* (L. R., 8 L. A., 197), for we find from an inspection of the record that the successful party obtained a larger sum as *masilat* than he had claimed in his plaint. At the same time, we would observe, that if it should appear that, in making his original claim for mesne profits, a plaintiff has special means of knowledge for determining the amount due, the judgment-debtor can fairly use as evidence against him his own statements embodied in his plaint. Applying this principle to the present case, we think that it must be remanded for reconsideration by the lower Appellate Court. Costs to abide the result.

Case remanded.

[9 Cal. 116: 12 C.L.R. 89]

APPELLATE CIVIL.

The 24th April, 1882.

PRESENT:

MR. JUSTICE CUNNINGHAM AND MR. JUSTICE TOTTENHAM.

Lukhynarain Chuttopadhyas.....Plaintiff

versus

Gorachand Gossamy.....Defendant.*

Special Appeal—Revenue Sale Law—Evidence—Registration - Common

Registry—Act XI of 1859, s. 39.

The fact that a tenure is registered in the Common Registry under Act XI of 1859, s. 39, is not of itself *prima facie* evidence that such a tenure exists.

In a suit for damages for trespass laid at a sum under Rs. 100, a special appeal will lie to the High Court if the title to the land trespassed upon has been raised in the Courts below.

THE facts of this case are fully set forth in the following judgment of the lower Appellate Court:—

“The circumstances in connection with the suit out of which this appeal has arisen are these: Asura Madhanpore and other mouzas formed a revenue-paying estate, and they were registered in the Collector's towji under two numbers, viz., 61 and 325, each of them representing a moiety of the estate. When the estate was advertised for sale on account of arrears of revenue, the plaintiff informed the Collector that he held the property in *inokurari* and was in possession, and prayed to have the sale stopped by offering to pay the arrears due.

[117] That application is dated the 1st of November 1878. The order of the Collector (Mr. Waller) runs as follows: ‘I cannot, as Collector, interfere. Applicant's remedy will lie in the Civil Court.’ That order was made on the 2nd November 1878. The plaintiff appealed to the Commissioner, and he was informed by a written notice, bearing date the 3rd December 1878, that his appeal had been rejected. In the meantime the property was sold on the 18th November 1878, and purchased by the defendant, who was put in possession by order of the Collector. After obtaining possession, the defendant collected rents from the tenants and took some fruits from the mango and jack trees. There could not, therefore,

* Appeal from Appellate Decree, No. 499 of 1881, against the decree of Baboo Brojendro Coommar Seal, Additional Judge of Bankura, dated the 30th December 1880, affirming the decree of Baboo Jogendro Nath Bose, Munsif of Gungajulghatty, dated the 15th October 1879.

be any mistake that the object of the defendant was to ignore the mokurari right of the plaintiff to the mouza if he had any. Under such circumstances a suit to have the mokurari right established would have been intelligible, but the plaintiff did not want to have such broad relief. His suit was peculiar in its nature. It was a suit to have his title to two mangoe trees and one jack tree, and to the land on which they stand, established, and to recover damages without applying for leave of the Court under s. 41 of the Procedure Code. He valued the land on which the three trees stood, at 1 anna and six pies, the value of the trees at Rs. 13, and the value of the fruits taken at Rs. 6, 10 annas; total value of the claim was Rs. 19, annas 11, pies 6. The defendant denied his liability to pay damage and put the plaintiff to the proof of the patta set up by him. The plaintiff offered no evidence to prove the patta, but showed that, in 1862, he had his tenure registered under the provisions of Act XI of 1859, and contended that he was, therefore, protected by the provisions of s. 37 of that Act.

"Now it ought to be observed, that the fact of a tenure having been registered under the sale-law does not show that the patta which is said to have been granted is proved. The procedure to be followed for getting a tenure under Act XI registered is laid down in s. 40. That section does not even impose upon the applicant for registration an obligation to file the patta before the Collector. It is just like an application for foreclosure of a mortgage. Because a mortgagee has applied for foreclosure, and the year of grace has expired, it does not follow that the mortgagee is to get a decree without proof of the mortgage when the truth of the deed is not admitted. If a tenure-holder is able to prove that the tenure was in existence, that it was actually created by the late proprietor, the fact of the registration would protect him; but if he fails to show that the tenure existed, the fact of his having registered the [118] existence of something which never existed, would not create a right which he never possessed. The patta put forward by him bears date the 29th of March 1855. It is, or purports to be, only twenty-six years old, so it has to be proved. The plaintiff made no attempt to prove it.

It has to be noted that the alleged lessor, by her petition of the 3rd January 1863 presented before the Settlement Authorities, appears to have distinctly denied having granted any such patta. The defendant distinctly alleged, in his written statement, that the father of the plaintiff was a servant under the employ of Raja Gopal Singh, the husband of the alleged lessor. There is, indeed, no evidence properly so called to show that he was the servant; but there is every reason to believe that he was so. My ground for believing it is this. The first court distinctly finds it in its judgment that the plaintiff's father was in the employ of Raja Gopal Singh. If it were not the fact, the appellant would have instructed his pleader to take exception to it most prominently in his memo of appeal; but the appellant did not even make the slightest suggestion in his petition of appeal that that finding was wrong.

The patta appears to direct the lessee to pay Rs. 10, annas 8 to the Collector as revenue, Rs. 4, annas 6 to one Ram Das, and Rs. 10 to the lessor herself. The plaintiff has not been able to file a single receipt to show payment of any portion of the rent to the lessee or to Ram Das. He has filed some receipts to show payment of revenue. But it is quite intelligible why, as a servant of the rani, his father should be the custodian of such receipts, and why he should, from time to time, collect rent as a servant of the raja. Everything turns upon the proof of the patta, and there is no proof whatever. The suit is, it ought to be remembered, to have a declaration that the plaintiff has a good title to the trees and the land on which they stand, and the basis of that title remains unproved. So far as possession is concerned, there is no proof that the plaintiff was in possession under his alleged patta. There is some evidence to show that his father sometimes collected rent, but that is not conclusive. He, as servant of the raja, would be the proper person to collect the rent. It is needless to enter into a discussion of the question as to whether the patta granted, as it purports to have been, by Rani Churamani would have created a valid title in plaintiff's favour if it had been proved."

Baboo *Bungshee Dhuur Sen* for the Appellant.

[119] Baboo *Umbuca Churn Bose* and Baboo *Kash Behary Ghose* for the Respondent.

The **Judgment** of the Court (CUNNINGHAM and TOTTENHAM, JJ.) was delivered by

Tottenham, J. A preliminary objection is taken by the respondent's pleader in this case, that no second appeal lies the subject of the suit being, as he submitted, one of the Small Cause Court class. For the appellant, however, it was contended, and, as we think, rightly contended, that the question of right to the land was raised by the plaintiff, and that the suit was treated by both the Courts below as one for title. We, therefore, hold that the appellant has a right to have the second appeal heard and the question of title decided.

The suit was brought against an auction-purchaser under Act XI of 1859 for an alleged trespass and damage done by him to the plaintiff by appropriating the fruit of certain trees said to be upon the plaintiff's mokurari tenure, which mokurari tenure is alleged to have been registered in the Common Register under Act XI of 1859. He, however, did not produce any further evidence of the existence of the tenure beyond filing a mokurari patta, and of that patta he adduced no proof.

For the appellant it is contended that the fact of registration under Act XI of 1859 is in itself *prima facie* proof of the existence of a tenure registered in the Common Register. We think that this is not so. If the tenure in this case had been specially registered, then, under s. 50 of the Act, entry in the Special Register would apparently have been *prima facie* good evidence of the existence of the tenure, but no such provision is made in the Act with regard to registration in the Common Register. It may be observed that, in any case in which a registered document is produced the fact of registration is not accepted as *prima facie* evidence of the genuineness of that document. It has to be proved independently. We see no reason to hold that the registration of a tenure in the Common Register under Act XI of 1859 relieves the person alleging such tenure of the necessity of proving its existence in the regular way. Section 37 of the Act provides, that certain [120] tenures, if registered, are protected from being set aside by auction-purchasers. The effect of this is, that a *bona fide* tenure actually proved is not protected unless it is registered. It does not provide that the registration of an alleged tenure will have the effect of proving it. We think, therefore, that the registration of the tenure alleged in this case is not a sufficient proof of the plaintiff's title.

The appellant's pleader, however, contended that there was further evidence in an admission by the lessor of the genuineness of the patta, such admission being contained in a petition made to the Collector at the time of the execution of the patta, or shortly afterwards, praying the Collector to enter the tenure in his books, and to hold the lessee responsible for a certain portion of the Government revenue. It turns out, however, that the petition here referred to is only a copy of the petition made, not by the lessor, but by a person calling himself the mooktear of the lessor. The petition, therefore, is of very little importance in this case, especially when we find that another petition made by the lessor before the Settlement Officer expressly repudiates any such patta as is now set up by the appellant.

It is unnecessary for us to go into the merits of the case, but we think that the lower Appellate Court was right, as a matter of law, in confirming the decision of the first Court.

The appeal is dismissed with costs.

Appeal dismissed.

[9 Cal 120]
APPELLATE CIVIL.

The 3rd May, 1882.

PRESENT :

MR. JUSTICE CUNNINGHAM AND MR. JUSTICE TOTTENHAM.

Bissorup Gossamy and others.....Plaintiffs

versus

Gorachand Gossamy and others.....Defendants.

*Suit for Possession—Co-defendants —Res judicata —Civil Procedure
Code (Act X of 1877) s. 13.*

A leased lands to B, who sued C for possession of a certain mauza, alleging it to be a portion of the lands leased. A was made a defendant, and supported the case of the plaintiff who obtained a decree. C appealed, making A and [121] B respondents, when the decree was reversed and the suit dismissed, on the ground that the mauza sued for was the property of C, and that ruling was upheld on special appeal to the High Court. Subsequently A brought a suit against C for the same mauza, making B a defendant.

Held, that the title to the mauza was *res judicata* between A and C, and that the suit would not lie.

Gobind Chunder Koondoo v. Taruck Chunder Bose (L. R. 3 Cal., 116) followed.

THE facts of this case, and the contentions raised by both parties, are fully set out in the judgment of the lower Appellate Court, which is as follows :—

“ The issue raised in the case is, whether the disputed land, which goes by the name of Bonkata, forms a part and parcel of Mauza Gossampur, or is it a separate mauza by itself distinct from Gossampur. The very same issue was raised in suit No. 393 of 1865, and it was found that there was no separate mauza by the name of Bonkata, comprising the land in dispute, but that it was part of Gossampur. The first Court has held, therefore, that the present suit is barred by the rule of s. 13 of the Civil Procedure Code. In appeal I have to see whether that view is correct or not.

“ The facts of suit No. 393 of 1865 have to be closely examined. In that suit, Monmohini Dabia was the plaintiff. She stated that she had taken a pathni of Mauza Bonkata on the 2nd of Pous 1271 (15th December 1864) from the plaintiffs in this case, and endeavoured to take possession on the 19th Pous 1271 (1st January 1865), but in consequence of the resistance offered by the defendants, she could not get possession. She, therefore, wanted to recover possession on an adjudication of her title. In that suit the plaintiffs in this case were made *pro forma* defendants. They filed a written statement supporting Monmohini. At the trial they produced documentary evidence in support of their allegation. The first Court, in its judgment, took notice of their document. It was found by the Munsif that Bonkata was a separate mauza, and the claim of Monmohini was decreed on the 31st of May 1866. In appeal, Monmohini and her lessors, the present plaintiffs, were respondents; and the defendants were the appellants. The Appellate Court took notice of the documents filed by the plaintiffs, but it came to a different conclusion, and the claim of Monmohini was dismissed, it being found that Bonkata was not a separate mauza, but that it formed part of Gossampur. That judgment bears date the 21th of September 1866. [122] It was confirmed in special appeal on the 28th of March 1867. The judgment of the High Court is not with the record.

* Appeal from Appellate Decree, No. 2235 of 1880, against the decree of Baboo Brojendro Coomar Seal, Additional Judge of Bankura, dated the 28th June 1880, affirming the decree of Baboo Jogendro Nath Bose, Munsif of Gungajulghatty, dated the 21st March 1879.

" In their plaint in the present suit, the plaintiffs say that they had made a permanent settlement of the mauza with one Dinobundhu Chatteropadhyaya in 1237, and were in possession through him; that Dinobundhu having failed to pay rent, they brought a suit against him, and in execution of the decree in that case entered into khas possession (when, it is not stated), and afterwards made a settlement of it with Monmohini Dabia on the 2nd Pousht 1271 (15th December 1861), and received rent from her up to the year 1274. Thus, though Monmohini never obtained possession of the property, and though it was finally settled by the High Court on the 28th of March 1867 (16th Chait 1273) that the plaintiffs were not entitled to get rent on account of this property, the plaintiffs say that Monmohini paid rent up to the year 1274. The first Court notices that Monmohini is the mother of plaintiff No. 5. These are the facts of case No. 393 of 1865, and the plaintiffs in the present case date their cause of action from the time that the judgment in Monmohini's case was confirmed by the High Court.

" The difference between the case of Monmohini and that of the plaintiffs is this, that whereas the property in dispute in the case of Monmohini was the patni interest, in this case it is the zamindary right which is the subject of dispute; but the issue which has to be decided in this case is the same which was raised in that case. In Case No. 393, the present plaintiffs occupied the position of *pro forma* defendants, it is true; but s. 13 of the Procedure Code does not appear to make any distinction between principal parties and *pro forma* parties. Throughout the Code there is no mention of *pro forma* parties. Parties or no parties, the plaintiffs were parties. Were they parties litigating under the same title? Monmohini litigated for herself and for the plaintiffs, and the plaintiffs supported her, and were parties. The right for which Monmohini contended was one in which the plaintiffs were interested. According to Explanation V of s. 13 and the Full Bench case of *Gobind Chunder Koondoo v. Taruck Chunder Bose* (4 L. R., 3 Cal., 116), section 13 appears to bar the plaintiffs. My attention has been drawn to the case of *Price v. Khelat Chunder Ghose* (13 W. R., 461). That case was decided in 1870, long before the Procedure Code of 1877 came into operation.

" The plaintiffs were *pro forma* defendants, and from their position as defendants it is stated that they could not join issue with the other [123] defendants. No doubt it was so, but every case has to be decided on its own merits. Monmohini, the plaintiff in that case, was the mother of plaintiff No. 5. The plaintiffs, if so disposed, might join Monmohini as plaintiffs, but they did not like to do so, and they were made *pro forma* defendants. As *pro forma* defendants they did not contend that they were not necessary parties to the case, but, on the other hand, supported Monmohini, and put in documentary evidence. In appeal, Monmohini and the present plaintiffs were respondents. So it was open to the plaintiffs to appeal to the High Court in the same way as Monmohini did, for they were interested in the issue that was tried in the same way as Monmohini was. There may be cases in which the position of *pro forma* defendants would not allow them to appeal, but suit No. 393 was not one of such cases. I agree with the first Court in holding that the issue which is raised in this case cannot be tried again. Without entering into the question as to whether the suit is barred by limitation, I dismiss the appeal with costs."

The plaintiffs appealed to the High Court, on the ground that the Court below was in error in holding that the present suit was barred under s. 13 of the Code of Civil Procedure.

Baboo Borkant Nath Dass for the Appellants.

Baboo Umbeca Churn Bose for the Respondents.

The **Judgment** of the Court (GUNNINGHAM and TOTTENHAM, JJ.) was delivered¹¹.

Cunningham, J.—In this case the plaintiffs sue for possession of certain land, described as Mauza Bonkata, on a declaration of their title thereto. They

allege that their ancestors obtained the entire Mauza Gossamipur and two drones of land transferred from the jami of Jugurnathpore; that these two drones were reclaimed and called Mauza Bonkata, and were let on mokurari lease to the father of the defendant Dinobundhu; that, on Dinobundhu's failure to pay rent, the land was resumed and let on patni to the 13th defendant Monmohini; that Monmohini sued the principal defendants for possession, and obtained a decree in the original Court, which was reversed in appeal and special appeal, 28th March 1867; that Mauza Bonkata [124] never did appertain to Mauza Gossamipur, and never belonged to the defendants. In that suit the present plaintiffs were joined as defendants.

The defendants contend, and the Courts below have held, that the suit is barred by s. 13 of Act X of 1877, inasmuch as the main issue in the case—*viz.*, the question whether the disputed land appertains to Mauza Bonkata and belongs to the plaintiffs,—has already been raised and adjudicated in a suit to which the present plaintiffs and defendants were parties,—*viz.*, the suit brought by Monmohini, the 13th defendant in the present suit, against (i) the present defendants and (ii) the present plaintiffs.

It appears that Monmohini is the mother of the 5th plaintiff in the present suit and that, in the former suit, the present plaintiffs, though formally joined as defendants, supported Monmohini's case and put in evidence in its support; and that, in appeal, Monmohini and the present plaintiffs were joined as respondents. In that appeal it was decided that the disputed land did not form a separate mauza, as Bonkata Mauza, but pertained to Gossamipur; and that the present plaintiffs not having any rights in it could not settle it with Monmohini.

The same issue is raised in the present suit; but it is contended that s. 13 does not apply, the matter not having been "in issue between the same parties," inasmuch as the present plaintiffs were co-defendants in that suit with the present principal defendants, and Monmohini, the present 13th defendant, was plaintiff.

We concur with the Courts below in thinking this contention unsound. The material point for deciding whether a matter has become *res judicata* under s. 13 is, whether it was directly and substantially in issue between the same parties and was finally decided. If the issue is clearly raised between the several parties to the suit and adjudicated, it matters not that the parties were marshalled in the one case differently from the other—*Gobind Chunder Koondoo v. Tarack Chunder Bose* (I. L. R., 3 Cal., 146). Here there can be no doubt, that though the present plaintiffs were joined as defendants in the former suit, they were practically supporting the case of the plaintiff and had the fullest [125] opportunity of contesting the point which that suit decided, a circumstance which is proved by their being joined as respondents in the appeal. In these circumstances, the plaintiffs are, in our opinion, debarred under s. 13 from now again contesting the same point with the parties to the former suit. The appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[RES JUDICATA—CO-DEFENDANTS—

In (1886) 12 Cal. 580, a Full Bench of the Calcutta High Court came to a different conclusion and practically overruled this case. Their main arguments were *firstly* that though the lessee claims under the lessor, the lessor does *not claim through* the lessee and

therefore is not bound by any decree in a suit the conduct of which is in the lessee's hands ; and *secondly* though made a defendant and thus a party to the suit, he, the lessor, was only a *pro forma* defendant, and took no active part in the suit.

These two arguments are not supportable. The former argument would be perfectly valid if the lessor had not been a party ; but in the case, he *was* made a party, as a matter of fact ; and it therefore ignores the *raison d'être* of his being a party.

The latter argument ignores the rule of '*might and ought*' laid down in the Explanations to the *Res judicata* section. The bar of *Res judicata* does not depend on the will and the conduct of the defendant with reference to the first suit.

The facts of the lessor having been a party to the first suit and of his having been *in the same interest* with the lessee will be sufficient. This is laid down by the Master of the Rolls (Sir JOHN LEACH) in the early English case of *Parquharson v. Seton* (1828) **5 Russel 45** (at 61-63). There the second mortgagee had sued the first mortgagee *inter alia* for getting the amount of the first mortgage debt declared at a certain sum ; and the mortgagor was a party thereto, and he supported the plaintiff. A decree was made, and there was an appeal by the first mortgagee, one of the defendants, but the mortgagor, the co-defendant, was not a party to this appeal, and *he was not even served with the notice of appeal*. In the subsequent suit by the mortgagor against the mortgagee he was held bound by the *decree of the appellate Court* fixing the debt at a certain sum. Sir JOHN LEACH M.R. observed, "The form of relief can make no difference in the *principle*, that the mortgagor *being a defendant in the suit in the same interest with the plaintiff*, the subsequent encumbrancer must be equally bound by the decree which establishes the amount of the debt of the first encumbrancer. It is argued that the plaintiff in the present case was not bound by the decree of the Privy Council (the appellate Court) because he was not served with the petition of appeal. I consider that it was not incumbent upon the appellant to serve him. The appeal was against a decree *obtained by the plaintiff*, with whom the appellant was to contest the validity of the decree, and if a defendant, *in the same interest with the plaintiff*, did not think proper to trust his interest to the sole conduct of the plaintiff, he should have applied to the Court, and have prayed that he might be admitted as a party to support the decree which permission would have been granted to him as of course."

It is possible to distinguish this case, as one of mortgage wherein all were said to be *necessary* parties ; but this has no force or validity, inasmuch as the bar of *res judicata* has been applied to intervenors who were not necessary parties.

The text-writers (*Hahn Chaud*, *Caspers*, on *Res judicata*) cite both the 9 Cal. and the 12 Cal. cases ; but there is no clear indication as to their opinion of the 12 Cal. case.

This subject is dealt with *in extenso* in the Notes to **12 Cal. 580** ; (which was followed in 6 C. P. L. R. 87 overruling 2 C. P. L. R. 52) and to 11 Bom. 216, in the **LAW REPORTS REPRINTS.**]

[9 Cal. 125]
APPELLATE CIVIL.

The 19th June, 1882.

PRESENT:

MR. JUSTICE PRINSEP AND MR. JUSTICE O'KINEALY.

Bhootnath Chatterjee.....Defendant

versus

Kedarnath Banerjee and others.....Plaintiffs.

*Suit for possession—Previous dispossession—Limitation—Adverse possession—
Evidence—Onus.*

In every suit for the recovery of land, on the allegation of previous dispossession by the defendant, the plaintiff must start his case by showing that, at some time within twelve years previous to the institution of the suit, he has been in possession of the land sued for.

Rajah Sahib Perhlad Sein v. Maharajah Rajender Kishore Singh (12 Moore's L. A., 337), *Dawkins v. Lord Penrhyn* (4 App. Cas. 51), and *Noyes v. Crawley* (10 Ch. D., 31, 36), cited.

THIS was a suit for the recovery of possession of four katas of land, on adjudication of rights thereto. The plaint alleged that the land in dispute (together with certain land adjoining, which is now the property of the defendant) formerly belonged to the plaintiffs' father; that the defendant purchased from the plaintiffs' father the land adjoining the land in dispute; and that he had, by falsely alleging that he had subsequently obtained the disputed land as a gift from the plaintiffs' father, got himself registered as the owner thereof under the provisions of Beng. Act VIII of 1876. The defence was, that the suit was barred by limitation, and that the plaintiffs' father had made a gift of the disputed land to the defendant. The Munsif [126] found that suit was barred by limitation, and he dismissed the plaintiffs' suit, though he found the story of the gift not proved. On appeal, the District Judge reversed this decision, on the ground that the land having admittedly belonged to the plaintiffs' father, and the defendant's allegation of gift having failed, the plaintiffs were entitled to a decree.

The defendant appealed to the High Court, on the ground that the District Judge should have determined the question whether the plaintiffs had been in possession at any time within twelve years previous to suit, and that he ought not to have thrown the onus as to adverse possession, in the first instance, on the defendant.

Baboo Opendar Chunder Bose for the Appellant.

Baboo Gopinath Mookerjee for the Respondents.

The **Judgment** of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

Prinsep, J.—This is one of the many cases that have recently been before the Courts arising out of the Land Registration Act. The defendant succeeded, as against the plaintiffs, in getting his name registered as in possession of four katas of land.

* Appeal from Appellate Decree, No. 591 of 1881, against the decree of J.F. Browne, Esq., Officiating Judge of the 21-Parganas, dated the 13th January 1881, reversing the decree of Baboo Prosunno Coomar Bose, Additional Munsif of Baroypore, dated the 24th March 1880.

The plaintiffs have brought the present suit to obtain possession by proof of title, alleging that the registration-proceedings were their cause of action,-- that is to say, as we understand it, that they were in possession up to the date on which those proceedings were taken. The defendant says, that he has been in possession for the last twenty-five years under a verbal gift made in his favour by one who is said to have been the plaintiff's ancestor.

Now the first point which the District Judge had to decide was whether, under such circumstances, the plaintiffs have proved that they were in possession of the land in dispute within twelve years from the institution of the suit. The possession set up by the plaintiffs is, that they excavated this land for the purpose of obtaining bricks, which were buried there. The Munsif found that this was false. The District Judge comes to no [127] very definite finding on this point, though, so far as we can learn his opinion, he seems to have thought that it was not true; but, that however that might be, the plaintiffs' real cause of action was the registration-proceedings. To make out his cause of action in a case of this kind, the plaintiff had to show the date on which he was dispossessed, that is to say, to show that either on the particular date on which he stated the dispossession to have taken place, or some other period within twelve years from the date of the institution of the suit, he was in possession of this land. As an authority for this view of the law we would refer to the judgment of the Privy Council in the case of *Rajah Sahib Perhlad Sen v. Maharajah Rajender Kishore Singh* (12 Moore's I. A., 337), *Dawkins v. Lord Penrhyn* (4 App. Cas., 51), and *Noyes v. Crawley* (10 Ch. D., 31, 36). In the present case, until the plaintiffs could show that their suit was not barred by limitation, that is to say, that they were in possession within twelve years from the date of the institution of the suit, -- they could not call upon the defendant to prove his title under the alleged verbal gift. We, therefore, remand this case to the lower Appellate Court, that it may re-try the appeal in accordance with the above observations. Costs to follow the result.

Case remanded.

NOTES.

[SUIT FOR POSSESSION ONUS --

In a suit for possession based on dispossession, the onus of proof is on the plaintiff to prove his prior possession within the period of limitation within Art. 112 of the Limitation Act:-- (1888) 16 Cal. 473; (1906) 10 C.W.N. 630 P. C.; (1892) 14 All. 193.

But such prior possession may be established by presumptions, such as those concerning continuity of ownership, joint ownership, derivative or representative ownership, constructive possession, *part possession* standing for the entirety, etc.-- (1883) 9 Cal. 744; (1902) 29 Cal. 518; 3 Cal. 796 P. C.; 19 Cal. 660; 12 Cal. 33; 11 C.W.N. 478. It will then be for the dispossessor to prove that his dispossession has been adverse and perfected by limitation (within Art. 114 of the Limitation Act).-- (1882) 14 Bom. 458, 462, explaining (1882) 5 All. 1 and 16 Cal. 473; 9 C.W.N. 89 P. C.; 36 Cal. 1.]

[9 Cal. 127]
APPELLATE CIVIL.

The 20th June, 1882.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE O'KINEALY.

Brojo Gobind Shaha..... Defendant

versus

Goluck Chunder Shaha, *alias* Goluck Shaha.....Plaintiff.

Stamp Act (I of 1879) -Stamp Duty- Hathchitta Evidence --
Acknowledgment.

An account in a *hathchitta*, showing advances of money made to, and part payment made by, the defendant, the whole amount being in the handwriting and signed by the defendant, is admissible in evidence without being stamped.

Brojender Coomar v. Bromonoge Chowdhrao (I.L.R., 1 Cal., 885; 3 C.L.R., 520) followed.

[128] THIS was a suit to recover the sum of Rs. 1,130, being the balance of a sum of money lent and advanced by the plaintiff to the defendant on the 6th of Bysack 1283 (17th of April 1876). The plaint stated that the defendant, "as evidence of that transaction, opened a hisab (or account) in a khata-book in favour of the plaintiff." This hisab is thus described by the Subordinate Judge: "The hisab is written in one of the pages of the khata-book. The words used there are exactly these 'Account (of money) due to Goluck Shaha by Brojo Gobind Shaha,' and below this is written the word 'Cr.' on the left side, and the word 'Dr.' on the right side, in the usual way. Beneath the word 'Dr.' are inserted the following words. 'The 6th Bysack. Cash received in person (1,250) twelve hundred and fifty, due by me, payable with interest at the rate of 1 rupee and 12 annas.' On the left side, under the word 'Cr.,' is entered a sum of Rs. 400, paid on two dates, and at the top is signed the name of Brojo Gobind Shaha, the defendant. But there is no time specified for the repayment of the money, nor are the names of witnesses therein." It was proved that the defendant had received the money, and that the hisab was throughout in his handwriting.

Previously to the institution of the suit, the hisab had been presented to the Collector for the purpose of being stamped on payment of a penalty; and this officer held, according to the decision in *Ferrier v. Ramkalpa Ghose* (23 W. R., 403), that the hisab, or account in question was one falling within the meaning of cl. ii, sched. ii, Act XVIII of 1869; that the omission to put on a stamp at first was not a material one; and that the document should be stamped with an 8-anna stamp. It was contended before the Subordinate Judge that the hisab was a promissory note; that, as such, it should have been stamped with a 1-anna stamp, that the action of the Collector was illegal under s. 20, Act XVIII of 1869; and that, therefore, the document must not be admitted in evidence, citing *Prosunonath Lahiree v. Tripoora Soondree Debia* (24 W., R., 88), *Ankur Chunder Roy Chowdhry v. Madhub Chunder Ghose* (21 W. R., 1).

Appeal from Appellate Decree, No. 1820 of 1880, against the decree of W. P. Mc Esq., Officiating Judge of Tippera, dated the 25th August 1880, affirming the decree of Baboo Kali Dass Dutt, Second Subordinate Judge of that district, dated the 6th August 1879,

Giridia Coomar Dutt [129] *Chowdhry v. Mohessur Bhattacharjee* (19 W. R., 246), and the Circular Order of the High Court, dated the 12th of May 1876, passed in accordance with para. 69 of the Circular Order of the Sudder Board, dated the 23rd of March of the same year. The Subordinate Judge overruled the contention, and gave the plaintiff a decree. On appeal, the Officiating Judge considered the document was a promissory note, but feeling bound by the decision in *Perrier v. Ramkatha Ghose* (23 W. R., 403), which he considered to be in point, he affirmed the decree of the Court below with costs. The defendant appealed to the High Court.

Mr. *Montgion* and *Baboo Sreenath Doss* for the Appellant.

Baboo Kali Mohun Dass for the Respondent.

The **Judgment** of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

Prinsep, J. It is contended before us in appeal that the document upon which the plaintiff sues is a "promissory note," and that being so, it should have been stamped, and that the Collector, at a subsequent period, was unable to order it to be stamped on payment of a penalty. It appears to us, however, that the document before us cannot be so regarded. It is exactly of the same nature as the document which forms the subject of the suit in the case of *Brogender Coomar v. Brohomoye Chowdhram* (I. L. R., 4 Cal., 885; 3 C. L. R., 520). In that case WHITE, J., in delivering the Judgment of the Court, expressed himself in the following terms: "Now, if any one of the entries in the *hatchitta* had stood alone, and had been intended by the parties to form an isolated entry in the book, it might have been contended with considerable force that it fell within the description of document mentioned in the 5th article as requiring a stamp. We think, however, that the entries cannot be detached from the account of which they form a part. That account has two sides to it, the one headed 'amount advanced,' and the other 'amount received.' The amount due varies from time to time, [130] and depends upon the relation of the amount advanced to the amount received. In the present case no sum is entered under the head of 'amount received,' but that is an accident and makes no difference in considering the question as to what is the nature of the document which is offered in evidence." The only difference between that case and the one now before us is, that, in the heading of the 'amount received,' there are two payments on the part of the debtor, amounting in all to Rs. 400. Being accordingly of opinion that the document in this case is not a "promissory note," we think that the judgment of the lower Appellate Court is correct and dismiss the appeal with costs.

Appeal dismissed.

NOTES.

[UNSTAMPED SIGNATURE IN HATCHITTA ACKNOWLEDGMENT--

See also (1878) 1 Cal. 885; (1887) 15 Cal. 162; (1912) 39 Cal. 789 16 C.W.N. 915 15 I. C. 279]

APPELLATE CIVIL.

The 14th June, 1882.

PRESENT :

MR. JUSTICE TOTTENHAM AND MR. JUSTICE O'KINEALY.

Ertaza Hossein and another... . Defendants

versus

Bany MistryPlaintiff."

Suit for possession - Previous dispossession - Limitation - Adverse possession -

Onus.

Where, in a suit for the recovery of land, based on title, the plaintiff alleges that he has been in possession of the land and was dispossessed therefrom by the defendant within twelve years prior to the institution of the suit, mere proof of such possession will not be sufficient to entitle the plaintiff to a decree.

Wise v. Amcerunnissa Khatoon (I. R., 7 I. A., 73) followed. *Kara Manji v. Khawas Nussio* (5 C. I. R., 278) disapproved.

IN this case the plaintiff alleged that, from a long time, he had a dwelling-house on six katas of land in Mouza Allygunge, the property of Juggunnath Sahoy and other proprietors; that the defendants dispossessed him of a portion in the month of November 1877; and he instituted the present suit on the 18th of March 1879, claiming an adjudication of his right to the land on the ground of long previous possession. The defence [131] was, that the land claimed was the defendants' land, and formed part of the defendants' Mauza of Hobeehpore. The Munsif gave the plaintiff a decree for the portion claimed. On appeal, the Subordinate Judge found that the defendants had dispossessed the plaintiff as alleged; that the plaintiff had not proved twelve years' possession prior to the act of dispossession; and he remanded the case to the lower Court in order that the Munsif should find on the evidence as it then stood, whether the disputed land formed part of Mauza Allygunge or of Mauza Hobeehpore. This the Munsif was unable to do, and the Appellate Court holding that the previous possession of the plaintiff threw upon the defendants the onus of showing title to the land, gave a decree in favour of the plaintiff, citing *Kara Manji v. Khawas Nussio* (5 C. I. R., 278). The defendants appealed to the High Court.

* Appeal from Appellate Decree, No. 318 of 1881, against the decree of Moulvi Hafez Abdool Kareem, Subordinate Judge of Bhagalpore, dated the 20th December 1880, affirming the decree of Moulvi Ameer Ally, Sudder Munsif of that District, dated the 12th September 1879.

The **Judgment** of the Court (TOTTENHAM and O'KINEALY, JJ.) was delivered by

Tottenham, J. We think that the judgment of the lower Appellate Court in this case cannot be supported.

The question in dispute was, whether the land belonged to the village of Allygunge or that of Hobeehpore. The plaintiff sued to recover it on the ground that it belonged to Allygunge; and that he held it under the proprietors of that Mauza, and for a long time. It, therefore, was incumbent upon him, in our opinion, to prove either that the land in fact belonged to Allygunge, or that he had enjoyed possession of it adversely to the defendants for at least twelve years. The proprietors of Allygunge were not parties to the suit. The proprietors of Hobeehpore were the defendants.

The lower Appellate Court found as a fact that the plaintiff had not made out twelve years' adverse possession. The Subordinate Judge, therefore, remanded the case to the Munsif for an enquiry as to which mauza the land belonged. The result was that the Munsif professed himself unable to determine that point. The Subordinate Judge agreed with him that upon the evidence, it was not possible to say to which mauza [132] the land belonged. But it must be observed that, by his remand order, the Subordinate Judge had precluded the parties from adducing evidence on the point which had to be determined. It does not follow, therefore, that if an opportunity of adducing all the evidence available had been given, there might not have been enough to enable both the Munsif and the Subordinate Judge himself to come to a decision upon the point. But the lower Appellate Court apparently thought it immaterial which mauza comprised the land in question, for it thought that it could decide in the plaintiff's favour upon the strength of a decision of a Division Bench of this Court in the case of *Kara Manji v. Khowaz Nussio* (5 C. L. R., 278). There it appears to have been held that a plaintiff having once established that he had been in possession and had been dispossessed, his possession was enough to prove his title *prima facie*, and to throw upon the other side the burden of proving a better title. In this case the Subordinate Judge found that the plaintiff had been in possession, and that he had been dispossessed, and he held, that mere possession was sufficient evidence of title, and it was for the other side to prove a better title. The defendants having failed to prove a better title, the Subordinate Judge confirmed the decree of the first Court. But the decision of this Court, to which the lower Appellate Court refers, is not in accordance with the decision of the Privy Council in the case of *Wise v. Ameerunnissa Khatoon* (L. R., 7 L. A., 73). Their Lordships quoted and approved of the observations made in the case before them by the Judges of this Court, to the effect that mere possession would not prove any title, and would not entitle a plaintiff to obtain a decree for recovery of possession excepting under the special Statute which entitles him to recover possession if the suit is brought within a certain time from the date of dispossession. But while we think that the decision of the lower Appellate Court cannot be sustained, we think also that the plaintiff is entitled to have the suit tried upon the real point in issue, namely, to which mauza the land in question belongs, to Allygunge or Hobeehpore; and for that purpose the case must go back to the first Court. We are also of opinion that the proprietors of Mauza Allygunge ought to be made parties to this suit. The Munsif should, therefore, issue a notice to them to show cause why they should not be made co-plaintiffs; and in case they refuse, he should make them defendants, so that the point in issue may be determined in their presence as well as in that of their adversaries, the proprietors of Hobeehpore,

who are already defendants. On their being made parties, the whole case will be re-opened. Costs will abide the result.

Case remanded.

NOTES.

[SUIT ON PREVIOUS POSSESSION --

This is an erroneous decision. See the Notes *supra* to 9 Cal. 39, which is a precisely similar case. See also 17 Cal. 256; 8 Bom. 371; 12 All. 16; 26 Cal. 579; 3 C.W.N. 158; 78 P. R. 1902; U B.R. (1892-1896), Vol. II 619; 12 C P.L.R. 59.

In a suit in ejectment, the rule is that the plaintiff must succeed on the strength of his own title. But it is enough if the title is established as against the defendant, and it need not be a title good against all the world: -- *Perry v. Chissold* (1907) P. C. 73. The right to possession of the plaintiff may arise (1) from previous possession and subsequent dis-possession, or (2) from title alone without previous possession, as in the case of the lessee suing the lessor; of the purchaser against the vendor, etc., or (3) such a right derived from such a person may have to be enforced against not only such person but against third parties in present possession.

The presumption in favour of possession applies in each of these cases. As regards its application to the first case, see the Notes to 9 Cal. 39 *supra*; as regards the second, the plaintiff must show a subsisting right to sue not barred by limitation; as regards the third, the plaintiff must begin and establish not only his title, but also the right to possession as against such third party. See as to onus, etc., Notes to 9 Cal. 125.]

[9 Cal. 133 : 11 C.L.R. 333]

APPELLATE CIVIL.

The 9th June, 1882.

PRESENT :

MR. JUSTICE TOTTENHAM AND MR. JUSTICE O'KINEALY.

Puddolabh Roy.....Defendant

versus

Rangopal Chatterjee and others.....Plaintiffs.*

Act XX of 1863, s. 14 Jurisdiction Leave to Sue-- Suit by Committee.

A committee appointed under Act XX of 1863 may, without leave of the Court previously obtained, sue their manager, or superintendent, for damages for misappropriation, and for an injunction. The provisions of Act XX of 1863, s. 14, do not apply to such suits by the committee themselves.

THIS was a suit, by the members of a committee appointed under Act XX of 1863, to obtain an injunction against the defendant, to restrain him from styling himself or acting as superintendent, or *paricha*, of the Sutiabadi Muth, and to recover from him a large sum of money on account of waste and misappropriation of the temple-funds committed by him. The facts of the case and the contentions raised on behalf of the defendant are fully set out

* Appeal from Appellate Decree, No. 1734 of 1880, against the decree of A. W. Cochrane, Esq., Officiating Judge of Cuttack, dated the 26th May 1880, confirming the decree of W. Wright, Esq., Subordinate Judge of that district, dated the 30th June 1879.

in the judgment of Mr. Justice TOTTENHAM. The suit, which was in respect of a temple of the description provided for in s. 3, Act XX of 1863, was instituted in the Court of the Subordinate Judge of Cuttack without the leave of the District Judge having been previously obtained. The Subordinate Judge refused to entertain the question of damages, no leave to sue having been obtained; but he granted the injunction prayed for, "with costs in proportion," citing *Chinna Ranganayagar v. Subbraya Mudali* (3 Mad. H. C. R., 334), *Janardhana Embrandi v. Palakal Kesava Embrandi* (3 Mad. H. C. R., 198), *Syed Amin Sahib v. Ibrahim Sahib* (4 Mad. H. C. R., 112), *L. Venkataswami v. Sadagopasamy Iyer* (4 Mad. H. C. R., 401), and distinguishing *Local Agents of Zillah Hooghly v. Kishanund Dunder* (S. D. A., 1848, pp. 253, 255). On appeal this decision was affirmed, and the appeal dismissed with costs. The defendant appealed to the High Court.

Mr. *Twisdale* for the Appellant.

Baboo *Hem Chunder Canerjee* and Baboo *Umbica Churn Bose* for the Respondents.

The **Judgment** of the Court (TOTTENHAM and O'KINEALY, JJ.) was delivered by

Tottenham, J. The plaintiffs in this suit stated that they were appointed a committee under Act XX of 1863 of the temple of the idol Gopinath. They said that the defendant was the highest officer in the temple appointed by the former local agents and confirmed by themselves, and that his duty was, under their supervision, to look after the *sheba* of the idol and to collect the rents, &c. They say that he became incompetent for the discharge of his duties and mismanaged affairs; and that, consequently, the committee dismissed him from office on the 15th November 1876. Notwithstanding his dismissal, the plaintiffs say, that the defendant continued exercising the same rights and enjoying the same perquisite, and so forth that he had during his incumbency as superintendent; and that he was causing waste of the property of the idol. They therefore brought a suit asking for an injunction against the defendant, directing him not to assume the official designation of the superintendent of the idol; not to exercise any authority over the property of the idol, and in short not to interfere in any way. They also ask for a decree for the sum of Rs. 1,882-9-6, which was the estimated loss sustained by the idol in consequence of [135] the defendant's improper exercise of authority subsequent to his dismissal; and they asked for the costs of their suit.

The defendant took various preliminary objections to the suit. He urged that the plaintiffs had not dismissed him, and that they were not competent to dismiss him under Act XX of 1863 except by a suit. He denied the alleged misappropriations and mismanagement; and with reference to that, he pleaded that the old local agents very judiciously decided that, after making provisions for the offerings better than what the idol had before, and after making arrangements for the *sheba* of the idol, he should take the balance of the profits as a remuneration for his labour. That order, he said, was final; and, in the last paragraph of his written statement, he alleged that the idol in question was his ancestral family god; that the debutter properties were given by his ancestor; and that he has the right and full power to manage the *sheba* and to spend money.

At the trial in the Subordinate Judge's Court an objection was taken that the suit would not lie in that Court at all; that, supposing that the endowment comes under Act XX of 1863, such a suit could only be brought in the

Court of the District Judge, and by his permission. The Subordinate Judge held that the suit would lie in his Court, and did not require the sanction of the District Judge, so far as the prayer for an injunction was concerned; and as regards the sum claimed as damages, the Subordinate Judge found, *first*, that there was no proof of any such misappropriation as the defendant was charged with, and *secondly*, that, if there had been any proof of that, a suit would not lie without the sanction of the District Judge in respect of that claim. The result was that the Court gave a decree for the injunction only, with costs of suit in proportion. The defendant appealed to the District Judge and took the same grounds, —*viz.*, that the suit is bad in law as having been brought in the wrong Court, and without the necessary sanction. He did not very clearly take the objection that this property did not come under the operation of Act XX of 1863, but he did say that the committee had no power to dismiss him; and in appeal before us it was contended that that objection was broad enough to cover the objection that the endowment [136] did not come under that Act. But we may observe that the very point of his objection was based upon the assumption that the case would come under the Act. Unless Act XX of 1863 governed the endowment, his objection that a suit in respect of it would not lie, and that if a suit did lie it should be brought in the Court of the District Judge, would have no possible foundation. The District Judge confirmed the decree of the first Court, both as to the injunction and as to costs.

In appeal before us four points are pressed upon our attention: *first*, that the suit would not lie in the Subordinate Judge's Court, but only in the District Judge's Court, under the Act; and that, as the first Court found that one portion of the claim was bad for the reason that it was brought in the wrong Court and without sanction, the whole suit should have been dismissed; *secondly*, it was contended that the endowment was not a public endowment at all, and that the committee under Act XX of 1863 had no power to deal with it or with the defendant; *thirdly*, it was contended that the decree was bad, because while it prohibited the defendant from continuing the management of the service of the idol, it made no provision for anybody else to do so; and *lastly*, it was objected that the order as to costs was wrong. As to the third objection, *viz.*, as to the effect of the decree, we think it unnecessary to discuss that point at any length, because it does not seem to us to be competent to the appellant to object to the decree on that ground. If it was right so far as the injunction against himself goes, it does not matter to him who succeeds him, or whether anybody is appointed or not.

On the first point, *viz.*, as to the jurisdiction of the Subordinate Judge to try the case, we think, upon the construction which we put upon the act, and looking to the authorities on the subject, that there is no doubt whatever that this suit was properly brought in the Subordinate Judge's Court, and that it did not require the sanction of anybody. The section relied upon by the appellant is s. 14. We think that that section is merely an enabling section intended to allow suits to be brought by any person interested in the endowment, against the members of the committee themselves or any of those who are engaged in managing or superintending the affairs of the [137] endowment. We think that it was not intended by that section to take from the committee the power which would be inherent in them of their own authority to bring a suit in the ordinary Court against the manager in respect of moneys misapplied. We have been referred to various cases which fully support the opinion we have formed. On this point, therefore, we think that the appeal fails.

Then as to the question whether the endowment is a public endowment within the scope of Act XX of 1863, or whether it was the private property of the defendant, we have been asked to remand the case for the trial of this point, or else to say that, as the original defendant is now dead, and the point was not clearly raised and decided in the Courts below, there is no binding decision upon that point, and that it remains open for future litigation.

We think we ought not to assent to this course, because we think that the original defendant, who was the person to raise the issue, and to insist on having it tried out, if he thought fit to do so, did not really in his written statement contest the fact that the endowment was governed by s. 3 or 4, as the case may be, of Act XX. We find in various portions of his written statement that he expressly admits that he has been acting as superintendent appointed by the committee under Act XX, and by the local agents before them. In paragraph 12 especially, he expressly states that he was allowed by the previous local agents to appropriate to himself, as remuneration for his labour, the balance that remained after providing for the *sheba* of the idol; and at the trial he produced a proceeding of the Deputy Collector of the year 1846, and a proceeding of the Commissioner of the year 1859, which clearly set out that he was appointed by the Collector as local agent. We think, therefore, that it is much too late, and it was too late even at the commencement of the suit, for the defendant to pretend that he was independent of Act XX of 1863, and we must, therefore, disallow this point of the appeal.

The only matter as to which we think that the defendant has ground for complaint is as to the matter of costs; in that, while he has been saddled with the costs of the suit so far as it was [138] decided against him, he has not been awarded costs on the amount as to which the suit was dismissed. The suit was mainly brought for an injunction against the defendant. That he got, but, besides that, the plaintiffs claimed a considerable sum, nearly Rs. 2,000, as damages; and that part of the claim was dismissed. The order of the Court below was not, as the appellant appears to imagine, that he should pay costs to the plaintiffs on the whole amount of the plaint.

The order was that costs should be given in proportion.

Accordingly we find in the schedule of costs only Rs. 10 were paid in as the stamp-fee for the plaint, but Rs. 80 have been allowed as pleader's fees. Nothing has been allowed to the defendant in respect of the large portion of the claim which was dismissed. The Courts below have given no reason for departing from the usual rule in such cases, and it may probably have been by an oversight that they made no order for the defendant to get his share of the costs.

We think it right to amend the decree by saying that the parties will get their costs in proportion to their success respectively. The costs of this appeal will follow the same.

Appeal dismissed.

NOTES.

[See *Ganapati Iyer's Religious Endowments* (1905), First Edn., pp. 45, 135, 136.]

[9 Cal. 138 : 7 Ind. Jur. 256]

APPELLATE CIVIL.

The 6th June, 1882.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE
McDONELL.

Yusuf Ali and others..... Plaintiffs

versus

The Collector of Tippera.....Defendant.*

Mahomedan law -- Gift, Requisites of—Gift in futuro.

Under the Mahomedan law a gift is not valid unless it is accompanied by possession, nor can it be made to take effect at any future definite period.

A document, containing the words "I have executed an ikrar to this effect, that, so long as I live, I shall enjoy and possess the properties, and that I shall not sell or make gift to any one : but, after my death, you will be the owner, and also have a right to sell or to make a gift after my death," held, to be an ordinary gift of property 'in futuro,' and as such invalid under Mahomedan law.

[139] THE facts found on remand in this case, after the hearing on appeal to the High Court, were as follows :—

That one Bhani Bebi held an absolute interest in certain properties given by her husband and in other properties which she had acquired by purchase out of funds allowed to her by him ; and that she, being childless, out of natural love and affection, agreed to, and on the 19th Bhadro 1253 (3rd September 1846) entered into an ikrar, under which she took a life-interest in these properties only, the remaining interest going to one Asfunnissa, another wife of Buksh Ali, the mother of the defendant ; the words used being "I have executed an ikrar to this effect, that, so long as I live, I shall enjoy and possess the properties, and that I shall not sell or make gift to any one ; but, after my death, you will be the owner, and also have a right to sell or to make gift after my death ;" that this ikrar was duly executed by Bhani Bebi, and was explained to her, and that there was absolutely no trace of fraud in the transaction. The defendant, who was a lunatic, was represented by the Collector of Tippera.

This ikrar was impugned by the plaintiffs, who were the brothers and sisters of Bhani Bebi, and they disputed the order of the Collector, who had ordered the defendant to be registered as proprietor of the properties.

The point on which the case turned on appeal before the High Court was, whether such a voluntary relinquishment of her property on the part of Bhani Bebi was valid under the Mahomedan law.

Mr. Ghose (with him Mr. Amir Ali and Moonshee Serajul Islam) for the plaintiffs contended that the ikrar was invalid, as under the general rule of Mahomedan law, any gift to be valid must be accompanied by immediate delivery of possession, *see* Chap. V of Macnaghten's Mahomedan law, p. 50, and Baillie's Digest of Mahomedan law, p. 250, 2nd Edn. ; and that a gift cannot be postponed so as to make it take effect at any future definite period—*Rajah Syud Enaet Hossein v. Ranee Roshan Jahan* (5 W. R., 4), and on appeal, *Khajoo-*

* Appeal from Appellate Decree, No. 1294 of 1879, against the decree of J.C. Geddes Esq., Officiating Judge of Comilla in Tippera, dated the 10th March 1879, reversing the decree of Baboo Umachurn Kastogiri, First Subordinate Judge of that District, dated the 28th June 1877.

roonissa v. Roushan Jehan (I. L. R., 2 Cal., 184). [140] As to immediate delivery of possession, see *Abedoonissa Khatoon v. Ameroonissa Khatoon* (9 W. R., 257), *Obedur Reza v. Mahomed Muneer* (16 W. R., 88), *Gulam Jafar v. Masludin* [I. L. R., 5 Bomb., 238 (242)], and *Khader Hussain Sahib v. Hussain Begum Sahiba* (5 Mad. H. C. Rep., 114). The case relied on by the other side will be *Nawab Umjad Ally Khan v. Mussamut Mohumdee Begum* (11 Moore's I. A., 517), but the present case cannot be governed by it. The case of *Jeswant Singjee Ubby Singjee v. Jet Singjee Ubby Singjee* (3 Moore's I. A., 245), cannot be distinguished from the present case, and it was before the Privy Council at the trial of the case of *Nawab Umjad Ally Khan v. Mussamut Mohumdee Begum* (11 Moore's I. A., 517). The Privy Council did not intend, in the case of *Nawab Umjad Ally Khan v. Mussamut Mohumdee Begum* (11 Moore's I. A., 517), to depart from the rule laid down in the case of *Jeswant Singjee Ubby Singjee v. Jet Singjee Ubby Singjee* (3 Moore's I. A., 245). This *ikrar* is not a testamentary disposition; the legatee has not enjoyed possession, and there is no consent of the heirs; the donee in this case predeceased the donor. The Mahomedan law does not contemplate any other kind of disposition than a gift and a testamentary disposition. To show that the Mahomedan law is applicable, see the case of *Zohorooddeen Sirdar v. Baharoolah Sircar* (W. R. for 1861, p. 185).

The Officiating Advocate-General (Mr. Phillips, with him Bahoo Anoda Pershad Bawerjee) for the Respondent. I submit the deed was a kind of family arrangement, and is not in any way governed by Mahomedan law. It is not in form or substance a gift; it is merely a definition as to what the wife's status was to be. It does not come within the definition of 'gift' according to the Mahomedan law, and if so, the Mahomedan law is not applicable. There are a number of cases which are not contemplated by Mahomedan law, such as trusts, &c.; but they are valid nevertheless. The case cited—*Zohoorooddeen Sirdar v. Baharoolah Sircar* (W. R. for 1861, p. 185)—came within the definition of 'inheritance,' the will there was capable of being revoked at any time during the life of the donor. [141] If the rule of equity and good conscience is sufficient to let in the Mahomedan law of gifts in the case of Mahomedans, then, under that principle, the law of every nation with regard to gifts would be applicable in our Courts. A general rule of equity, which is applicable to Mahomedans, is laid down in *Stapilton v. Stapilton* (Cited in White & Tudor, Eq. Cas., 649), that family arrangements do not come within the rules relating to persons dealing with reversionary interests, and in the absence of undue influence on the part of the parent, will be binding. The transaction in the case of *Nawab Umjad Ally Khan v. Mussamut Mohumdee Begum* (11 Moore's I. A., 517) is much the same as the transaction in the present case. That case was heard in Oude before the transfer to the East India Company, and it was for that reason that the Mahomedan law was applied.

The **Judgment** of the Court (GARTH, C.J., and McDONELL, J.) was delivered by

Garth, C.J.—We thought it right in this case, when it first came before us on second appeal, to send it back to the District Judge, for the purpose of having these two material points more clearly ascertained :

1st—What interest had Bhani Bibi in the properties given her by her husband, and those purchased with her own money, at the time when she executed the *ikrar* of 1253? and

2nd—Under what circumstances, and for what reason, did she execute that ikrar?

Upon these points the District Judge has found :

1st—That Bhani Bibi had an absolute, and not a life, interest only in the property in dispute up to the time when she executed the ikrar of 1253; and

2ndly—That the ikrar of 1253 was executed at the solicitation of her husband, but without any undue influence or fraud.

He says that the reason for her executing it seems to have been that, as she was then pretty well advanced in life, and had no children, her husband was anxious that the property which [142] he had bestowed upon her should not pass away from his own children. He, therefore, induced her to convey it to herself for life, and after her death to his children by his other wife.

The District Judge finds, moreover, that the instrument was executed at Bhani Bibi's own residence, and in the presence of her husband, without any of her own relatives being present; that it was read over to her before she signed it; and that as to any fraud, compulsion, or undue influence, except the 'anurah' of her husband mentioned by the witness Doorga Churn, there is absolutely no trace.

These findings of the Judge completely dispose of the two material points which were raised before us on the former occasion. It is now clear that Bhani Bibi had an absolute and not a life estate in the property, and that the ikrar was not made in settlement of any dispute, or by way of compromise.

We thought it not improbable, that some dispute had arisen in the family as to whether she had a life-estate or not, or as to what her rights in the property really were; and if that had been so, and if the ikrar had been made for the purpose of settling those disputes, there might have been a good consideration for it. But these doubts are now set at rest by the finding of the District Judge.

We have, therefore, only to decide, as a matter of law, whether such voluntary relinquishment of her property on the part of Bhani Bibi was valid in point of law; and as to this it has been contended by the appellants :

1st —That, by Mahomedan law, a gift cannot be valid unless it is accompanied by possession; and

2nd—That it cannot be made to take effect at any future definite period.

There certainly seems no doubt as to the correctness of both these propositions. They are laid down very clearly in Baillie's Digest of Mahomedan law, pp. 507 and 512, and in Macnaghten's Mahomedan law, p. 50, Chap. V, paras. 3 and 4; and they are confirmed and exemplified by several authorities to which we have been referred. See *Nawab Umjad Ally Khan v. Musamat Mohumdee Begum* (11 Moore's I.A., 517), *Khader Hussain Sahib v. [143] Hussain Begum Sahiba* (5 Mad. H. C. Rep., 114), *Rajah Syud Enact Hossein v. Rance Roshun Jahan* (5 W. R., 419), and *Khajooroosnissa v. Rowshan Jehan* (I. L. R., 2 Cal., 184).

Indeed, the Advocate-General, who appeared for the respondent, scarcely attempted to dispute the general correctness of these propositions. But his main contention was, that the deed of gift by Bhani Bibi was the result of a family arrangement, and that, being of that nature, we ought to presume that it was made for good consideration.

There is no evidence, however, that it was the result of a family arrangement; and certainly the finding of the lower Court, which was directed to enquire into the circumstances under which it was made, affords no ground for

that supposition. The disposition of the property was made by the lady at the request of her husband, and prompted, no doubt, by a very proper motive. She felt grateful to him for the generosity with which he had treated her, and was very ready to carry out his wishes by securing (as no doubt she intended to do), the reversion of the property after her death to her husband's family.

There is nothing, so far as we can see, in the form of the disposition to distinguish it from an ordinary gift of property *in futuro*; and, as such a gift is not valid by Mahomedan law, we must need reverse the judgment of the Court below, and confirm that of the Subordinate Judge with costs.

Appeal allowed.

NOTES.

[MAHOMEDAN LAW GIFTS IN FUTURO -

See also (1905) 7 Bom. L. R. 306 ; 2 Cal. 181 ; 10 Mad. 196 ; 22 Bom. 489 ; 14 All. 429.]

[9 Cal. 143 : 12 C.L.R. 34]

APPELLATE CIVIL.

The 14th April, 1882.

PRESENT:

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Shoo Sunkur Sahoy.....Defendant

versus

Hridoy Narain.....Plaintiff.

*Suit for damages - Splitting claims - Civil Procedure Code (Act X of 1877),
s. 43.*

On the 27th Joist 1286 F. S. (2nd June 1879) the plaintiff brought a suit to recover damages for the breach of a contract on the part of the defendant, for not having made over possession to him of certain leasehold properties, the [144] damages claimed being for the profits accrued due for the year 1283 F. S. (1875-6). In this suit he obtained a decree.

On the 21st Joist 1287 F. S. (11th June 1880) the plaintiff brought another suit against the defendant to recover damages for the profits accrued for the years 1284, 1285, and 1286 F. S. (1876-7 to 1878-9).

Held, that the plaintiff should have included the damages for the years 1284 and 1285 (1876-7 and 1877-8) in his former suit, and that he was debarred by s. 43 of Act X of 1877 from including in his second suit any portion of his claim for damages which had accrued due at the time of the institution of his first suit, and for which he had omitted to sue; but that he was entitled to recover damages for the year 1286 (1878-9).

Taruck Chunder Mookerjee v. Panchu Mokun Debba (I. L. R., 6 Cal., 791) followed.

THE defendant, on the 30th Shrabun 1282 F. S. (31st July 1875), executed a fieca patta in favour of the plaintiff, and thereby leased a certain mouza to him at an annual panna of Rs. 3,714 for a term of eleven years, beginning in 1283 (1875-6) and ending in 1293 (1886-7).

* Appeal from Original Decree, No. 391 of 1880, against the decree of Batoo Koilash Chunder Mookerjee, Subordinate Judge of Tirhoot, dated the 3rd September 1880.

The defendant, however, neglected to give possession of the land leased to the plaintiff and the latter brought a suit for possession, and obtained a decree giving him possession; and after appeal, was put into possession on the 18th June 1879. The plaintiff then, on the 27th Joist 1286 (2nd June 1879), brought a suit against the defendant to recover damages for the year 1283 (1875-6), during which year he had been kept out of possession, and obtained a decree on the 16th July 1879.

On the 21st Joist 1289 (18th June 1880), he again sued to recover damages and interest for the years 1281, 1285, and 1286 F. S. (1876-7 to 1878-9) during which time he was kept out of possession.

The defendant contended that the claim in this latter suit should have been included in the former suit, and it not being so included, the suit was barred under s. 43 of Act X of 1877.

The Subordinate Judge held, that the claim for damages was a cause of action recurring year by year; that the claim in suit related to a claim subsequent to the period covered in the former suit; and that, therefore, the suit was not barred under s. 12. He also held that the case was the converse of the illustration to s. 43 of the Code, and that, inasmuch as no claim [145] for damages for the year 1286 (1878-9) could have been raised in the former suit, he gave the plaintiff a decree for the greater part of the sums claimed by him.

The defendant appealed to the High Court.

Baboo *Unmoda Pershad Banerjee* and Baboo *Mohesh Chunder Chowdhry* for the Appellant.

Baboo *Chunder Madhub Ghose*, Mr. C. *Gregory*, and Mr. M. L. *Sandel* for the Respondent.

The **Judgment** of the Court (MITTER and MACLEAN, JJ.) was delivered by

Mitter, J.—This is a suit for the recovery of damages from the defendant under the following circumstances:—A ticea patta was executed by the defendant in favour of the plaintiff on the 13th Shrabun 1282, stipulating that the plaintiff should remain in possession of the property leased from 1283 to 1293 on a fixed rent, which was to be applied to the payment of Government revenue, the interest upon the zurpeshgi-money, and other charges. The possession of the leasehold property not having been given to the plaintiff, a suit was brought to recover possession, and a decree was passed in his favour on the 19th of December 1877. On the 2nd of June 1879, corresponding with the 27th Joist 1286, a suit for the profits of the ticea lease for the year 1283 was brought by the plaintiff against the defendant, and a decree was obtained. The present suit was brought for the profits of the ticea for the years 1284 to 1286. An objection was taken in the lower Court that this suit was barred by the provisions of s. 43 of the Civil Procedure Code of 1877. This objection was overruled in the lower Court, which decreed the plaintiff's suit. In appeal this objection has been again taken before us, and we think that the contention of the appellant upon this point is valid, so far as the claim for 1284 and 1285 is concerned. It is supported by a decision of this Court in the case of *Taruck Chunder Mookerjee v. Panchu Mohan Debba* (I. L. R., 6 Cal., 791). That case is not distinguishable from the present in any respect. That was a suit for rent, and the present is [146] a suit for damages, and if there be any distinction, the distinction is against the plaintiff. Section 13, as it stood when the suit of 1879 was brought, was to the following effect: "Every

suit shall include the whole of the claim arising out of the cause of action, but a plaintiff, etc., etc. If a plaintiff omits to sue for, or intentionally relinquish any portion of his claim, he shall not afterwards sue for the portion so omitted or relinquished."

Now what was the cause of action in the former suit which was brought on the 2nd of June 1879? The cause of action was the breach of contract on the part of the defendant in not having made over possession of the leasehold property to the plaintiff. The particular amount which should have been claimed in that suit was the amount of damages which had then accrued from the wrongful act of the defendant. In measuring the amount of the damages, if the plaintiff chose only to include the profits of 1283, he certainly cannot bring a second suit for any portion of the claim which had thus accrued due, and for which he omitted to sue.

The suit was brought in the month of Joist 1286, and it was incumbent upon the plaintiff, under s. 43, to include in his claim the whole amount of damages sustained by him up to the date when that suit was brought. There is no question that the damages for the years 1284 and 1285 had then accrued due, therefore the plaintiff cannot successfully claim these damages in this suit. But it has been further contended that the damages for the year 1286 also had accrued due then, because the suit was brought in the last month of the agricultural year 1286. But we have no evidence on the record from which we can say that, on the 27th Joist 1286, the plaintiff, if he had been in possession, could have realized the whole or any portion of the rents and profits of that year of the leasehold property. Then it is further contended that the plaintiff could have at least claimed the interest due to him up to the month of Joist 1286, and that, therefore, to that extent the claim for the year 1286 should be disallowed.

Now, in the former suit for the damages of 1283, the Court decided that, according to the terms of the agreement, the [147] interest would not fall due till the end of the year. The parties are bound by that decision. Therefore no portion of the claim for 1286 is shown to have accrued due on the 27th Joist 1286, when the first suit for damages was brought. This part of the claim is, therefore, not affected by the provisions of s. 43.

The plaintiff has taken objection to the finding of the lower Court as to the amount of damages, but we are of opinion that there is no valid ground for impugning the correctness of the lower Court's decision upon this point.

We, therefore, reverse the decree of the lower Court so far as it relates to the years 1284 and 1285, and dismiss the plaintiff's suit for these years. The decree of the lower Court in respect of the year 1286 is confirmed. The plaintiff will pay and receive costs in both Courts in proportion to the claim dismissed and decreed.

Decree modified.

NOTES.

[This case was **affirmed** by the Privy Council in (1885) 12 Cal. 482. See also (1885) 12 Cal. 339; (1891) 19 Cal. 615; (1901) 7 Bom. L. R. 107; 29 Bom. 107.]

[9 Cal. 147 12 C.L.R. 418]

APPELLATE CIVIL.

The 19th July, 1882.

PRESENT:

MR. JUSTICE MITTER (OFFICIATING CHIEF JUSTICE) AND MR. JUSTICE
NORRIS.

Gunesh Dass.....Plaintiff

versus

Gondour Koormi.....Defendant.*

Breach of contract in planting trees on land let for agricultural purposes—Beng. Act VIII of 1869, s. 27 Act X of 1859—Limitation Act (XV of 1877), sched. ii, art. 120.

Section 27 of Beng. Act VIII of 1869 only relates to such suits as could be brought either by the landlord or tenant under Act X of 1859, and will not apply to an alternative claim, put forward in a suit for ejectment, to compel the defendant to remove trees from certain lands leased to him for agricultural purposes. Article 120 of sched. ii of Act XV of 1877 is applicable to such claims.

THIS was a suit brought on the 13th Bysack 1286 (19th April 1879) to eject the defendant from two plots of land, on the ground that he had committed a breach of contract in planting trees on his land which had been leased out to him for agricultural purposes only.

[148] The plaintiff alleged that the trees were planted on plot No. 1 in 1284 F. S. (1876-7), and on plot No. 2 in 1281 F. S. (1873-4), and he asked that the defendant might be ejected, or in the alternative that the defendant might be compelled to remove the trees.

The defendant pleaded limitation, contending that the trees were planted on plot No. 1 in 1282 F.S. (1874-5), and on plot No. 2 in 1274 F. S. (1866-7).

The Munsif found that the suit in respect of plot No. 2 was barred by limitation, more than twelve years having elapsed since the trees were planted; but as regards plot No. 1 he held, that the suit was in time, and therefore gave the plaintiff a decree, ejecting the defendant from plot No. 1, and ordering the removal of the trees.

Both the plaintiff and the defendant appealed to the district Judge. The Judge dismissed the plaintiff's appeal and decreed that of the defendant, directing the dismissal of the whole of the plaintiff's suit as being barred by s. 27 of Beng. Act VIII of 1869.

The plaintiff appealed to the High Court.

Baboo Taruck Nath Palit for the Appellant.

Baboo Pron Nath Pundit for the Respondent.

The **Judgment** of the Court (MITTER, Offg. C.J., and NORRIS, J.) was delivered by

Mitter, Offg. C.J.—This was a suit brought by the plaintiff to eject the defendant from two plots of land constituting his holding. The suit was based

* Appeal from Appellate Decree, No. 925 of 1881, against the decree of H.W. Gordon, Esq., Officiating Judge of Tirhoot, dated the 28th February 1881, affirming the decree of Baboo Birj Mohun Persad, Munsif of Durbhunga, dated the 27th December 1879.

upon the ground that, under a contract, or according to the custom of the country, the defendant was bound to use the land of his holding for agricultural purposes only ; but that the defendant, in contravention of this condition, planted trees upon the land in dispute, and converted it into a garden.

The plaintiff alleged that this planting of trees took place in October 1876. The suit was brought on the 19th of April 1879. The plaintiff in his plaint sought for two reliefs. He [149] asked first for the ejectment of the defendant, and if the defendant was not liable to be ejected, he next asked in the alternative that the defendant should be compelled to remove the trees planted by him.

As regards one of the plots in dispute the Munsif found that the planting of the trees had taken place more than twelve years before the date of this suit. He accordingly dismissed the plaintiff's suit in so far as it related to this plot. But with reference to the other plot he found that the trees were planted on it within twelve years from the date of the suit, and that, therefore, the suit was not barred by limitation. Upon the merits the Munsif finding that the plaintiff's allegation was made out, awarded a decree in his favour.

Against that decree, which was partly in favour of the plaintiff and partly in favour of the defendant, both the plaintiff and the defendant appealed to the District Judge.

The District Judge dismissed the plaintiff's appeal and decreed that of the defendant, directing the dismissal of the whole of the plaintiff's suit, on the ground that it was barred by limitation under the provisions of s. 27 of Beng. Act VIII of 1869. He came to this conclusion, because, on the face of the plaint, the suit was brought more than one year after the alleged planting of trees.

Section 27 of Beng. Act VIII of 1869 only relates to such suits as could be brought either by the landlord or tenant under Act X of 1859. The claim of the plaintiff so far as it seeks to eject the defendant was a claim which was cognizable under Act X of 1859, and therefore we are of opinion that decision of the District Judge, so far as it disallows the claim of the plaintiff for ejectment of the defendant, is correct.

But s. 27 of Beng. Act VIII of 1869 will not apply to that part of the plaintiff's claim in which he seeks to compel the defendant to remove the trees, because a suit of that nature was not cognizable under Act X of 1859. Therefore, so far as that part of the plaintiff's claim is concerned, the decision of the lower Appellate Court is not correct.

Then the question arises, what article of the Limitation Act of 1877 governs this part of the plaintiff's claim ?

[150] It was contended on behalf of the defendant that art. 31 sched. ii of that Act applies.

We are clearly of opinion that this contention is not correct, and we are supported in this opinion by the decision in the case of *Kilar Nath Nag v. Sritirutno* (I. L. R., 6 Cal., 34). In our opinion art. 120 governs this part of the plaintiff's case ; and the lower Appellate Court will have to determine whether it is barred under that article or not.

We, therefore, set aside the decision of the lower Appellate Court so far as it dismisses the plaintiff's claim to compel the defendant to remove the trees, and remand this case to that Court for retrial with reference to that relief. The costs will abide the result.

It is admitted that the appeals, numbered from 926 to 933 both inclusive, will be governed by this decision. The same order will be made in those cases also.

Case remanded.

NOTES.

[This case was **disapproved** of in (1899) 26 Cal. 564 F. B. , wherein the Court followed (1896) 21 Cal. 160 ; (1886) 8 All. 446.]

[9 Cal. 150 : 11 C.L.R. 440]

APPELLATE CIVIL.

The 19th July, 1882.

PRESENT:

MR. JUSTICE MITTER (OFFICIATING CHIEF JUSTICE) AND MR. JUSTICE NORRIS.

Edun.....Defendant

versus

Mahomed Siddik and others.....Plaintiffs*

Suit to compel registration -Registration Act (III of 1877), ss. 73, 77.

Under the Registration Act of 1877, a suit to compel registration is maintainable only when the provisions of s. 77 of the Act have been complied with. A person omitting to make an application to the Registrar as provided by s. 73, within the time provided by s. 72, cannot be said to have complied with the conditions precedent to a suit under s. 77. Independently of s. 77 of the Act, no suit will lie.

Bhagwan Singh v. Khuda Baksh (I. L. R., 3 All., 397) followed.

Ram Ghulam v. Chotey Lal (I. L. R., 2 All., 46) dissented from.

THIS was a suit to compel the defendant to register a certain mokurari lease granted to the plaintiff on the 27th of January 1880. The plaintiffs alleged that they filed the lease in the Sub-[151]Registrar's office at Patna on the 31st of January 1880, but that the defendant appeared and denied execution, and that the Sub-Registrar, on the 9th of February 1880, refused registration. On the 8th of April 1880, the plaintiffs applied under s. 73 to the Registrar to establish his right to registration, but the Registrar held that the application was made out of time,—i.e., more than thirty days after the date of the refusal to register.

The plaintiffs then brought this suit under s. 77 of Act III of 1877 to compel registration. The defendant denied execution of the deed, and contended that the suit was barred.

The Munsif found that a Civil Court could not direct the registration of an instrument of which registration had been refused, and as to which the person complaining of non-registration had not presented an application under s. 73 to the Registrar in time; that such an order would, if made, override the express provisions of limitation set out in the Registration Act, and held that

* Appeal from Appellate Decree, No. 672 of 1881, against the decree of H. Beveridge, Esq., Officiating Judge of Patna, dated the 27th January 1881, reversing the decree of Baboo Kodarnath Roy, Third Munsif of Patna, dated the 11th August 1880.

the suit was barred, inasmuch as the application under s. 73 was not presented within thirty days after the Sub-Registrar had refused registration; and that the question could not be contested in a regular suit. The plaintiffs appealed to the District Judge, who overruled the Munsif's decision, holding, on the authority of *Ram Ghulam v. Chotey Lal* (I. L. R., 2 All., 46), that the sections of the Registration Act were merely permissive, and would not exclude such a suit as the one before him for the enforcement of the contract of sale, which included the obligation to register, and that although the plaintiffs might have been out of time under the Registration Act, yet they were at liberty to bring a regular suit for the purpose of enforcing the contract.

The defendant appealed to the High Court.

Bahoo Sahgram Singh for the Appellant.

Mr. Twidale for the Respondents.

The **Judgment** of the Court (MITTER and NORRIS, JJ.) was delivered by

Mitter, J. This is an appeal against the decree of the District Judge of Patna, reversing the decision of the Munsif, [152] by which the plaintiff's suit was dismissed. The decree appealed against is in these words :—"Defendant must cause registration of the deed and delivery of it, and put the plaintiffs in possession of the thing sold, and then plaintiffs will pay to her, or into Court, the Rs. 20 still due."

The plaintiffs brought this suit to compel the defendant to register a mokurari patta alleged to have been executed by her in their favour. It was alleged in the plaint that the defendant agreed to grant a mokurari patta of the property in dispute on a bonus of Rs. 100; that, according to this agreement, a mokurari patta was executed by the defendant on the 27th of January 1880; that, on that date, Rs. 80, out of Rs. 100, were paid, and the mokurari patta was made over to the plaintiffs; that the said document was filed by the plaintiffs in the Sub-Registry Office at Patna on the 31st of January 1880; that the defendant, in accordance with a summons issued upon her by the Sub-Registrar, appeared before that officer and denied the execution of that document. The Sub-Registrar, on the 9th of February following, refused registration. Against the order of the Sub-Registrar the plaintiffs preferred a complaint to the Registrar, by a petition dated the 8th April 1880. The Registrar, on the 28th of May 1880, refused to adjudicate upon the complaint, and rejected the application as it was made more than thirty days after the Sub-Registrar's refusal. Then the present suit was brought on the 5th of June 1880.

The question raised in the lower Court was, whether, under the circumstances stated above, the suit was maintainable. The Munsif being of opinion that the suit was not maintainable, dismissed it upon that amongst other grounds. The District Judge on appeal has overruled the Munsif's decision upon this point. We are of opinion that the Munsif's decision upon this point is correct.

We entirely agree in the reasons given by the Allahabad High Court in *Bhagwan Singh v. Khuda Baksh* (I. L. R., 3 All., 397), which supports the Munsif's view of the law. Under the Registration Act of 1877, such a suit as this is maintainable only when the provisions of s. 77 have been complied with. The District [153] Judge, relying upon a decision of *Ram Ghulam v. Chotey Lal* (I. L. R., 2 All., 46), was of opinion that the sections of the Registration Act are merely permissive, and that a suit of this nature is maintainable, although,

it does not come within the purview of s. 77. The decision cited by the learned Judge fully supports his view ; but with deference to the learned Judges of the Allahabad Court, we find ourselves unable to agree in the view of the law taken in that case.

The most formidable objection to the maintenance of a suit of this nature lies in the circumstance that, under the Registration Act, the mokurari patta cannot be received in evidence, because it has not been duly registered under its provisions. The patta being not receivable in evidence, the main allegation upon which the plaintiffs' suit is based, *viz.*, that a mokurari grant was made, is not capable of proof. It was upon this ground that a Full Bench of this Court, in the case of *Sheikh Rahmatulla v. Sheikh Sarwatulla Kagechi* (1 B. L. R., F. B., 58), held, that a suit like the present would not lie.

Then again, under s. 34 and s. 23 of the Registration Act of 1877, the Registering Officer is prohibited, subject to certain specified exceptions, from registering a document, unless it be presented for registration, and unless the persons executing such document or their representatives, assigns or agents authorized under the Act, appear before him within four months from the date of its execution. It may be that that period may lapse before a decision is arrived at by a Civil Court in a suit of this description. Should the Court in that case direct the Registering Officer to register the document in spite of the provisions of the Registration Act ?

Similarly, under the second para. of s. 71, a Registering Officer, after he has refused registration, and endorsed on the document the words 'registration refused,' is prohibited from accepting for registration a document so endorsed unless and until, under the provisions contained in the Act, the document is directed to be registered. In the place of this prohibition, is the Civil Court competent to direct the registration of a document, [154] although no steps have been taken under the provisions of the Registration Act to obtain an order for registration ?

These considerations clearly show that a suit like the present, independently of s. 77 of the Registration Act, will not lie.

In this case the plaintiffs cannot succeed under s. 77 of the Act, because they did not comply with the conditions precedent to the maintenance of a suit under that section. But it has been said that those conditions were complied with, because an application was made to the Registrar complaining of the Sub-Registrar's order refusing registration. This argument is not valid ; the application referred to above was not made within the time allowed by the Act. Under these circumstances, we are of opinion that it cannot be said that the plaintiffs have complied with the conditions precedent for the maintenance of a suit under s. 77.

The decision of the Munsif was, therefore, right ; and the District Judge was in error in reversing it. The appeal is decreed with costs.

Appeal allowed.

NOTES.

[The Allahabad High Court has held that a suit will lie independently of the provisions of the Act, 2 All., 46 ; 3 All. 397 ; 5 A. W. N. 329 ; 16 All 303 ; 24 All. 402. The Calcutta and the Madras High Courts have taken a contrary view :—9 Cal. 150 ; (1883) 9 Cal. 851 ; (1885) 11 Cal. 750 ; (1884) 7 Mad. 535 ; (1893) 16 Mad. 341 ; 6 M. L. J. 263. See also (1884) 9 Bom. 63 (74) ; (1898) 2 O. C. 77.

In 16 All. 303 it was pointed out that the Judges in 9 Cal. 151 failed to notice that there had not been recourse to registration in 2 All. 46, whereas there had been recourse to registration and refusal to register by, the Sub-Registrar in 9 Cal. 151.]

[9 Cal. 154 : 12 C.L.R. 371 : 7 Ind. Jur. 248]

FULL BENCH.

11th July, 1882.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE MITTER,
MR. JUSTICE WILSON, MR. JUSTICE TOTTENHAM, AND MR. JUSTICE MACLEAN.

Tinumoni Dasi.....Plaintiff

versus

Nibarun Chunder Gupta and others.....Defendants.¹

Hindu Law Succession by daughter before her marriage --Subsequent marriage and birth of son---Death of such daughter---Succession of married sister.

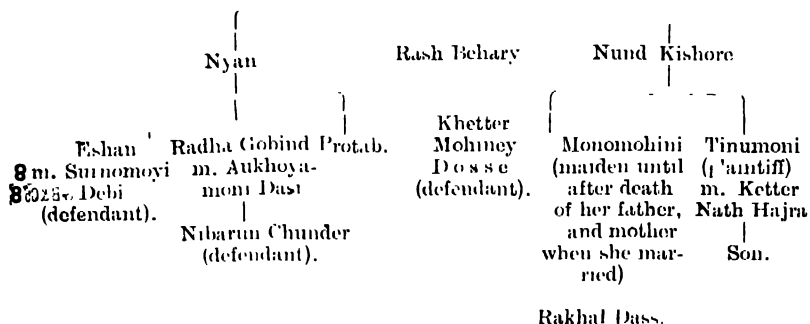
On the death of a daughter, who had succeeded before her marriage to her father's estate, to the exclusion of her married sister, the estate so inherited by her devolves upon her married sister, who has, or is likely to have, male issue, and not upon her own son.

[155] THIS was a suit to recover possession of certain properties which formerly belonged to one Nund Kishore.

The plaintiff alleged, that Nund Kishore left a wife and two daughters him surviving, that, on the death of his wife, her two married daughters, Tinumoni (the plaintiff) and Monomohini, inherited the property, and that, on the death of Monomohini, Tinumoni (the plaintiff) became sole heiress; but the defendants having taken possession of the properties, she brought this suit to recover possession.

The defendants, who were the heirs of the brothers of Nund Kishore, contended, that Nund Kishore left him surviving his wife, Monomohini, an unmarried daughter, and Tinumoni, who was married and had a son at that time; that, after the death of Nund Kishore's wife, Monomohini married and had a son named Rakhul Das; and that this son took the property to the exclusion of Tinumoni and her son.

The following is the genealogical tree of the family :



¹ Full Bench in Special Appeal, No. 1998 of 1880, against the decree of Baboo Brojendra Coomar Seal, Judge of Burdwan, dated the 3rd July 1880, affirming the decree of Baboo Bhubutty Roy, Subordinate Judge of Burdwan, dated the 29th September 1879.

The Munsif found that Tinumoni was, and that Monomohini was not, married at the date of the death of their mother; that Monomohini had subsequently married, and had a son Rakhal Dass; and that he took Nund Kishore's property to the exclusion of Tinumoni and her son, and dismissed the plaintiff's suit with costs.

The plaintiff appealed to the District Judge, who on the authority of the case of *Radha Kishen Manjhee v. Rajah Ram Mundul* (6 W. R. 147) dismissed the appeal and affirmed the decree of the Munsif.

The plaintiff appealed to the High Court. The Judges, PRINSEP and MOHENDRO NATH BOSE, JJ., referred to a Full [155] Bench the question, whether, according to the Hindu law current in Bengal, on the death of a daughter who had succeeded to her father's estate in her maidenhood (but who, subsequently to her parent's death, had married and had a son), to the exclusion of her married sister, the estate so inherited passes to her son or to her married sister capable of inheriting according to that law?

The reference to the Full Bench was as follows:—

This case raises a question on Hindu law as current in Bengal. The plaintiff is the married daughter of Nund Kishore, the deceased proprietor, and she seeks to take the inheritance left by him on the death of his maiden daughter, who had succeeded to it. She is opposed by the defendants, on the ground that the maiden daughter has left a son who has preference to the succession.

The lower Appellate Court has, on the authority of the case of *Radha Kishen Manjhee v. Rajaram Mundul* (6 W. R., 147), dismissed the plaintiff's claim.

In second appeal it is contended that the judgment in that case is not in accordance with the Hindu law: that although Macnaghten and Elberling in their Treatises have stated that, on the death of one who has inherited as a maiden daughter, her son succeeds to her father's estate before a married daughter, their opinion is not supported by any text of Hindu law; and the ruling of the Sadr Court in the case of *Mussamat Bijai Debia v. Mussamat Unnopoona Debia* (3 Sel. Rep., 26), on which it is based, does not bear it out.

We have considerable doubts as to the correctness of the judgment of the Division Bench. Referring to v. 30, s. 2, chap. xi of the Dayabhaga, it is clear that the maiden daughter takes the inheritance like any other female heiress, and, on her death, it goes to the heirs of her father, and not her own. Now these heirs, after the widow, are the daughters, and then the daughters' sons. Verse 25 establishes the position that the daughter's son succeeds after the daughter. These texts taken together, would exclude the maiden daughter's son in the presence of the married daughter of the deceased proprietor.

[157] The interpolation "without leaving issue" in v. 30 by Srikishen Tarkalanankar does not, in our opinion, raise any valid argument in favour of the inheritance of the maiden daughter's son. That was inserted, as we take it, simply to explain the text; for otherwise the husband could not be entitled to succeed to the wife's *peculium*. The verse first establishes the position that, after the maiden daughter, the inheritance devolves on the married daughter and others who would regularly succeed if there were no such unmarried daughter. It then distinguishes the character of the property taken by such daughter from a woman's peculiar property, by saying that the husband cannot take such property, as in the case of a woman's *peculium* when she dies with-

out issue, and concludes by saying that the position of such a daughter is no better than that of the widow, and, as in the case of the latter, so in the case of the former, the heirs of the former owner inherit the property on her death.

That this was the meaning of Srikishen in inserting the above passage will appear from his own treatise called the *Dayakrama Sangraha*. In chap. 1, s. 3, v. 3, he has put the matter of the 30th verse of the *Dayabhaga* in his own language as follows, namely: "The following special rule must be here observed, namely, that if a maiden daughter, in whom the succession had once vested, and who was subsequently married, should die without having borne issue, the married sister who has, and the sister who is likely to have, male issue, inherit together the estate which had so vested in her. It does not become the property of her husband or others, for their right is exclusively to a woman's separate property."

That Srikishen, by making the insertion, never meant to place the maiden daughter's son in a superior position to married daughters, will clearly appear from chap. 1, s. 4, v. 1 of his own book, wherein he places the daughter's son after all the daughters. He says, "in default of all daughters, the daughter's son takes the inheritance," so that, as long as any daughter who is entitled to succeed remains, the daughter's son cannot come in. Nor can such preference, if given, be consistent with the principle of offering oblations, which is the regulating principle of succession in the *Dayabhaga*.

There is no reason why, according to that principle, the maiden daughter's sons should have preference over other daughter's sons in regard to the succession, when they equally offer the general cake to their deceased grandfather.

As the point is of great importance, we think it proper to refer the following question for the decision of the Full Bench, namely, whether, according to the Hindu law as current in Bengal, on the death of a daughter who had succeeded to her father's estate in her maidenhood, to the exclusion of her married sister, the estate so inherited passes to her son, or to her married sister capable of inheriting according to that law?

Baboo Mohun Mohun Roy and Baboo Rashbehary Ghose for the appellant contended that the case of *Radha Krishen Manjhee v. Rajah Ram Mundul* (6 W. R. 147), relied on by the lower Appellate Court, was not in accordance with Hindu law; that although Macnaghten and Elberling in their treatises have stated that, on the death of one who has inherited as a maiden daughter, her son succeeds to her father's estate before a married daughter, their opinion is not supported by any text of Hindu law; and the ruling of the Sadr Court in *Mussamut Bipra Debia v. Mussamut Unnopoorna Debia* (3 Sel. Rep., 26) on which it is based, does not bear it out. The *Dayabhaga*, chap. xi, s. 2, v. 5 clearly states that the maiden daughter takes the inheritance like any other female, and on her death it goes to the heirs of her father, and not to her own heirs; and the heirs, after the widow, are the daughters, and then the daughters' sons. See v. 25, s. 2, chap. xi, *Dayabhaga*, explained by Srikishen in chap. 1, s. 3, v. 3 of his *Dayakrama Sangraha*.

The Court here called on the respondents.

Baboo Sreenath Dass for the respondents.—The question must be decided by the *Dayabhaga*, chap. xi. Section 2, v. 30 lays down that, if a maiden daughter, in whom the succession has vested, and who has afterwards married, dies, the estate which was hers becomes the property of the married daughters, who would have succeeded if there had been no unmarried daughter [159] to succeed. But this only is the case, I contend, when the unmarried,

who afterwards married, dies without issue, and this is shown by the interpolation of the words in v. 30, "without bearing issue," by Srikishen Tarkalankar. [MITTER, J.—The words "without issue" may be struck out as they do not appear in the original, and have been only interpolated by Srikishen. There are two reasons laid down why an unmarried daughter should succeed, whereas there is only one given for a married daughter.] Those are reasons for the succession, but not reasons for preference of one daughter over the other. In the chapters on daughters and daughters' sons Srikishen's own book points out what is meant by the words "after being married." Macnaghten's Hindu Law of inheritance, p. 24, lays down that if one of several daughters who had, as maidens, succeeded to their father's property, die leaving sons and sisters or sister's sons, then, according to the law in Bengal the sons take alone the share to which their mother was entitled, to the exclusion of the sisters and sisters' sons; and Elberling on Inheritance, Gift, &c., p. 76, is to the same effect. Section 30 of the Dayabhaga refers only to the case of a maiden daughter dying without leaving a son, and therefore the judgment of the lower Court is correct.

The **Opinion** of the Full Bench was as follows :—

We are of opinion that, on the death of a daughter, who had succeeded before her marriage to her father's estate to the exclusion of her married sister, the estate so inherited by her devolves upon her married sister, who has, or is likely to have, male issue, and not upon her own son.

According to the Hindu law in Bengal, the succession of females who have generally no heritable rights, takes place in certain exceptional cases specified in the Shasters. Jimutavahana, after citing the text of Baudhayana to the effect that "a woman is entitled not to the heritage; for females and persons deficient in an organ of sense or member are deemed incompetent to inherit," says, that "the succession of the widow and certain others takes effect under express texts without any contradiction to this maxim"—see Dayabhaga, chap. xi, s. 6, para. 11.

[160] There are also certain special rules applicable to the succession of a female. For example, on her death the succession devolves not upon her heirs, but upon the heirs of the last owner who had absolute estate in the property.

Of the exceptional female heirs, the widow ranks first. Jimutavahana, after laying it down that the widow is entitled to succeed on default of a son, grandson, or great-grandson, says in chap. xi, s. 1, para. 56: "But the wife must only enjoy her husband's estate after his demise. She is not entitled to make a gift, mortgage, or sale of it." Thus Katyayana says: "Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her, let the heirs take it." In commenting upon this passage, Jimutavahana says: "But when she (the widow) dies, the daughters or others who would regularly be heirs in default of the wife, take the estate."

Then in para. 65, s. 1, chap. xi, Dayabhaga, its author says: "In like manner if the succession have devolved on a daughter, those persons who would have been heirs of her father's property in her default take the succession on her death, not the heirs of her daughter's property."

Then the above rule is laid down in chap. xi, s. 2, paras. 30 and 31, as applicable to all cases of woman's succession. Referring to the text of Katyayana (chap. ii, s. 1, para. 56), Jimutavahana says in s. 30 cited above: "Since it has been shown by a text before cited that, on the decease of the widow in

whom the succession had vested, the legal heirs of the former owner who would regularly inherit the property if there were no widow in whom the succession vested, *viz.*, the daughters and the rest succeed to the wealth; therefore, the same rule is inferred *a fortiori* in the case of the daughter and grandson whose pretensions are inferior to the wife's (31), or the word 'wife' is employed with a general import, and it implies that the rule must be understood as applicable generally to the case of a woman's succession by inheritance."

There is no authority to be found in any portion of the Dayabhaga or any other Hindu law-book recognized in Bengal, [161] which shows that this rule, which is so clearly laid down as applicable to all cases of a woman's succession by inheritance, does not apply to the case of a maiden daughter's succession.

It is said that, in the opinion of Srikishen Tarkalankar (a commentator of the Dayabhaga, and also the author of a treatise on inheritance current in Bengal, *viz.*, Dayakrama Sangraha), this rule is not applicable to the case of a maiden daughter succeeding to the property of her father, and then dying after marriage, leaving a son. But neither in his commentary, nor in his treatise, is to be found any passage clearly expressing this opinion. On the other hand, in the Dayakrama Sangraha, he says in chap. 1, s. 4, which treats of the right of succession of the daughter's son, that "in default of all daughters, the daughter's son takes the inheritance," &c., &c.

There is, therefore, no express authority in Srikishen's Dayakrama Sangraha, or in his commentary on the Dayabhaga, for the contention that the general rule applicable to the succession of a woman is not applicable to the case of a succession of a maiden daughter dying after marriage and leaving a son. But it has been contended, that this is the opinion of Srikishen, may be inferred, because in para. 30, chap. xi, s. 2 of the Dayabhaga, he suggests that, after the word 'die,' the words "without bearing issue" are understood. He does not assign any reason for this suggestion. We are left entirely to conjecture only, as to the ground for his holding that these words are understood. The passage with the words suggested by Srikishen placed within brackets runs thus: "But if a maiden daughter in whom the succession has vested, and who has been afterwards married (die without bearing issue), the estate which was hers, becomes the property of those persons, a married daughter or others who would regularly succeed if there were no such (unmarried daughter) in whom the inheritance vested, and in like manner succeed on her demise after it has so vested in her. It does not become the property of her husband or other heirs; for that text (which is declaratory of the right of the husband and the rest) is relative to a woman's peculiar property."

It is clear that this is an illustration of the general rule laid [162] down in the latter end of this and in the next paragraph, *viz.*, that, in the case of woman's succession, the property on her death devolves not upon her heirs, but upon the heirs of the last owner. It is exceedingly probable that the annotator suggested the addition of the words "without leaving issue," thinking that the language of the author without these words would be open to the objection of want of precision. Because, on the death of a maiden daughter (in whom the succession had vested, and who had been afterwards married) leaving issue, the estate would "not become the property of her husband or other heirs" even if the law regulating the succession to a woman's peculiar property were applicable, because the husband would succeed only in default of issue.

In our opinion, therefore, Srikishen Tarkalankar suggested the addition of these words by way of mere verbal criticism upon the language of the paragraph (30) cited above, and that he did not intend thereby to lay down

an exception to the general rule enunciated by Jimutavahana relating to the case of a woman's succession by inheritance.

In Macnaghten's Hindu Law, Vol. I, page 25. and Elberling on Inheritance, it is laid down that, in a case like the present, the son of the deceased sister is entitled to succeed to the exclusion of the married sister. No authority is cited in support of this doctrine, which is clearly contrary to the opinion of Jimutavahana. Furthermore, Mr. Macnaghten was mistaken in supposing that the case of *Mussamut Bija Debia v. Mussamut Unnopoorna Debia* (3 Sel. Rep., 26) was decided in accordance with the doctrine laid down by him. That case does not in any way support his view.

The case of *Radha Kishen Manjee v. Rajah Ram Mundul* (6 W. R., 147), referred to in the order of reference, seems to have been mainly decided on the authority of Macnaghten and Elberling. But the opinion of these two European text-writers on Hindu law being opposed to the Dayabhaga cannot be followed. The learned Judges who decided that case also referred to the Dayabhaga, chap. xi, s. 2, para. 30, as supporting their view. But in our opinion the text cited shows just the contrary.

[163] The decisions of the lower Courts are, therefore, erroneous. We accordingly reverse them. The case will be remanded for the trial of the other questions raised by the parties. Costs will abide the result.

Appeal allowed—Case remanded.

NOTES.

[HINDU LAW—MAIDEN DAUGHTER'S SUCCESSION]

The text of Gautama prescribing the order of succession among daughters to those who are *apratita* and those who are *apratistita* has been the subject of different interpretations in the Mitakshara and the Dayabhaga schools. But the exclusion under either interpretation is temporary only, so that, when the succession opens again on the death, etc., of the daughter that was preferred by the application of that text, the *unpreferred* daughter *then surviving* succeeds to the estate, *and not* the next class of heirs to the propositus—32 All. 314; 2 C. P. L. R., 166; 5 C. P. L. R., 58; 5 I. C. 384; 7 A. I. J. 293; 7 I. C. 884. Even a prostitute daughter may thus come in, in the Bombay and the Madras schools where chastity is not a condition precedent to succession—31 Bom. 195; 9 Bom. L. R. 774. It should be noted, however, that in the Bombay School, (and in the Provinces that follow that law) the daughter takes an absolute estate in the inheritance, and as a consequence of this, it follows, that on her death, the inheritance devolves to her heirs and has not to be traced to the propositus; thus, the daughter unpreferred at first would be excluded altogether:—11 Bom. 285; 5 N. L. R., 13; 1 I. C., 213; 2 S. L. R. 59. Similar principles have been applied to the case of *Stridhana* inherited by daughters, the text of Gautama being primarily enunciated for *stridhan*.—(1890) 17 Cal., 911; (1895) 19 Mad. 107.]

[9 Cal. 163 : 11 C.L.R. 409]

APPELLATE CIVIL.

The 22nd July, 1882.

PRESENT :

MR. JUSTICE MITTER, OFFICIATING CHIEF JUSTICE, AND

MR. JUSTICE NORRIS.

Bessessur Bhugut and others.....Defendants

versus

Murli Sahu and othersPlaintiffs.*

Civil Procedure Codes (Act VIII of 1859), s. 246; and (Act X of 1877), ss. 97, 371--Limitation (Act XV of 1877), sched. ii, arts. 11 and 120.

The defendants attached certain property, which the plaintiffs alleged belonged to them. The plaintiffs preferred a claim to the property under s. 246 of Act VIII of 1859; this claim was disallowed on the 15th August 1877.

In June 1878, the plaintiffs brought a suit to establish their title to the property attached and for confirmation of possession. Pending this suit, the principal defendant died, and the plaintiffs applied for an order to substitute certain persons as defendants. The Court thereupon directed the issue of a summons on the defendants proposed by the plaintiffs to appear and defend the suit; but the plaintiffs failing to pay the costs of the service of this summons, the suit was dismissed on the 14th March 1879.

On the 4th March 1880, the plaintiffs again brought a suit to establish their title to the same property, and for confirmation of possession.

Held, that the order of the 15th August 1877 not being an order passed under s. 283 of Act X of 1877, art. 11 of sched. ii of Act XV of 1877 did not apply, but that art. 120 of sched. ii was applicable; and that as the first suit had not been dismissed upon the merits the plaintiffs were entitled to maintain the second suit.

Baboo *Umakali Moorkerjee* for the Appellants.

Baboo *Turuck Nath Paulit* for the Respondents.

[164] THE facts of this case are sufficiently set out in the **Judgment** of the Court (MITTER, Offg. C.J. and NORRIS, J.) which was delivered by

Mitter, Offg. C.J.—It appears that the appellants before us held a decree against certain persons, who are on the record styled the second party defendants, and in execution of that decree the property in dispute in this case was attached. The plaintiffs intervened under s. 246 of the Procedure Code of 1859, claiming to have the property in dispute released on the ground that it did not belong to the second party defendants, but to themselves. Their claim was disallowed by the Court executing the decree on the 15th of August 1877.

The present suit was brought on the 4th of March 1880 for the purpose of establishing the plaintiffs' title to the property in dispute, and for confirmation of their possession thereof. The object of the suit apparently was to obtain a declaration that the decree-holders were not entitled to sell this property in execution of their decree against the second party defendants.

* Appeal from Appellate Order, No. 27 of 1882, against the order of H.W. Gordon, Esq., Officiating Judge of Mozsufferpore, dated the 4th January 1882, reversing the decree of Baboo Koylash Chunder Mookerjee, Second Subordinate Judge of that district, dated the 25th August 1882.

The Court of First Instance dismissed the plaintiffs' suit as barred by limitation. It was of opinion that art. 11 of the 2nd schedule of the present Limitation Act applied to this suit, and that as it was not brought within one year from the 15th of August 1877, when the Execution Court disallowed the plaintiffs' claim under s. 246, it was barred.

There was also another question before that Court, and it arose in this way.

Before the present suit was brought, the plaintiffs had brought another suit for obtaining the same declaration, and while that suit was pending the principal defendant,—namely, the father of the appellants before us,—died. Thereupon, the plaintiffs applied for the substitution of the appellants in the place of their deceased father. The Court granted their application, and directed that a summons should issue to the appellants before us to appear on a day fixed by the Court to defend the suit; but the plaintiffs having failed to pay the costs required for the service of this summons the suit was dismissed.

With reference to this proceeding, the appellants contended before the Court of First Instance that the dismissal of the suit [165] under such circumstances operated as a bar to the maintenance of the present suit.

On this point also the decision of the first Court was in favour of the appellants before us.

On appeal, the District Judge overruled both the pleas raised in the defence. He was of opinion that as the order of the 15th of August 1877 was not an order passed under s. 283 of Act X of 1877, art. 11 of sched. ii of the Limitation Act did not apply.

As regards the other objection, the Judge held that the suit was not dismissed under the provisions of s. 371 of Act X of 1877, but was dismissed under the provisions of s. 97 of that Act; and as an order passed under s. 97 is no bar to a fresh suit, the District Judge was of opinion that the plaintiffs were entitled to maintain this suit.

Against this judgment the present appeal has been preferred.

We agree with the District Judge in the opinion expressed by him on both these points. The Limitation Act must be strictly construed. In this case there is no doubt that Act XV of 1877 would apply, because the present suit was brought more than two years after the passing of that Act. But then it must be shown that art. 11, which the Court of First Instance held barred the present suit, is really applicable. That article distinctly refers to an order passed under s. 283 of Act X of 1877, and as the order of the 15th of August 1877 was not an order passed under that section, the article in question cannot apply: and if art. 11 is not applicable, then art. 120, which gives six years as the period of limitation for all the other kinds of suits not elsewhere provided for in the Act, will apply; and if art. 120 applies then the suit is in time.

But it has been argued that if the order of the 15th of August 1877 is not to be considered as an order passed under s. 283 of Act X of 1877, then the plaintiffs are not entitled to maintain this suit at all, because s. 246, which gives to an unsuccessful party in a proceeding under it the right of instituting a suit to establish his title, was repealed by s. 3 of Act X of 1877, and there is no provision in that Act, nor in s. 6^{*} of Act I of 1868, saving the existing rights of the parties.

Matters done under an enactment before its repeal to be unaffected.

*[Sec. 6 :—The repeal of any Statute, Act or Regulation, shall not affect anything done or any offence committed, or any fine or penalty incurred, or any proceedings commenced before the repealing Act shall have come into operation.]

Without expressing any opinion upon the question whether [166] the repeal of an Act affects existing rights (and, as at present advised, I am disposed to think that, independently of s. 6 of Act I of 1868, the repealing of an Act would not affect rights already acquired), it seems to us that the contention of the learned pleader for the appellants is not valid.

If s. 246 of Act VIII of 1859 is to be considered as wholly repealed, then the learned pleader must establish that the present suit is barred by any of the provisions of Act X of 1877. The present suit is a suit of a civil nature, and s. 11 of Act X of 1877 says, that the Courts shall, subject to the provisions contained in that Act, have jurisdiction to try all suits of a civil nature excepting suits the cognizance of which is barred by any enactment for the time being in force. The learned pleader must, therefore, make out that the cognizance of this suit is barred by any enactment now in force; but he has not been able to do so. We are, therefore, of opinion that there is no force in this contention.

Then, as to the question whether the order of dismissal passed in the former suit would not operate as a bar to the present suit, we entirely agree in the view which the District Judge has taken of that order.

Section 371 of Act X of 1877 cannot apply. That section applies only to orders passed under the last paragraph of s. 368, and the second paragraph of s. 370. Under the last paragraph of s. 368 a suit abates, and under the last paragraph of s. 370 an order of dismissal may be passed when the circumstances mentioned in that section come into existence.

The order referred to, therefore, not having been passed under s. 371, the only other section under which it could have been passed is s. 97.

But supposing that s. 97 were not applicable if the order was not passed under s. 371, the cognizance of the present suit is not barred, because the order dismissing the suit was not an order disposing of it on the merits.

On all these grounds, we are of opinion that the decision of the lower Appellate Court is correct.

We dismiss the appeal with costs.

Appeal dismissed.

NOTES.

[I. RES JUDICATA--SUITS NOT DISMISSED ON MERITS--

"There is no decision of a matter in issue when a suit is dismissed for default; and the rule of *res judicata* will not apply in such a case." 15 L. A. 156; 12 C. L. R., 29; 13 All., 53; 8 All., 286; 6 Bom. 182; even though a subsequent suit on the same cause or for the same relief may be barred by some special provision of law, as for example by section 103 of the C. P. C. 1882. Nor will the dismissal of a suit constitute *res judicata* if it is ordered only for the non-payment of process-fees for summoning the defendant (9 Cal. 163) or of a fee for the appointment of a commissioner to assess the value of the land sued for, 13 Mad. 510"—*Hukar Chand* on Civil Procedure (1900) Vol. I pp. 180-181.

II. LIMITATION APPLICABLE TO DECLARATORY SUITS—

In arriving at the opinion that the residuary Article would be applicable, MOOKERJEE, J. reviewed the previous authorities, in an elaborate judgment—(1904) 1 C. L. J. 73.

III. SUITS IN RESPECT OF ATTACHED PROPERTY—

See as to the applicability of Art. 11, the Notes to 9 Cal. 43; also (1883) 13 C. L. R. 139; (1885) 11 Cal. 673; (1893) 18 Bom. 260; (1891) U. B. R. (1892-96) Vol. 11 458.]

[-- 11 C.L.R. 339]

[167] APPELLATE CIVIL.

The 13th July, 1882.

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE MITTER,
AND MR. JUSTICE MACLEAN.

Hari Ram and another.....Defendants

versus

Denaput Singh and another.....Plaintiffs.

Unpaid vendor—Lien—Creditor of vendor, Right of, to lien—Mortgage.

Although an unpaid vendor holds a lien upon property sold for the consideration-money, yet a creditor of that vendor cannot claim the same right.

THE facts of this case were, that the plaintiffs, under a chitti dated March 1873, lent to Ram Nath and Hem Nath a sum of Rs. 192, and that Hem Nath and Ram Nath being possessed of a share in a certain mauza, the former sold his share to one Gokoola Persad, defendant No. 2, on the 10th July 1874, and on the same date, Hem Nath, as guardian of his deceased brother's child, granted a zurpeshgi lease of Ram Nath's share to Gokoola Persad, defendant No. 2. Out of the consideration-money of these two transactions by an arrangement between the parties, Rs. 192 was left in the hands of defendant No. 2, to be paid over to the plaintiffs in satisfaction of their loan of March 1873. Defendant No. 2 neglected to pay over this sum, and the plaintiffs brought a suit for its recovery; and on the 13th September 1876 obtained a decree against defendant No. 2, for the amount due, and in execution of this decree caused the property bought by Gokoola Persad, the defendant No. 2, to be sold, and themselves became the purchasers at the sale on the 2nd April 1877, and were put into possession by the Court.

Defendant No. 2, on the 10th April 1875, had given a mortgage of the properties so purchased in execution by the plaintiffs, to defendant No. 1; and the latter, on the 18th May 1877, brought a suit on his mortgage-bond and obtained thereon a decree. Defendant No. 1 executed his decree by putting up the property to sale, and purchasing it himself on the 6th May 1878. The plaintiffs objected to the sale, alleging that they held [168] an equitable lien on the properties, as the money for which they had obtained a decree was in reality part of the purchase money which defendant No. 2 had to pay to Hem Nath and Ram Nath, and that they stood in the place of these two latter; and on their objections being overruled on the 23rd March 1878, brought this present suit on the 22nd March 1879 to have the sale of the 6th May 1878 set aside, and to reverse the execution-proceedings which disallowed their objections, on the ground that their purchase prevailed over the defendants' mortgage, inasmuch as they had a prior lien upon the property.

Defendant No. 1 contended that the decree obtained by the plaintiffs was merely a simple money-decree which could create no lien on the property in suit; that the property having been previously mortgaged by the judgment-debtor to him, the plaintiffs could, by their purchase, which extended merely

* Appeal from Appellate Decree, No. 131 of 1881, against the decree of Baboo Kali Prosunno Mookerjee, Second Subordinate Judge of Sarun, dated the 13th September 1880, reversing the decree of Baboo Purno Chunder Banerjee, Officiating Munsiff of Purnea, dated the 9th July 1879.

to the rights and interests of the judgment-debtor, only acquire a right of redemption in the property, and not having redeemed it before it was brought to sale in execution of his decree, their right lapsed.

The Munsif dismissed the plaintiff's suit, holding that the plaintiffs only purchased the right of redemption, and not having exercised their right before the purchase of defendant No. 1, their right was annihilated.

The plaintiffs appealed to the District Judge, who held, that defendant No. 1 acquired nothing by his purchase, the plaintiffs not having been made parties to the suit of defendant No. 1, and that the plaintiffs' purchase was not therefore affected; and that they being in possession, the order of the 23rd March 1878, made against them when objecting to the sale, was wrong, and for these reasons he reversed the decree of the Munsif and set aside the miscellaneous order of the 23rd March 1878.

The defendant No. 1 appealed to the High Court.

Moonshee Mahomed Yusuf for the Appellant.—The appellant has a preferential title to the property, his decree being a mortgage decree, the suit was brought upon a mortgage-bond, and the whole claim decreed, it must therefore be taken that not only the claim for money, but also the claim upon the property, [169] was decreed—*Debi Churan v. Pirbhu Din Ram* (1. L. R., 3 All., 388). The suit upon the mortgage-bond was instituted on the 17th January 1877, and the present plaintiff purchased in execution of his money-decree on the 2nd April 1877, therefore the doctrine of *lis pendens* applies.

Baboo Karuna Sindhu Mookerjee for the Respondents.—The decree obtained by the defendants was in reality a money-decree; the doctrine of *lis pendens* can have no application to the case of an execution-purchaser, but the doctrine would apply to cases of voluntary alienation—*Sreemutty Gourmonee Dabee v. Charles Reed* (2 Taylor and Bell, 83), *Dhirendro Chunder Mookerjee v. Anund Moyee Dossee* (1 W. R., 103), *Nuffur Merdu v. Ram Lall Adhicary* (15 W. R., 308), and *Ali Shah v. Husain Baksh* (1. L. R., 1 All., 588). If a third party purchases at an auction-sale pending suit, he may be made a party by a supplemental bill—Story on Equity Pleading, 342.

The doctrine of *lis pendens* was held to apply in the following cases: *Rajkishen Mookerjee v. Radha Madhub Holdar* (21 W. R., 349), *Lala Kali Prosad v. Buli Singh* (1. L. R., 4 Cal., 789, s.c., 3 C. L. R., 396), *Rabia Khanum v. J. P. Wise* (23 W. R., 329), and *Manual Fruval v. Sanagapalli Latchmidevamma* (7 Mad. H. C., 105), on the supposition that there was no distinction between voluntary and involuntary alienations; but the Privy Council, in the case of *Donendro Nath Sanyal v. Ram Coomarr Ghose* (10 C. L. R., 281) have decided that there is a distinction. If the doctrine of *lis pendens* does not apply, then even supposing that the decree which the defendant obtained was a mortgage-decree, still he would get nothing at the sale in execution of his decree. The mortgagee can only sell his lien and the property of the judgment-debtor; and if at the sale the judgment-debtor has no property, the lien cannot pass to the purchaser, because the lien is inseparable from the property—*Metharam Das v. Boloram Phukan* (9 C. L. R., 233). The only remedy which the mortgagee has, is to [170] enforce his lien against the person in possession of the property—*Chowdhry Jonmajoy Mullick v. Dassi Moni Dass* (9 C. L. R., 353).

Moonshee Mahomed Yusuf in reply cited *Manual Fruval v. Sanagapalli Latchmidevamma* (7 Mad. H. C., 105).

The Judgment of the Court (GARTH, C.J., and MITTER and MACLEAN, JJ.) was delivered by

Garth, C.J.—The facts of this case are briefly these: Two persons, Ram Nath and Hem Nath, took a loan of Rs. 192 from the plaintiffs, under a chitti dated the 17th Falgoun 1280 (March 1873). Hem Nath sold his share in Mauza Rizapore Damudur to Gokoola Persad, defendant No. 2, on the 24th July 1874. On the same date Hem Nath, as the guardian of his nephew Mothoora Persad, son of his deceased brother, the aforesaid Ram Nath, granted a zurpeshgi lease of Ram Nath's share in the same property also to Gokoola Persad, defendant No. 2. Out of the consideration-moneys of these two transactions, by an arrangement between the parties, Rs. 192 was left with the defendant No. 2 to be paid over to the plaintiffs in liquidation of the debt due under the chitti of the 17th Falgoun 1280 (March 1873), but this money was not paid by the defendant No. 2 to the plaintiffs, who brought a suit for its recovery; and, on the 13th September 1876, obtained a money-decree against the defendant No. 2.

Before this decree was passed, defendant No. 2, Gokoola Persad, mortgaged the mauza in suit, that is Rizapore Damudur, to the defendants, first party in this suit.

The plaintiffs, in execution of their decree, caused the property in suit to be sold, and purchased it themselves on the 2nd April 1877.

The defendants first party brought a suit against the defendant No. 2 to enforce their mortgage-bond dated the 10th April 1875, and obtained a decree on the 18th May 1877. The plaintiffs' decree was for a very small amount, *viz.*, for Rs. 192, with costs and interest. The decree obtained by the first party defendants was for a very large amount, *viz.*, about a lac of [171] rupees. The defendants first party, in execution of their decree, attached the property in suit. The plaintiffs thereupon intervened, and objected to the sale, on the ground of their prior purchase dated the 2nd April 1877; their case before the execution Court was that, under their decree, they held an equitable lien upon the property in dispute, because the money for which they had obtained a decree was really part of the consideration-money which Gokoola Persad, the vendee, had to pay to Hem Nath and Ram Nath. They contended that as Hem Nath and Ram Nath could claim a lien upon the property sold for that portion of the consideration-money which the vendee Gokoola Persad had not paid, they, standing in the shoes of Hem Nath and Ram Nath, were entitled to claim the same lien.

The execution Court, however, on the 23rd March 1878, disallowed the claim and directed the property to be sold, unless the plaintiffs should satisfy the mortgage-decree. The value of the property in dispute being only Rs. 751, the plaintiffs, of course, did not pay the amount due upon the defendant's decree, which was for upwards of a lac of rupees, in order to save it; and it was accordingly sold in execution of the defendants' decree and purchased by the defendants on the 6th May 1878.

The plaintiffs then brought this suit on the 22nd March 1879, for the declaration of their title to the mauza in suit, on the ground that their purchase should prevail over the defendants' mortgage, because they had a prior lien upon the property. The Munsif tried this question only, *viz.*, whether the plaintiffs held a prior lien upon the property or not. This question was raised in the first and the second issues framed by the Munsif. The Munsif was of opinion that the plaintiffs' contention was not valid. The plaintiffs being only creditors of the vendors, in his opinion, could not claim the same lien upon the property sold for any unpaid portion of the purchase-money which the vendors had. He accordingly dismissed the suit.

On appeal, the Subordinate Judge disposed of the case on an issue which was not raised by the parties. He decreed the plaintiffs' claim, because the plaintiffs were not made parties to the defendants' suit upon their mortgage bond. The Subordinate Judge was not right in disposing of the suit by allowing [172] the plaintiffs to alter the nature of their contention in the Appellate Court. The plaintiffs, it seems to us, purposely did not put their case on the ground upon which the Subordinate Judge has decided it, because it would have enabled them only to obtain a temporary victory. If the defendants were to bring a suit against them to enforce their lien, the property in dispute could not be saved unless they would pay the whole of the mortgage decree, which evidently they would not do because it is of small value compared with the amount of the mortgage-debt. The plaintiffs, therefore, put their case upon the only ground upon which, if they succeeded, they thought they would be able to reap a real benefit—that is, if they could establish their prior lien, they would be entitled to hold the property in dispute free from the defendants' mortgage. The Subordinate Judge was, therefore, not right in allowing the plaintiffs to make out a new case in the Appellate Court.

Then, as regards the Munsif's decision, we are of opinion that it is correct in law. It is true that an unpaid vendor holds a lien upon the property sold for the consideration-money, but a creditor of that vendor cannot claim the same right. The decree of the lower Appellate Court will be reversed with costs, and the decree of the Munsif will be restored with costs.

Appeal allowed.

[9 Cal. 172]

APPELLATE CIVIL.

The 22nd June, 1882.

PRESENT :

MR. JUSTICE TOTTENHAM AND MR. JUSTICE BOSE.

Gobind Lall Seal and another Defendants

versus

Chundhurry Maity and others..... Plaintiffs.*

Sale for arrears of rent—Publication of notice of sale—Material irregularity—Reg. VIII of 1819, s. 8, cl. 2.

Clause 2, s. 8 of Reg. VIII of 1819, which provides that a notice of sale under the Regulation shall be stuck up in the catchery of the zamindar, is not complied with by serving the notice upon the zamindar himself or his agent. The object of the Regulation is to make known to the holders of under-tenures and ryots and the residents of the place that the patni

*Appeal from Original Decree, No. 170 of 1881, against the decree of Baboo Jodu Nath Roy, Subordinate Judge of Midnapore, dated the 31st May 1881.

will be sold if [173] the arrears are not paid off within the time specified, and if the notice is not stuck up in the cutchery, as prescribed by the Regulation, there is such a material irregularity in the publication as will avoid the sale.

Baboo *Aushootosh Dhur*, Baboo *Rajender Nath Bose*, and Baboo *Gopal Chunder Ghose* for the Appellants.

Baboo *Gopi Nath Mookerjee* for the Respondents.

THE facts of this case sufficiently appear from the **Judgment** of the Court (TOTTENHAM and BOSE, JJ.), which was delivered by

Tottenham, J.—This is an appeal against the decree of the Subordinate Judge of Midnapore, setting aside a patni sale on the ground of certain irregularities, which the Court below considered to have been established, and which it thought had been the cause of the patni being sold for an inadequate price.

As to the irregularities found by the lower Court, we think that there is only one with which we need deal. As to the others we doubt whether they should be held to be irregularities at all; and even if they are, we do not think that the plaintiffs, the patnidars, can be said to have sustained any injury therefrom. The material irregularity, however, upon which the lower Court's decree must stand or fall is that relating to the service of the notice under s. 8 of the Patni Regulation. The Regulation requires that there shall be a three-fold publication of the notice: A notice is to be published in the Collector's office; a similar notice is to be stuck up at the Sadr Cutchery of the zamindari; and a copy or extract of such part of the notice as may apply to the individual case shall be sent by the zamindar to be similarly published at the cutchery or at the principal town or village upon the land of the defaulter. The Regulation further provides that the notice to be sent to the mufassal shall be served by a single peon, who shall bring back the receipt of the defaulter or his manager for the same, or, in the event of inability to procure this, the signatures of three substantial persons residing in the neighbourhood, in attestation of the notice having been brought and published on the spot.

[174] The dispute in the case relates to the notice which the law requires to be published on the spot,—that is, at the defaulter's cutchery.

The Court below has found it to be false that the notice was, as alleged, stuck up on the door of the cutchery.

The evidence shows that the service was accomplished by making the notice over to the karkoon of the defaulter in the absence of the defaulter himself and his naib. The karkoon admits having received it and having given a receipt for it. He also proves that, on the return of the naib, he made the notice over to him.

We have no doubt, therefore, upon the evidence, that the defaulter, or his manager, had notice of the intended sale of the patni for arrears; but the Court below holds that such service was not sufficient; and that, when the Regulation lays down that the notice shall be stuck up at the cutchery of the defaulter, or in some principal town or village upon his land, it is not sufficient to hand it over to one of his servants and take his receipt, that servant not being the manager of the defaulter.

Baboo *Aushootosh Dhur*, who appears for the appellants, admits that if the Regulation intended the local publication of the notice to be for the information of ryots and holders of under-tenures in the patni, then mere service of the notice on the defaulter's servant would be insufficient; but he contends that the Regulation does not contemplate any such publication as should inform the local public,—that is, the publication of the notice in the mufassal. He says, that the only information intended for the public is that to be gained from the notice suspended in the Collector's office and the zamindar's cutchery.

He contends that the notice prescribed for the defaulter's cutchery is simply intended to convey information to the defaulter or his manager that the patni is in jeopardy.

We do not take the same view of the law. If the notice were only intended to convey private intimation to the defaulter or his agent, the law would hardly have used the term 'published.' To publish is, in our opinion, to make public,—that is, to convey information to the public or all whom it may concern.

There is one point which merits observation, although it has [176] not been brought to our notice by the pleaders on either side; and it is this—that, in the notice issued by the zamindar to the defaulter, it is set out specifically that "it is the duty of the peon, who is entrusted with this notice, to proceed first of all to the principal mauza or cutchery of the aforesaid lot, stick up the same and bring back the receipt, according to the form of the publication of this notice, from the taluqdar himself or from his naib, or any other agent." It is quite clear, therefore, that the zamindar himself, or at any rate the person who prepared this notice for him, fully understood that the Regulation requires what we now hold to be its requirements. Baboo Aushootosh Dhur has referred us to the case of *Hunooman Doss v. Bipro Churn Roy* (20 W. R., 132) in which a Division Bench of this Court held, that when it was shown that the defaulter's cutchery was an empty and ruinous building, and the notice had therefore been served upon the gomashtha's residence, where the business of the patnidar was actually carried on, such service was an infinitely more exact compliance with the spirit of the law, than service of the notice at the deserted cutchery would have been. The Judges in that case said that the object of the Regulation in this particular was to ensure the publication of the notice to the defaulter or his manager. The pleader, therefore, asks us to infer that the Regulation does not intend any such notice to any body else, and that personal service upon a servant is equal, not to say superior, to the mode of service prescribed in the Regulation, that is, the sticking up of the notice on the cutchery. We need hardly say that we fully concur in the judgment pointed out to us so far as it goes. We fully agree that where the gomashtha's house has practically taken the place of an old and dilapidated cutchery, publication at that house sufficiently meets the requirements of the Regulation. We also agree that the object of the Regulation in this particular is to ensure the publication of the notice to the defaulter or his agent. But we do not find that the Judges in that case said that this was the exclusive object. Had they said so, we should have felt compelled to disagree with them. In our opinion the object of the Regulation is also to make known to the holder of under-[176] tenures and ryots and the residents of the place generally that the patni will be sold if the arrears are not paid off within the time specified; and in the case cited we find that the notice was not merely served personally on the gomashtha, and shut up by him in his box, but was, as prescribed by the Regulation, stuck up on the house. There is, therefore, nothing in that case which to our minds relaxes the rules laid down in s. 8 of the Regulation.

As observed before, Baboo Aushootosh Dhur has admitted that should we take the view we have just expressed of the object of the Regulation his case must fail. We have thus arrived at the result which he foreshadowed.

The appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[PUBLICATION OF NOTICE—IRREGULARITY—

See also 20 Cal. 86 19 I. A. 191, affirming 17 Cal. 474; 19 Cal. 703; 27 Cal. 789; 12 Cal. 67; 9 Cal. 619.]

[9 Cal. 176 : 12 C.L.R. 22]

APPELLATE CIVIL.

The 3rd July, 1882.

PRESENT :

MR. JUSTICE TOTTENHAM AND MR. JUSTICE BOSE.

Luchmiput Singh.....One of the defendants

versus

Amir Alum (Plaintiff) and others.....Defendants.

*Mahomedan Law—Wuqf—Provisions for payment of debts and maintenance—
Minor plaintiff—Guardian.*

A Mahomedan created a *wuqf* of all his property, and appointed his minor grandson *mutwali*, providing that, during the minority, the property should be managed by the minor's father. The deed contained a provision that, in the first place, certain debts should be paid, and then provided that the property should be applied towards the religious uses created and the maintenance of the settlor's grandsons and their male issue. In execution of a decree against the minor's father, the endowed property was attached and sold. In a suit by the minor through his sister, as guardian, to recover possession of the property, in which suit the sister was not made guardian *ad litem* by an order of Court, but was allowed to sue by the District Judge.

Held, that the suit was maintainable as framed.

Held also, that, notwithstanding the provisions for payment of debts and maintenance, the *wuqf* was valid.

By a *wuqfnama*, dated the 6th February 1872, one Shah Enayet Hossein endowed certain properties, which he had inherited from his wife Bibi Rujjan, for the expenses of the [177] *musjid* and the tomb of the holy personages of his family, the servants of a certain *asthana*, and for performing the *urs* and *fateha* at the tomb; and he appointed Shah Mahomed Amir Alum, his grandson, the minor son of Syed Shah Asudulla, as *mutwali*. The deed directed that so long as Shah Mahomed Amir Alum remained a minor, Syed Shah Asudulla should manage the property, and it directed that the manager should, in the first place, pay certain debts, and afterwards apply the property towards the religious uses created and the maintenance of the settlor's grandsons and their male issue. Besides the endowed property Syed Shah Asudulla was possessed of property which he had acquired by inheritance.

In execution of a decree obtained by Brij Mohun Thakur and Huri Mohun Takur, against Shah Asudulla, the endowed property was sold on the 7th August 1878 and purchased by Roy Luchmiput Singh.

Shah Amir Alum, who was still a minor, now instituted a suit through Mussamat Bibi Ommutul Fatema, his sister, against Roy Luchmiput Singh, Brij Mohun Thakur, Huri Mohun Thakur, and Shah Asudulla, for a declaration that the endowed property was not liable to be sold for the debts of Shah Asudulla, and for possession. Mussamat Bibi Ommutul Fatema was not appointed guardian *ad litem* by an order of Court, but was allowed to sue by the District Judge. The defendants, besides the usual pleas of fraud and collusion, pleaded that the plaintiff could not sue through Ommutul Fatema, and that the deed was invalidated by the condition for payment of debts.

* Appeal from Original Decree, No. 175 of 1880, against the decree of Moulvi Hufez Abdul Karim, Subordinate Judge of Bhagalpore, dated the 16th of April 1880.

The Subordinate Judge held, that it was reasonable and proper that Mussamat Ommutul Fatema should be the guardian for the purposes of the suit, and that the endowment was valid.

The defendant Roy Luchmiput Singh appealed to the High Court.

Baboo Sreenath Dass and Baboo Rashbehary Ghose for the Appellant.

Mr. R. B. Twiddle, Mr. C. Gregory, and Moonshee Mahomed Yusuf for the Respondents.

[178] The Judgment of the Court (TOTTENHAM and BOSE, JJ.) was delivered by

Tottenham, J. This is an appeal against a decree of the Subordinate Judge of Bhagalpore, ordering restoration to the plaintiff, respondent, as mutwali, of certain property alleged to be *wuqf*, which had been acquired by the defendant No. 1, appellant, by auction-purchase in execution of a decree held by the defendants Nos. 2 and 3 against the defendant, No. 4. The *wuqf* was created in 1872 by Shah Enayet Hossein, the late father of the defendant No. 4, and grandfather of the plaintiff. The plaintiff, being a minor, the suit was, with the permission of the District Judge, instituted on his behalf by his sister, Bibi Ommutul Fatema *alias* Bibi Nur Jehan.

The defendant No. 4, Shah Asudulla Sahib, is the plaintiff's father.

When the property was attached in 1873, the debtor filed a claim on behalf of the present plaintiff, objecting that the property was *wuqf*, and not liable to be sold, the debtor being only the manager thereof during the minority of his son, the mutwali. That claim, however, was rejected, and the sale took place on the 7th of August 1878.

The judgment of the lower Court, after setting out the pleadings, held, that the suit was maintainable as brought; that the *wuqf* was a valid one in all respects; and that the purchaser at auction had acquired no right under the sale.

The contentions urged before us in appeal have been, *first*, that the suit was not maintainable by Ommutul Fatema as next friend to the minor plaintiff, and that there must be a formal order of the Court appointing a guardian *ad litem*; *secondly*, that the alleged *wuqf* is not a valid one under Mahomedan law; and *thirdly*, that the *wuqfuana* was never intended by Enayet Hossein, the maker of it, to be operative, and that, in fact, the property has always continued to be enjoyed and used as the means of support of the family.

As to the first point we think that the objection is not well founded. It was first assumed by the pleader for the appellant that the minor's father, the defendant No. 4, was his certificated guardian under Act XL of 1858. But it seems that this is not [179] so; and we consider that the District Judge, who undoubtedly had jurisdiction to try this suit, was competent, under s. 3 of the Act, to allow it to be instituted by the minor's sister, he considering that the father had neglected his interest in respect of the property in suit.

The next question is, whether or not the *wuqf* is a valid one according to Mahomedan law. There has always been a good deal of controversy in the Courts as to what is essential, and as to what will invalidate a *wuqf*. On the one hand, it has been contended that no *wuqf* is valid unless it is solely and wholly for pious and charitable purposes enduring throughout all times; and on the other hand, there have been those who considered that what is practically a perpetual provision for the dedicator's family may be a valid *wuqf*.

The fact that the Subordinate Judge who tried this case is himself a Mahomedan gentleman of considerable attainments in Arabic learning, entitles his opinion to peculiar weight in a case of this nature ; and he appears to have entertained no doubt, whatever, as to this *wuqf* being of a thoroughly legitimate character as to its constitution and objects. And singularly enough, the only matter which strikes us as one in respect of which, with reference to the decisions of the Courts, makes the character of this alleged *wuqf* at all doubtful, is the very one which the lower Court has treated as one as to which there could be no dispute as to its being a proper object of *wuqf*. For, in the *wuqfnama*, there is express provision for the maintenance of the dedicator's male descendants, in addition to the strictly pious and religious objects for which the *wuqf* purports to have been made. But the Bombay High Court has, by a Full Bench, decided that, to constitute a valid *wuqf*, there must be a dedication of the property solely to the worship of God, or to religious or charitable purposes : see *Abdul Ganne Kasam v. Hussien Miya Rahimtula* (10 Bom. H. C. R., 13). That view has been endorsed by a Division Bench of this Court in the case of *Mahomed Humidulla Khan v. Budrunnissa Khatun* (8 C. L. R. 164).

The definition might seem to exclude from judicial recognition a *wuqf* of which one object is a provision for the family of the creator of it.

[180] The lower Court, however, easily disposes of this question by the observation that "it is quite evident, and there is no necessity to quote any authority on the subject, that a *wuqf* for one's-self and for one's children is valid."

In the Bombay case the Judges, after considering all the available authorities on this question, held, that the balance was in favour of the dictum to which they gave effect ; and this too was what the Division Bench, of which one of us was a member, decided in the case of *Mahomed Hamidulla Khan v. Budrunnissa Khatun* (8 C. L. R., 164). In that case the alleged *wuqf*, which we declined to recognize, had for its object nothing connected with the worship of God or religious observances, and provided only in a very remote contingency for the poor. It was simply a perpetuity for the benefit of the dedicator's daughter and her descendants so long as any should exist.

The *wuqfnama* now before us is of a very different character : and having regard to the passage in it reciting the fact of dedication, we think that, without saying whether or no we are prepared on further consideration to adopt to the full the ruling above-mentioned, we can treat this *wuqf* as actually fulfilling the condition described, for the maker of the *wuqf*, after reciting the whole of his property of every kind, proceeds to declare that all has been endowed by him for the expenses of the masjid and the tombs of the holy personages of his family the servants of the *asthana*, and for performing the *urs* and *fatehu* at the tomb.

These are the objects of the *wuqf*, and they are all distinctly religious. They also involve to some extent charity to the poor.

We are disposed to hold this, therefore, to be a valid *wuqf* within the purview of the rulings quoted.

The subsequent direction that the manager shall maintain the future male descendants of the maker of the *wuqf* does not necessarily alter its character. Whether or not the provision or direction can be lawfully carried out, it is not necessary for us now to decide. But apart from this we are of opinion that the *wuqf* was completed by the passage which we have quoted. And we accordingly decide this point against the appellant.

[181] As regards the third and last objections we are of opinion that the *wuqf* being found to be a legal and valid one, it is really immaterial for the purposes of this suit to enquire how the proceeds of the property have since been applied. For no amount of misappropriation or other misconduct on the part of the manager can alter the character of the *wuqf* or render it void.

That being so, we hold that the decree of the lower Court was right, and we dismiss the appeal with costs.

This judgment will also govern Appeal No. 52 of 1881.

Appeal dismissed.

NOTES.

[I. SUIT BY NEXT FRIEND, ETC.—

See now the C. P. C. 1908, O. 32, r. 1, according to which, if a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall *act as the next friend* of the minor, or be appointed his guardian for the suit, unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed as the case may be. For the law under the previous Code, see 11 Cal. 509; 10 Cal. 134; 12 Cal. 18; 9 All. 508; 14 Cal. 159; 31 All. 7.

II. WUQF—VALID DEDICATION.—

See also 13 Mad. 66 (74); 18 Mad. 201 (212); 11 Bom. 492 (504); 13 Bom. 264 (272); 8 Bom. L. R. 245 (250); 20 Cal. 116; 8 O. C. 379; 33 All. 400; 9 I. C. 753; 8 A. L. J. 162. These cases have lost most of their importance after the coming into force of the Mussalman Wuqf Validating Act, VI of 1913, passed for the purpose of removing doubts as to wuqf created by persons professing the Mussalman faith in favour of themselves, their children and descendants and ultimately for the benefit of the poor or for other religious, pious, or charitable purposes.*]

[9 Cal. 181 11 C. L. R. 34.]

APPELLATE CIVIL.

The 17th April, 1882.

PRESENT:

MR. JUSTICE WHITE AND MR. JUSTICE MACPHERSON.

Mon Mohun Buksee.....Decree-holder

versus

Gurga Soondery Daboo.....Judgment-debtor.

Execution of decree—Minor plaintiff—Application for execution by guardian—Limitation Act (XV of 1877), s. 7.

A plaintiff, who has obtained a decree during his minority, has the option either of applying through his guardian to execute the decree during his minority or to wait until the expiration of his minority before executing his decree. The application of the guardian is the application of the infant. The minor is under disability during the whole period of his minority. His disability does not cease, because he, through his guardian, makes two or more applications for execution however long the interval between them, provided they are all made during his minority.

Baboo Issur Chunder Chuckerbutty for the Appellant.

Baboo Kossory Mohun Roy and Baboo Mohiny Mohun Roy for the Respondent.

*Appeal from Appellate Decree, No. 342 of 1881, against the order of F. J. G. Campbell, Esq., Judge of Rungpore, dated the 3rd September 1881, reversing the order of Baboo Denobundhoo Roy, Munsif of Kooreegram, dated the 3rd May 1881.

THE facts of this case sufficiently appear from the **Judgment** of the Court (WHITE and MACPHERSON, JJ.), which was delivered by

White, J.—The Court below held that the execution was not barred by the law of Cooch-Behar, but that it was so by the law of British India, that being the law of the Court in [182] which the judgment was sought to be enforced, and the law defining the limitation for suits being part of the *lex fori*.

On appeal before us it is argued, that, assuming the question to be determinable by the Limitation Act now in force in British India (Act XV of 1877), yet by that Act the execution is not barred, for the plaintiff (the decree-holder) is a minor, and as such under disability, and therefore time does not run against him during his minority. It is not disputed that the decree-holder is a minor; and accordingly, under s. 7 of the Act, until his minority has ceased, he is not affected by the law of limitation. It is contended, however, for the respondent that, upon the true construction of s. 7, the minor must wait until he attains majority before suing out execution, and that, until then, he cannot, through his guardian, take any steps to enforce his decree. This contention is unsound, and is disposed of by the judgment of the Privy Council upon the corresponding section of the old Limitation Act, XIV of 1859, in the case of *Mussumat Phoolbas Koonwur v. Lalla Jogeshur Sahoy* (L. R., 3 L. A., 25-26). A plaintiff, who has obtained a decree during his minority, has the option either of applying through his guardian to execute the decree during his minority, or to wait until the expiration of his minority before enforcing his decree.

Another point was attempted to be argued, that, if the guardian of a minor commenced to execute the decree on his behalf during the minority, all subsequent applications by that guardian on the minor's behalf must be governed by the law of limitation. This argument also is unsound. It assumes, contrary to the law on the subject, that the application of the guardian is not the application of the infant, but something distinct. The minor is under a disability during the whole period of his minority. His disability does not cease, because he, through his guardian, makes two or more applications for execution, however long the interval between them, provided they are all made during the minority.

The order of the Judge is reversed, and that of the Munsif restored with costs in this Court and also in the lower Appellate Court.

Appeal allowed.

NOTES.

[MINOR—DISABILITY—

See also 20 Cal. 714; 3 C. W. N. 24; 16 Bom. 536; 6 Bom. L. R. 765; 22 All. 199; 32 Cal. 129.]

[11 C.L.R. 305]
 [183] APPELLATE CIVIL.

The 30th June, 1882.

PRESENT:

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

 David.....Plaintiff

versus

Grish Chunder Guha..... ..Defendant.*

Mufassal Small Cause Court Act (XI of 1865), s. 6— Res judicata—

Interest in land —Jalkar District Road Cess Act (Beng. Act X of 1871.)

A suit to recover road cess and public works cess is not a claim for money on bond or other contract, but is a claim created and made recoverable by a special enactment of the Legislature, and does not fall within the provisions of s. 6 of the Mufassal Small Cause Court Act.

The decision of a District Judge deciding that the plaintiff is not entitled to sue in a suit for road cess, where the amount claimed is less than Rs. 100, and therefore no second appeal lies to the High Court, is a bar to a second suit in which the amount claimed is above Rs. 100.

A jalkar does not impart any interest in the soil itself, and therefore a patni of a jalkar is not "an interest in land" within the meaning of the definition in the District Road Cess Act.

Baboo *Rashbehary Ghose* and Baboo *Lall Mohan Dass* for the Appellant.
 Baboo *Rajendro Nath Bose* for the Respondent.

The facts of this case sufficiently appear from the Judgment of the Court (McDONELL and FIELD, JJ.), which was delivered by

Field, J. In this case the plaintiff is the proprietor of a *sair mohal*, or jalkar, which is No. 4000 on the rent-roll of the Furriddpore Collectorate. The defendant holds under the plaintiff a patni, apparently of the whole of this property. The present suit is brought to recover the sum of Rs. 302-4 annas, on account of road cess and public works cess. A preliminary objection is taken that this is a suit of the Small Cause Court class, and therefore, as the amount is under Rs. 500, no second appeal will lie. It is contended that, with reference to the language of cl. 1 of the proviso to s. 6 of Act XI of 1865—
[184] "for any claim for the rent of land or other claim for which a suit may now be brought before a Revenue Officer,"—the claim in the present case is not a claim for which a suit could have been brought before a Revenue Officer at the time when Act XI of 1865 was passed. It is said, therefore, that the case does not fall within the proviso, but comes within the general words of s. 6 of the Act; and that the suit is therefore maintainable in the Small Cause Court alone.

We think it unnecessary to consider whether the suit comes within the language of the proviso or not, because it appears to us that this particular suit does not come within the general words of the section itself. We think that this is not a claim for money on bond or other contract. It is a claim created and made recoverable by a special enactment of the Legislature; and,

* Appeal from Appellate Decree, No. 2376 of 1880, against the decree of Baboo Nobin Chunder Gangooly, Subordinate Judge of Furriddpore, dated the 10th of September 1880, affirming the decree of Baboo Girindro Mohan Chuckerbutty, First Munsif of Bhanga, dated the 25th of August 1879.

in our opinion, does not fall within the provisions of s. 6 of the Small Cause Court Act.

The next contention is, that, so far as regards the road cess, the present claim is barred by a previous decision between the same parties, in which it was held that the plaintiff could not recover road cess. In that case the amount claimed was under Rs. 100; and inasmuch as the road cess is declared by the Act to be recoverable in the same way as rent, the provisions of Beng. Act VIII of 1869 were held applicable, and under the provisions of s. 102 of that Act, as the amount sought to be recovered was below Rs. 100, it was held that there was no second appeal; and the District Judge's decision was therefore final. It is now contended that, inasmuch as the amount sought to be recovered in the present case exceeds Rs. 100, and there is therefore a second appeal to the High Court, the principle of *res judicata* is not applicable. But it appears to us that the question as to the liability to road cess was decided by a Court of competent jurisdiction in the former case, and that therefore the principle of *res judicata* does apply. We may observe that the plaintiff could easily have secured his second appeal upon the point which he raises by waiting to sue until the amount sought to be recovered exceeded 100 rupees.

The third question raised is, whether public works cess can be recovered by the plaintiff upon this so-called *patni*. The [135] public works cess is provided for by Beng. Act II of 1877, which declares all immoveable property to be liable to the payment of a cess therein called the public works cess. Section 5 enacts that all holders of estates or tenures shall pay the public works cess at the rate determined under s. 4 and in the manner and the proportions prescribed for the payment of the road cess by the District Road Cess Act. Section 9 provides that the words and expressions 'house,' 'estate,' 'tenure,' 'district,' 'immoveable property,' 'holder of an estate or tenure' shall have the meanings attributed to them respectively in the District Road Cess Act. The District Road Cess Act is Act X of 1871 of the Bengal Council, and the definition of 'tenure' as given in that Act is: 'tenure' "includes every interest in land, whether rent-paying or not, save an estate as above defined, and save the interest of a cultivating ryot." Now the question admittedly to be determined is, whether this *patni* of a *jalkar* is a tenure within the meaning of the term as used in the District Road Cess Act (Beng. Act X of 1871). 'Land' is defined in the same section to mean "land which is cultivated, uncultivated, or covered with water." It is to be observed that the language of the definition of 'tenure,' which "includes every interest in land," etc. must be understood as not excluding all the usual and ordinary meanings of the word tenure.' It has not been contended before us that the word 'tenure,' apart from the above definition, would include a *jalkar*, and we think it impossible to say that it would.

Turning then to the definition, can we say that a *jalkar* is an interest in land, meaning by 'land,' land which is cultivated, uncultivated, or covered with water? It appears to us that we cannot say that it is such an interest. The question whether a fishery implies the ownership of the soil was discussed in England in the case of *Marshall v. The Ulleswater Steam Navigation Company* (3 Best and Smith's Reps., 732). It was there held that the allegation of a several fishery *prima facie* imports ownership of the soil,--BLACKBURN, C.J., dissenting, although he held that the Court was bound by the authorities to that effect. Now, in England, [186] a several fishery may undoubtedly exist apart from any ownership of the soil under the water. It may exist as an incorporeal right. Where it exists as an incorporeal hereditament, it has been held not to be the subject of occupation, and therefore not to be rateable for the

relief of the poor; and it required express words in the Rating Act, 37 and 38 Vict., c. 54, s. 3, to make rights of fishing when secured from the occupation of land, rateable for the relief of the poor. In this country we think that a *jalkar* does not necessarily imply any right in the soil. In the case of *Radha Mohun Mundul v. Neel Madhub Mundul* (24 W. R., 200), it was said:—"It is quite familiar that *jalkar* rights are frequently granted extending over large estates, the property of other persons than the grantee of the *jalkar*; and it is clear that if, on the water drying up, the land below it become the property of these grantees, the most complicated questions of fact would constantly be arising, because long after the drying up of the beels, the Courts would be called upon to decide how far the water had originally extended, and, as in the very case before us, grants of *jalkar* are usually conveyed in such terms as to import the use and enjoyment of what may be called purely aqueous rights, such as fishing, gathering of rushes and other vegetation which arise from and are connected with water, and it may be very well conceived that if in such cases the right to the soil were implied in the grant of the *jalkar*, it would be wholly unnecessary to specify the particular rights. We have mentioned this because if the grantee were the owner of the land, he would, as a matter of course, be entitled to everything on it." Now, if a *jalkar* does not import any interest in the soil itself, we think it impossible to say that it is an interest in land within the meaning of the definition in the District Road Cess Act, land being there defined to mean land which is cultivated, uncultivated or covered with water. We may further observe that, in Act VII of 1868 of the Bengal Council, the word 'tenure' is defined to include "all interests in land, whether rent-paying or *lakhiraj* (other than estates as above defined) and all fisheries." Now, if the word 'tenure,' in its ordinary accepta-
[187] tion, included fisheries, it would have been unnecessary for the Legislature to say in so many words that in Beng. Act VII of 1868 it was to include fisheries. Beng. Act VII of 1868, it is to be observed, was passed before the District Road Cess Act (Beng. Act X of 1871); and if it can be contended that, in the latter Act, the omission of fisheries in the definition was due to an oversight of the Legislature, it is important to observe that no steps have been taken to remedy that oversight in the Cess Act (Beng. Act IX of 1880). The result would seem to be that the Legislature, by deliberately inserting 'fisheries' in the definition of 'tenure' in one Act, and omitting the same matter in the definition of the same word in another Act, passed for different purposes, intended that the term 'tenure' should not include fisheries in the latter Act. We think, therefore, that a *patni* of a *jalkar* is not a tenure within the meaning of the Road Cess Act.

The appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[I. JALKAR—

"Their Lordships are satisfied that the term '*Jalkar*' is a general one, signifying '*water-rights*' and might therefore aptly include the right to drift and stranded timbers as well as the right of fishing or any other interest of a similar kind in the produce of the river":—24 I. A. at 44.

Jalkar was held not to be immoveable property within the Specific Relief Act 1877, sec. 9.

As regards the Limitation Act, see 3 Cal. 276; 5 Cal. 945; 9 Cal. 703; 19 Cal. 562; 23 Cal. 55; 31 Cal. 937; as regards the Transfer of Property Act, see 20 Cal. 446. The right to *Jalkar* carries no right to the soil, 31 Cal. 937.

II. RES JUDICATA—

See also 25 Cal. 571.

III. THE CESS ACT—

See (1907) 11 C. W. N. 105 as to whether a *meta* or *fair* is immoveable property within this Act.]

The 6th, 7th, and 8th, February, and 10th March, 1882.

PRESENT:

LORD BLACKBURN, SIR B. PEACOCK, SIR E. P. COLLIER, SIR R. COUCH,
AND SIR A. HOBHOUSE.

Nilmoni Singh Deo..... Defendant

versus

Bakranath Singh..... Plaintiff
and The Secretary of State for India
in Council.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

*Jaghir—Inclusion of jaghir lands in area of settled Zamindari—
Ghatwali tenure—Reg. XXIX of 1814.*

In the area of a zamindari were included at the Permanent Settlement the mauzas which made up the mehal of a jaghir, the succession to which was subject to the sanction of Government, the jaghirdar being bound to render public services. One-third of the revenue assessed upon the jaghir mehal was retained by the jaghirdar, forming no part of the zamindari assets on which the jama of the latter was fixed.

Held, that whether this jaghir was a ghatwali tenure or not, within the meaning of the term as applied in Reg. XXIX of 1814* (the zamindari being Pachit, adjoining, and at one time included in, Birbhum,) the jaghir was analogous to such tenure as described in the preamble to the Regulation.

[188] *Held* also, that the nature of the tenure had not been altered by the Permanent Settlement, after which the services due by the jaghirdar remained as before, public services, and continued to be due to the Government. That the zamindar became entitled only to the rent, or revenue, which was previously due to the Government, and in respect of which he was assessed, and did not become entitled to the services in respect whereof the one-third of the rent or revenue was allowed as compensation to the jaghirdar. That the jaghir, though hereditary, was not subject to the ordinary rules of inheritance according to the Hindu or the Mahommodan law, but was held upon the condition of approval of the heir by the Government. Thus were precluded both division of the jaghir mehal upon the death of the holder, and alienation during his life.

It followed that the jaghir mehal was not liable to attachment and sale in execution of a decree against the father and predecessor in estate of a jaghirdar so approved, as assets by descent in the possession of the latter.

Raja Lelanund Singh v. The Government of Bengal (6 Moore's I. A., 101) followed.

APPEAL from a decree of the High Court (9th June 1879), made under the 15th clause of the Letters Patent of the High Court, 1862, which reversed a decree (21st April 1877) of a Divisional Bench, and restored a decree (25th November 1875) of the Judge of the District of West Burdwan.

The question on this appeal was, whether lands within the area of a permanently settled zamindari were held in jaghir independently of the

* Relating to "the lands held by the class of persons denominated ghatwals in the district of Birbhum."

zamindari; and were held on such a tenure that, in the possession of the jaghirdar, they were not assets by descent from his father and predecessor in estate, liable to be attached for the judgment-debt of the latter.

The suit commenced in the Court of the Munsif of Gangajalghati, and transferred to that of the Judge of the West Burdwan District—was to obtain a declaration that nine mauzas, forming the mehal of a jaghir, in Pargana Moheshara, in the zamindari of Pachit, were not liable to attachment and sale under an order of 10th August 1871, in execution of a decree obtained in that year by the defendant, appellant, the Raja zamindar of Pachit, against Bir Singh, the father of the plaintiff, respondent, Bakranath Singh, the jaghirdar. The latter claimed the mouzas as held by him in jaghir, subject to certain public services due from him to the Government, which had sanctioned his succession to the jaghir in 1865.

[189] The Raja zamindar maintained that the mauzas were not jaghir mehal but part of his malguzari lands, settled with a tenant by one of the Raja's predecessors, for services to be rendered to him as zamindar. Having been the property of Bir Singh, deceased, the interest of the jaghirdar was liable to attachment in the possession of his heir, and could be brought to sale in execution of the decree of 1871, in conformity with the Code of Civil Procedure.

The Government, joined as a defendant, supported the claim in its written statement, alleging that the land was held in jaghir, as a service tenure, subject to the jaghirdar's discharging public duties, and to the approval by the Government of his succession to the jaghir. The zamindari of Pachit, at one time included in the Birbhum District, was placed under special administration under Reg. XVIII of 1805. In 1817, it was transferred from Manbhum to the District of West Burdwan.

In 1817, the jaghir mehal, then 14½ mauzas, was divided into two parts, as to both of which litigation ensued on the question of the Raja's rights as zamindar. In 1863 the Raja sued Bir Singh, the plaintiff's father, for resumption of 6½ mauzas, part of the above, alleging that they had been granted by an ancestor of the Raja's for personal service, which was no longer either required or rendered. The dismissal of this suit by the Deputy Commissioner of Manbhum and the Judicial Commissioner of Chota Nagpore was followed by the rejection of a special appeal in the High Court—*Rajah Nilmoney Singh Deo v. The Government of Bengal* (6 W. R., 121) - and an appeal to Her Majesty in Council was also dismissed (18 W. R., P. C., 321).

In 1867, a suit by the Raja against the present jaghirdar, for arrears of rent accrued during the lifetime of his father Bir Singh, was dismissed in the local Courts, and a special appeal to the High Court was rejected, it being held that a new jaghirdar was not responsible for the rent due from a former one as such—*Rajah Nilmoney Singh v. Bakranath Singh* (10 W. R., 255).

But, in 1871, a claim for some villages, part of the above mehal, but other than those now in dispute, founded on an [190] alleged appointment by the Government of the plaintiff as jaghirdar, was brought against the Raja in the case of *Udaychund Chuckerbutty v. The Raja of Pachit* (unreported). The High Court (Dwarkanath Mitter and Ainslie, JJ.), in dismissing this suit, decided that the tenure was one in which the Raja, as zamindar, was primarily interested.

In the present suit the Officiating Judge of the West Burdwan District (Mr. J. Tweedie) decreed for the plaintiff, finding that the service, of which the performance was a condition of the jaghirdar's tenure, was of a public

nature, and was not rendered to the zamindar. The plaintiff's interest was not, in his opinion, saleable in satisfaction of the debt of his father and predecessor.

On appeal to a Divisional Bench of the High Court (MARKBY and ROMESH CHUNDER MITTER, JJ.), this decree was reversed, in accordance with the judgment of the senior Judge.

An appeal against this decree of the Divisional Bench was heard, under s. 15 of the Letters Patent of the High Court, by a Bench consisting of the Officiating Chief Justice, L. S. JACKSON, J., and AINSLIE and WHITE, JJ. The proceedings in the Divisional Court and an appeal under the Letters Patent will be found reported in the 3rd volume of the Calcutta Law Report, p. 583.

The result was the reversal of the decree of the Divisional Bench, and a decree for the plaintiff according to the concluding words of the judgment above set forth.

From this decision the defendant appealed to Her Majesty in Council.

Mr. *R. V. Doyle* appeared for the Appellant.

Mr. *J. Graham*, Q. C., and Mr. *J. T. Woodroffe* for the Respondents.

The principal arguments on behalf of the appellant were, that the jaghir mehal had been included in, and assessed as part of, the lands of the permanently settled zamindari of Pachit; and that the jaghirdar's services, originally, were due to the Raja zamindar, as well as the rent for the land assessed. The jaghir was not a service tenure; and, having been Bir [191] Singh's property, could be attached in the hands of his son, who had succeeded him by hereditary right. The respondents had not shown that, at the Decennial or at the Permanent Settlement, the Government retained any right of dispossessing the holder of this tenure, or of interfering with the course of descent. They had also failed to adduce sufficient evidence of any right continuously exercised by the Government to require police services from the jaghirdar for the time being, and such evidence as there was of calls upon the jaghirdar in this respect related to matters which could be ascribed to encroachment or misapprehension, but could not be held to be inconsistent with the hereditary character of the tenure. Two conditions of tenure assumed to exist had been made the basis of the judgment appealed against, *viz.*, the appointment of the jaghirdar by, and his rendering services to, the Government. But these had not been established as essentially belonging to the tenure; and notwithstanding the fact that the sanction of Government had been given to recent successions, still the tenure being ancient and of unknown origin had descended from father to son, and was held by hereditary right. In a great degree this had been admitted, the only qualification insisted upon being that the heir could not be a person considered by the Government to be unfit for the duties attached to the tenure. The estate had probably been created by a grant from some predecessor of the Raja zamindar before the year 1765, the services being originally due to the local chief, and it had not been shown that the services were other than such as, by usage, the zamindar responsible for the good order of that part of the soubah of Behar, would have been entitled to claim from the holder of a subordinate tenure. Zamindars under the nawabi were entrusted as well with the defence of the territory against foreign enemies as with the maintenance of order within their boundaries. For this purpose they were accustomed to employ armed retainers to guard against hostile inroads, as well as a general police force, under the description of thannadars, paiks, and chaukidars, to repress crime

in the villages *Joykishen Mookerjee v. The Collector of Burdwan* (10 Moore's I. A., 16). From Bhagalpore to [192] Midnapore extended a chain of service tenures of which the holders were bound to assist their superiors in keeping the peace. Among these tenures the 'ghatwalis' of Bhagalpore had been held to form part of the permanently settled estate of the Raja of Karakpore, being included in his zamindari lands; and it had been decided that they were not thannadari or police lands, resumable on the Government's assuming charge of the police *Raja Lelanund Singh v. The Government of Bengal* (6 Moore's I. A., 101); Regs. XXXVII and XLII of 1793. The ghatwali tenures in Birbhum had been made the subject of special legislation in Reg. XXIX of 1811, which did not apply to the tenures now in question. Pachit, and the tenures within that zamindari, now forming part of the West Burdwan District, had been left to the operation of the general law. On the cardinal question what was the position of the zamindar in relation to this jaghir before the Decennial Settlement, the principal documentary evidence available was the following, as the records of the Birbhum Collectorate had been lost in the mutiny of 1857:

Letters from A. Higginson, Supervisor of Birbhum, to S. Middleton Chief Member of the Council of Revenue at Murshedabad in 1771 with Jamma-bandi Statement of the Pachit zamindari for that year.

A letter from the same, with enclosures, to the Hon'ble Warren Hastings, 10th April 1774.

A Revenue Report of Lalla Kanji, Tehsildar of Pachit, 18th June 1799.

Collectorate Papers issued in Manbhum and West Burdwan.

Analytical View of the Revenues of Bengal by Mr. J. Grant, addressed to the Court of Directors in 1786, printed as an Appendix to the 5th Report of the Select Committee of the House of Commons on the affairs of the East India Company, 1820.

Shore's minute, and Harington's Analysis of the Regulations.

Proceedings before Colonel J. F. Ouseley, Political Agent to the Governor-General, May 1815.

[193] Neither in the first settlement of 1771 made by Mr. Higginson, nor in the Decennial Settlement of 1786 made permanent in 1793, was there anything to alter the hereditary character of the jaghir or its dependence upon the zamindari. Whether the settlement was mauzawar, or in the lump, did not appear; but the jaghir mohal was treated as part of the whole zamindari estate. That there might be such sub-tenures included in the Permanent Settlement, and covered by the jama, might be implied from the decision in *Raja Lelanund Singh v. The Government of Bengal* (6 Moore's I. A., 101) from which case it appeared that there might be lands not liable to resumption under clause 4, s. 8, of Reg. I of 1793, as having been included in the allowances made to zamindars for police purposes. Thus there might be a tenure held conditionally on the performance of service due to the zamindar. Also might be cited *Joykishen Mookerjee's* case (10 Moore's I. A., 16), above referred to, as showing that there might be chakeran tenures not resumable as thannadari lands under the Regulation, but annexed to the malguzari. Again it was to be noticed that it did not follow that, because the Government might disallow the succession of an unfit person, the jaghir could not be hereditary. It was hereditary, and because hereditary, it was alienable. Grants held 'nashen bad naslan,' 'butnan bad butnan,' as this jaghir was, were transferable by gift, sale, or otherwise, by the terms of Regs. XXXVII of 1793, and XII of 1805,—*Bithul Bhut v. Lalla Raj Kishore* (2 Agra H. C.,

284). The supersession of the zamindari police establishments or thannadari system, discontinued on the 7th December 1792, had not altered the rights of the zamindar of Pachit over the jaghir in question. The new rules were enacted in Reg. XXII of 1793, which provided that the police of the country should, thenceforth, be under the exclusive charge of officers appointed by the Government. When this change took place, the Decennial Settlement (1789) had already been in force for some years; and therefore, until the Police Regulations of 1793, the jaghirdar must have been the subordinate of the zamindar for the repression of crime. After the latter date, the zamindar and the jaghirdar alike ceased to [194] be directly responsible in the police administration; but the effect of this was only to forbid the zamindar any longer to employ the jaghirdar in police duties. In other respects their relations to one another remained, and there was no transfer to the Government of the personal services due to the zamindar. Reference was made to Regs. XXII of 1793, VIII of 1814, XX of 1817, Mr. Shore's Minute (assessment of chakeran lands), and Harington's Analysis of the Regulations, vol. iii, pp. 239, 241. [Their Lordships inquired if the argument alleged that the jaghirdar, retaining one-third of the profits of the jaghir mehal, retained it free of services after the enactment of the Police Reg. XXII of 1793.] The jaghirdar no longer rendering police services to that extent gained. His duties, had he thenceforth been bound to render services to the Government, would have been defined. There was, however, no sufficient evidence as to the precise nature of the duties which the Magistrate could call upon him to undertake. The instances given did not, in any marked degree, exceed those services to which landholders were liable, as those services were defined in Reg. XX of 1817. The inference was, that such duty as he owed, he owed to the zamindar.

Reference being made to Lalla Kanji's Report (1799), (where it appeared that the jaghirdars acted under the control of the zamindar, upon whom fell the charges of police investigation, and where the duties of the digwar were distinguished from those of the jaghirdar), the true conclusion was, that the digwars rendering police services were paid by being maintained in holdings altogether rent-free. The jaghirdars, on the other hand, rendering only private services to the zamindars, held their mehals with only a partial remission of revenue. At this result the Judges had arrived in *Udoghund Chucker-butt v. The Raja of Pachit* (unreported), in which case the High Court considered that the ouster of jaghirdars, in certain instances, others being appointed in their places, was unauthorized. There was, in effect, no sufficient evidence of the Government's having had originally the right of appointment; and no such long and uniform series of appointments [195] by it had been shown, as would lead to the presumption that the right existed.

For the respondents it was argued that the jaghir mehal was not saleable in execution of the decree. It had been rightly decided that the jaghirdar's services were due to the Government, and not to the zamindar; also that sanction was necessary to the succession of each holder of the tenure. These two conditions were inseparable, and the right of the Government to approve the person who was to be responsible for the services would be defeated by alienation of the tenure; which, therefore, could not be transferred. Reference to the state of things before 1765 did not assist the argument for the appellant. For no zamindar, or any authority less than the ruling power of the day, could make any valid remission of the proportion of the produce of the lands due to it, without the sanction of that power: Regs. XXXVII and XLIV of 1793, preamble. *Rajah Nilmoney Singh Deo v. The Government of Bengal* (6 W. R.,

121) decided, in accordance with general principles, that the zamindar had no right to grant rent-free tenures.

Again, it was an error to assume that lands could not be held subject to police services without such duties being identical with those which all landholders in Bengal had to perform, and setting aside any ambiguity that had arisen as to the question of the services, the main consideration on which the decision of the case would rest was that, at settlement, one-third of the profits of the mehal was not brought into the estimate of the zamindari assets. To this remitted revenue, a jaghir in its strict sense, the terms of the Regs. XXXVII of 1793, s. 15, and XII of 1805, in regard to the heritable and transferable quality of certain estates, were inapplicable, as also was the decision cited in *Bithul Bhut v. Lalla Raj Kishore* (Agra H. C., 284). In what way, save by the dismissal of the jaghirdar by the Government, the tenure could be alienated, did not appear.

In 1771, when first these jaghirs, which had existed from time immemorial, were brought to notice, the jaghirdars received recognition from the supervisor of Birbhum, paying two-thirds of [196] the profits of their lands, and retaining one third as their remuneration for their services. At the Decennial Settlement, the jaghirs were included in Ghakla Pachit, but the zamindar's jama was calculated on the two-thirds payable by the jaghirdars, and not on the one-third retained by them. Reference was made to 3 Harington's Analysis, 113, *Bunde Ram Sen v. The Deputy Commissioner of the Sonthal Paraganas* (7 W. R., 178), *Rajah Nilmoney Singh Deo v. Bakranath Singh* (10 W. R., 255), *Raja Ichannud Singh v. The Government of Bengal* (6 Moore's I. A., 101), *Forbes v. Meer Mahomed Taqeer* (13 Moore's I. A. Cal., 438), *Koldeep Naram Singh v. The Government of Bengal* (14 Moore's I. A. Cal., 247), and *Sartakehunder-Bey v. Dharat Chunder Singh* (7 S.D.A. (1853), 900). This tenure but for the operation of Reg. XVIII of 1805, would have remained within the Birbhum Zilla jurisdiction, and would have been subject to Reg. XXIX of 1811. The Deputy Commissioner of Manbhum, in *Rajah Nilmoney Singh Deo v. The Government of Bengal* (6 W. R., 121), showed how the tenure corresponded to the 'ghatwali' of Birbhum, adding that the jaghirs were spoken of in the district as 'ghats,' the jaghir in suit being 'Ghat Dhekia. The same arrangements were found in these jaghirs as in ghatwali tenures viz., of 'tabedars' working under the jaghirdar, who was also called the 'sirdar,' and holding smaller portions of land in his jaghir.

The admission made as to the hereditary character of the tenure went no further than the statement made in Harington's Analysis, 509, in connection with the Birbhum ghatwals: meaning only that the Government usually appointed the son unless there was something to disqualify him.

Mr. R. V. Doyle replied.

Their Lordships' Judgment was delivered by

Sir B. Peacock.—This is an appeal from a decree of the High Court at Calcutta. The appellant is Raja Nilmoni Singh, the raja and zamindar of Pachit. He was the defendant in the suit out of which the appeal arises, and which was brought [197] against him by the respondent, Bakranath Singh, for confirmation of possession of a jaghir mehal, consisting of Mauza Dhekia and other mauzas specified in the schedule to the plaint, by establishing his title to the same, and reversing a summary order of the 10th of August 1874.

It appears that the appellant, having obtained a decree against Bir Singh, the father of the respondent, for the sum of Rs. 72 odd, awarded to him for

costs, had caused the mauzas in question to be attached in execution of the decree; and that, on the 11th June 1874, a proclamation was issued for the sale of the right, title, and interest of the judgment-debtor therein on the 10th of August in that year. In the proclamation the plaintiff was described erroneously as the judgment-debtor, whereas he was only the heir-at-law against whom the decree had been revived after the death of his father, Bir Singh.

On the day appointed for the sale, the respondent presented a petition, stating that he was not in possession of any property of the deceased judgment-debtor, and that the Government jaghir mehal could not be sold on account of the debts of the deceased; that, since the death of his father, the late Bir Singh, he had been appointed jaghirdar, and was in possession of the mauzas attached as ghatwal appointed on the part of Government; that the decree-holder, without describing the mauzas to be jaghir, and without stating the nature of his father's interest therein, had secretly done the acts relating to the execution of his decree; and that the petitioner, having received information that the jaghir mohals would be sold on the 10th of August, had presented the petition stating his objections. Upon that petition the summary order referred to in the plaint was passed by the Munsif;—"This petition of claim has been filed to-day just before the sale; the claim cannot be allowed at such a time. It is ordered that the petition of claim be rejected." The sale accordingly took place, and the present appellant became the purchaser.

The suit, out of which this appeal arises, was originally instituted in the Court of the Munsif of Choki Gangajulghati, in the District of West Burdwan, and the Secretary of State for India was made a *pro forma* defendant. The suit was subsequently [198] removed into the Court of the Judge of West Burdwan.

The Government put in a written statement, in which they alleged that the lands were police service lands, and that they had been held by jaghirdars in lieu of wages for the performance of police duties from before the Permanent Settlement, as had been formerly determined in the presence of the Raja defendant by the Deputy Commissioner of Manbhum, in case No. 105 of 1863, and the several Courts of appeal; that the lands not being transferable, and the Raja defendant having caused them to be sold without any specification that they were service lands, and having himself purchased them at the sale, could acquire no title by the purchase.

The Raja defendant, in his written statement, contended, amongst other things, that the mauzas were not a jaghir constituting Government property, but part of his permanently settled *mal* estates, and that they had been granted by his father to the plaintiff's father as a service tenure.

Further, he made the following statement:—

"Third 'Taruf Dhekia,' in which these mauzas are comprised, was divided into two (equal) parts, one of which is plaintiff's ancestral property, and the other was enjoyed by Dhurmo Das Chuckerbutty as a service tenure in the manner described above. Subsequently, the half share of Taruf Dhekia, held by the said Dhurmo Das, having been sold by auction for arrears of rent, his grandson, Uday Chuckerbutty, brought a civil suit to set aside the sale, alleging the share to be Government jaghir property; but, in the judgment of the High Court, the suit was dismissed, on declaration that the disputed estates appertained to the *mal* land, and in rejection of the allegation as to the Government jaghir lien, as will appear from the decision. Therefore, the plaintiff's suit is evidently false."

The plaintiff himself was examined, and stated that his profession was that of a ghatwali jaghirdar; that he was jaghirdar of Ghat Dhokia; that he was appointed in 1273 by the Magistrate of Bancoora, and served the Government and carried out the orders issued by the thanna; that the jaghir lands did not remain in his possession unless he performed the services; that the [199] person who is appointed in the place of a dismissed ghatwal holds possession of the land; that, after his appointment, the sub-inspector put him into possession; and that he never did any service for the Raja, and did not receive any permission from the Raja on his appointment.

Amongst other issues, the following were raised :—

2nd.—Whether the status or condition of the lands as Government service, —i.e., ghatwali or jaghir, had been decided in a former suit by a Court of competent jurisdiction?

3rd.—Whether the land in suit was held by the plaintiff as service land, —i.e., ghatwali or jaghir under Government, or as service land under the defendant, Raja Nilmonoo Singh?

4th.—Whether the land was land on account of which rent was paid to the Raja by the Raja's appointee, and whether this rendered the tenure a saleable one?

5th.—Whether the plaintiff's interest in the land was such an interest as admitted of being brought to sale in satisfaction of a decree due from the plaintiff's predecessor to the Raja.

The case was tried by the Officiating Judge of West Burdwan. On the trial the Government accepted the full burthen of the suit, and supported the plaintiff. It still holds the same position, having been made a respondent, and having appeared by Counsel before their Lordships and opposed the appeal.

The only substantial question to be decided is, whether the mauzas in question, which had been held by the plaintiff's father during his lifetime, and which at his death descended to the plaintiff as his heir, and to which the plaintiff was appointed by Government, were liable to be seized in execution of a decree against the father as assets by descent in the hands of the plaintiff, his son.

Neither the origin of the jaghir, nor the precise time at which it was created, is known; but it appears that, as far back as 1771, corresponding with 1178 B. S., the villages of which it was composed were held by jaghirdars, who paid to Government two-thirds of the annual value thereof as revenue, and retained the other one-third as remuneration for the services under which the jaghir was held. The villages included in the [200] jaghir were permanently settled as part of the zamindari of Pachit, of which the defendant, appellant, is the zamindar. In fixing the Government revenue at the time of the Decennial Settlement, the lands included in the jaghir were assessed at the two-thirds then payable by the jaghirdar to the Government, and the one-third retained by the jaghirdar in lieu of services formed no part of the assets of the zamindari in respect of which the Government revenue was fixed.

Jaghirdars were successively appointed or approved by Government up to the time of Gurucharn Mukerji, who was appointed in 1816 in the place of Rup Singh, who was dismissed for misconduct.

In February 1817, Gurucharn petitioned the Magistrate for leave to associate Durmo Das Chuckerbutty with himself as headman; this was sanctioned, and they divided the jaghir and the duties. On the death of Guru-

charn, his son applied to be installed as his successor, but Rup Singh having applied to be reinstated, his application was granted. In 1831, Rup Singh attempted to oust Dhurmo Das Chuckerbutty, but this was not allowed, and the jaghir has ever since remained divided.

In was contended, on behalf of the appellant, that, as the lands were included in his permanently settled zamindari, the services as well as the rent belonged to him; that the services were private services, and that he had a right to cause the lands to be sold in execution of his decree.

In support of his case, the decision of the High Court referred to in the Raja's written statement was cited. It is set on in the appendix to the record, and was in a suit brought against the Raja by Uday Chuckerbutty, who had been appointed successor of Dhurmo Das Chuckerbutty, to obtain possession of the mauzas which constituted that portion of the jaghir, which, upon the division of it, had been allotted to Dhurmo Das, whose right and interest had been sold by the Raja in execution of a decree for rent obtained by the Raja against him. The Government was a party to that suit, and supported the claim of the plaintiff therein. The first Court held that the plaintiff had a right to recover possession of the jaghir lands, but that decision was reversed on appeal by the High Court. [201] In speaking of that case, the Officiating Judge in the present case remarked:—"It is not relevant as evidence in this case, but is useful as a precedent or in argument. The Court found in that case that the services exacted by Government were encroachments of the Raja's rights, and that the duties,—i.e. service,—attached to the holding of the land, and not the holding of the land to the appointment to perform the duties. With respect to the lands in dispute I have to remark that the Raja's evidence in this case, as well as that of the Government, shows that the opposite is true in this case." Then, after referring to the evidence, he says:—"I therefore conclude that the performance of the services is the chief title to the jaghir lands, and that no man has any right to hold these lands except on a title arising out of a valid appointment to discharge the services; to adopt the words of the High Court's judgment," or rather the converse of it, "to the facts of the case, 'the holding of the lands attaches to the duties, and not the performance of the duties to the holding of the land.'" On the 3rd issue he found that the land in suit was land held by the plaintiff, Bakranath Singh, as service under Government, i.e., not ghatwali but jaghir land, and was not held as service under the Raja. On the 4th issue he found that the land in suit was not land on account of which rent was paid to the Raja by the Raja's appointees; and on the 5th, that the plaintiff's interest in the lands was not such as admitted of its being brought absolutely, and without special conditions, to sale in satisfaction of a decree due from the plaintiff, or his predecessor, to the Raja: but that the interest was saleable for the purpose aforesaid, provided it be sold subject to the performance of the jaghir services by the purchaser, after he has obtained appointment to the duties at the hands of the Magistrate or his representative police authorities, and installation by the same authorities. He accordingly annulled the sale of the lands under the execution, set aside the summary order of the Munsif, and declared that the plaintiff had a right to continue in possession as the service tenant of the Government, and as the rent-paying tenant to the plaintiff. The case was appealed to the High Court. The appeal was heard by a Division Bench, consisting of Mr. [202] Justice MARKBY and Mr. Justice ROMESH CHUNDER MITTER, who differed in opinion. The decree of the Officiating Judge was reversed, and the suit dismissed in accordance with the opinion of the Senior Judge, Mr. Justice MARKBY, Mr. Justice ROMESH CHUNDER MITTER dissenting, and holding that the decree ought to be affirmed.

Mr. Justice MARKBY agreed with the Officiating Judge that the Raja had not shown that the plaintiff held as his appointee; he relied upon the fact that the lands were part of the revenue-paying lands of the Raja, and also upon an admission of the Advocate-General, on behalf of the Government, that the tenure was an hereditary one, unless there was some special objection to the person entitled to succeed. He also relied very strongly upon the decision in Uday Chund Chuckerbutty's case, already referred to, and added,—“An appeal against this decision was lodged in the Privy Council by the Government, but it has not been prosecuted; and it is admitted that there is no intention to prosecute it.” He stated that he thought it was his plain duty to follow the former decision, unless he had the clearest possible reasons for differing from it; and that so far from differing from the decision, having considered the evidence and heard the arguments, he entirely concurred in it. He then proceeded to discuss the question whether the fact that the holders of the lands were liable to perform some services of an exceedingly indefinite character, but something of a police kind, to Government, took away from this tenure the character of alienability, which it would otherwise possess, and expressed his opinion that it did not.

An appeal was preferred under s. 15 of the Letters Patent of the High Court from the decree of the Division Bench to the High Court, and was heard by Mr. LOUIS S. JACKSON, then Officiating Chief Justice, Mr. Justice AINSLIE, and Mr. Justice SEWELL-WHITE, when the decree of the Division Bench was reversed, and the decree of the first Court affirmed, by a majority consisting of the Acting Chief Justice and Mr. Justice SEWELL WHITE against the opinion of Mr. Justice AINSLIE. Their Lordships concur generally in the view taken by Mr. Justice ROMESH CHUNDER MITTER and the Acting Chief Justice, and are of opinion [203] that the decree now under appeal ought to be affirmed. The judgment of Mr. Justice WHITE was founded merely upon the form of the proclamation: he concurred with the first Court in holding that, as the proclamation did not describe the lands as held under a service-tenure, the sale to the Raja, under the execution, passed no title to the property; and he abstained from expressing an opinion upon the question as to which Mr. Justice MARKBY and Mr. Justice ROMESH CHUNDER MITTER differed,—*viz.*, whether the interest of the plaintiff's deceased father in the lands was such, that when they came into the possession of the plaintiff they were assets of the father and as such liable to be attached and sold for his debts.

According to the report of Lalla Kanji, Tahsildar of Pachit, made on the 18th of July 1799, it appears that there were in Chakla Pachit, in addition to the digwars, three other classes of guards, whom he describes as jaghirdars, as ghatwals, and chauckidars. He says of the first, they hold their mauzas in jaghir, and whenever the digwars require assistance in arresting thieves or rioters, the jaghirdars assist them with their men. Of the second, that is the ghatwals, he says the second were posted at the ghats, 36 in number. In 23 of these the ghatwals were subordinate to the digwars, and were paid by them out of their jaghirs: 13 are occupied by the Raja's own immediate servants paid by him.

It is clear that the jaghirdar in question was not one of the ghatwals, referred to in the report as being subordinate to, and paid by, the digwars out of their jaghirs, for they were paid by the one-third of the malguzari, which they were allowed to retain as a compensation for their services.

Mr. Justice ROMESH CHUNDER MITTER held that the tenure in question was analogous to a ghatwali tenure. Mr. Justice AINSLIE treated it as one of the

ghatwalis to the south of Birbhum. Their Lordships entertain no doubt that, whether it was a ghatwali or not, the tenure was analogous to a ghatwali tenure of the nature described in the preamble to Reg. XXIX of 1814; and the Acting Chief Justice appears to have entertained the same view, by referring to Mr. Harington's Analysis of the Regulations, vol. iii, p. 509, where, after mentioning Reg. XXIX [204] of 1814, he goes on to say,—"tenures of this description were mentioned generally in a note to the second volume of this Analysis, as held at a low rent by ghatwals or guards of passes."

The preamble to Reg. XXIX of 1814 is as follows:—"Whereas the lands held by the class of persons denominated ghatwals, in the district of Birbhum, form a peculiar tenure to which the provisions of the existing Regulations are not expressly applicable, and whereas every ground exists to believe that according to the former usages and constitution of the country, this class of persons is entitled to hold their lands generation after generation in perpetuity, subject nevertheless to a fixed and established rent to the zamindar of Birbhum, and to the performance of certain duties for the maintenance of the public peace and support of the police." Pachit was formerly one of the parganas and mehals of Zilla Birbhum, but by Reg. XVIII of 1805 was separated from the jurisdiction of the Magistrate of that Zilla; and placed under the jurisdiction of a distinct officer denominated Magistrate of the Jungle Mehals (see ss. 2 and 3 of that Regulation). Their Lordships consider that the jaghir in question, although not falling within the Regulation, was a tenure of the nature of those described in the preamble. In the case of *Rajah Nilmoney Singh v. The Government of Bengal* (6 W. R., 121), it having, been found by the lower Courts that the lands were held upon a ghatwali tenure, the High Court upon special appeal held, that they were not resumable by the zamindar, upon the ground that the tenure had been forfeited on account of the tenant's refusal to perform them. The Chief Justice remarked,—“If the Government received only two-thirds of the annual value of the lands as rent or revenue, and allowed the tenant to retain one-third on account of services, the services must have been public and not private. The Government would not have allowed any portion of their revenue in consideration of private services to be rendered to the Zamindar.”

That case was affirmed by Her Majesty in Council on appeal (18 W. R., P. C., 321).

The permanent settlement of the lands did not alter the nature of the jaghir or of the tenure upon which the lands were [205] held, nor could it convert the services which were public into private services under the zamindar. The zamindar became entitled only to the rent or revenue which was previously payable to the Government and in respect of which he was assessed, and not to the services in respect of which the one-third of the rent or revenue was allowed to the tenant as compensation for the services. Those services continued to be due to the Government.

In the very luminous judgment pronounced by Lord Kingsdown in the case of *Rajah Lelannul Singh v. The Government of Bengal* (6 Moore's I. A., 101) the origin and nature of the ghatwali tenures of Birbhum, and the effect of the Permanent Settlement thereon, were fully explained, and it was there held that lands held under that tenure were not resumable by Government under Beng. Reg. I of 1793, s. 8, cl. 4, as lands included in the allowances to zamindars for thana or police establishments. In that case it was no doubt held, that it was the province of the Raja of Khurruckpore to appoint and dismiss the ghatwals (p. 127), but it was also stated that ghatwals held their lands in virtue

of sanads granted by the zamindar, except some who had received theirs from the former authorities (p. 123) : it was also found that in that case the lands had been granted by the ancestors of the Raja (p. 112), and it was said that the Regulation did not apply to lands which the zamindars had permitted other persons to hold free from rent, or at a reduced rent, or (referring to the cases in which the sanads had not been granted by the zamindar) to lands which such persons had a right to hold free from rent or at a reduced rent.

The above cases show that the jaghirs of which the lands in question formed one, and which were expressly found, in the case above referred to between the appellant and Bir Singh, the father of the plaintiff, and also in the present case, to be analogous to the ghatwali holdings of Birbhumi, are not resumable by the zamindar or by the Government.

In the case of *Hurlal Singh v. Jorawan Singh* (6 Sel. Rep., 204, Ed. of 1873), cited with approbation by Lord Kingsdown, in 6 Moore, 125, it was held, [206] that the ghatwali tenures were not divisible on the death of a ghatwal, but descended to the eldest son.

In delivering the judgment in that case Mr. F. C. Smith said,—“Reg. XXIX of 1814 says nothing on the subject; the point must, therefore, be decided with reference to the usual practice and the meaning and the intent of the term ‘ghatwal.’ Now the ghatwali lands are granted for particular purposes, especially of police, and to divide them into small portions amongst the heirs of the ghatwals would be to defeat the very ends for which the grants were made. I have submitted the question to the Judges of the Court, and all, with one exception, are of opinion, that a mahal of this nature cannot be divided, but should, on the death of an incumbent, devolve entirely on the eldest son, or the next ghatwal.”

It was stated by Mr. D. C. Smith, one of the Judges consulted, that the chakran lands of Bengal always go to the eldest son or to the nearest member of the family most capable of performing the duty. See also *Kustoora Koomaree v. Monohur Deo* (W. R., Sp., No., p. 39).

The jaghirs, although hereditary, are not governed by the ordinary rules of inheritance, under the Hindu or Mahomedan law, and are subject to the condition of the Government's approval of the heir.

The same principle which precludes a division of a tenure upon death must also apply to a division by alienation. Their Lordships are of opinion that the tenure is not transferable or saleable in execution of a decree, and that it is not one of the tenures referred to by the Beng. Reg. XXXVII of 1793, s. 15.

In the case of *Rajah Lelamund Singh v. Doorgabutty* (W. R. Sp., No., p. 249) it was held, that the ghatwalis of Khurruckpore were not capable of alienation by private sale or otherwise, nor liable to sale in execution of decrees except with the consent of the zamindar and his approval of the purchaser as a substitute for the outgoing ghatwal. In that case, however, as in the case already cited from 6 Moore's Indian Appeals, the ghatwal had been appointed by the Raja, and the Raja, and not the [207] Government, as in the present case, had a right to appoint and dismiss the ghatwal.

In the case of *Binode Ram Sein v. The Deputy Commissioner of the Sonthal Parganas* (7 W. R., 178) it was held, and in their Lordships' opinion rightly, that the surplus proceeds of a Birbhumi ghatwali tenure, which had passed by descent from ancestor to heir, were not liable, in the hands of the heir, for the debts of the ancestor; and reference was made to a decision of Mr. Hawkins in the Sudder Court, 2 Sevestre's Reports, 423, in which it was held that the lands were not alienable.

In a case also between the appellant and the respondent Bakranath Singh it was held, that the holder of the tenure in question in this suit is not responsible for the debts of a former jaghirdar. The Deputy Commissioner in his judgment said,—“As jaghirdar, the defendant has, what his father had, a life-interest in the jaghir. Whether the son will succeed or not is, notwithstanding the tenure is hereditary, uncertain, as he may at any moment be dismissed from Government employ,” rather he should have said ‘may never be sanctioned as jaghirdar.’ He proceeds,—“The jaghir is strictly a life-tenure as far as the jaghirdar is personally concerned, he holds the land in lieu of pay, and a new jaghirdar receiving the jaghir would not be bound by any arrangement made by his predecessor. A newly elected jaghirdar would not be held responsible for debts incurred by the late jaghirdar as such, as were he to be so, he would lose the benefit of his pay. Thus, a jaghirdar cannot be held responsible for arrears of rent due by a former jaghirdar.” That decision was upheld on appeal to the High Court (10 W. R., 255). The case is expressly in point, for if a successor is not liable for rent of the jaghir due from his predecessor, it follows *a fortiori* that he cannot be liable for an ordinary debt. It is unnecessary to decide whether the decision is *res judicata* or not.

The above decisions are more than sufficient to outweigh the decision in the case of *Uday Chand Chuckerbutty* (unreported) to which Mr. Justice MARKBY attached so much weight, even if that case had not been decided upon a different finding of facts. [208] Their Lordships, however, are of opinion that the learned Judges took an erroneous view in that case of the effect of the Permanent Settlement.

With reference to the argument upon which Mr. Justice AINSLIE so strongly relied as to the difficulty under which the zamindar would lie for the recovery of his rent if the lands could not be sold in execution of a decree for rent against his tenant, it is sufficient to say that the zamindar, at the time of the Permanent Settlement, must have been aware of the nature of the tenure upon which the lands were held, and that this case does not involve the necessity of deciding what remedy the zamindar has for recovering his rent, whether by sequestration of the estate or by application to the Government to remove the tenant, or by what other mode. Their Lordships, therefore, abstain from expressing any opinion which would be a mere *obiter dictum* upon the point.

It is quite clear that, if the jaghir were transferable without the consent of Government, either by descent to an heir, or by voluntary sale, or sale in execution, or otherwise, there would be no security that the transferee would be a proper person to discharge the duties in respect of which the lands are held at the reduced rent. The transferee might be a person of questionable or even of bad character, as remarked by the Court in 10 W. R., 240.

For the above reasons, their Lordships will humbly advise Her Majesty to affirm the decree of the High Court, from which the appeal has been preferred, and to dismiss the appeal.

The appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *Lambert, Petch and Shakespear.*

Solicitors for the Respondent: Mr. *H. Treasure.*

NOTES.

[ALIENABILITY OF SERVICE TENURES—

This case was referred to, in the following cases, as regards alienability :—(1884) 10 Cal. 677 (684) transfer of *ghatwali* tenure with consent ; (1885) 9 Bom. 198 *valans* ; (1903) 5 Bom. L. R. 988 (986) *saranjams* ; (1907) 5 C. L. J. 583 34 Cal. 753 12 C. W. N. 193 *digwari* tenure.]

[209] APPELLATE CIVIL.

The 2nd March, 1882.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Hurbans Sahye and others.....Defendants

versus

Thakoor Purshad.....Plaintiff.*

Civil Procedure Code (Act X of 1877), s. 630 Review of Judgment --Review granted on particular ground --Discretion of Court as to rehearing.

Where a review of judgment is granted on a particular ground, the Court is not bound to rehear the whole case under s. 630 of the Civil Procedure Code : it is in the discretion of the Court to rehear the whole case or only the particular point on which the review has been granted

THIS was an application for review in a suit brought by the plaintiff to recover possession of certain property on the allegation that it was his self-acquired property.

The plaintiff's case was that the property in suit had been sold under a decree passed on a mortgage-bond executed by his nephews, the first three defendants, who had no right or interest in the property ; that, in execution of the proceedings following the sale, he had been dispossessed by the auction-purchasers, Zakur Alum and Hurbans Sahye, the fourth and fifth defendants ; and that after he had put in a petition of objection to the Court by which the decree had been passed, and which petition was rejected, he brought this suit, making the parties above-named, together with the two decree-holders, defendants.

The auction-purchaser defendants alleged, that the plaintiff was never in possession within twelve years before the institution of the suit, and therefore the suit was barred by the law of limitation ; that the property in dispute was acquired by the plaintiff's father, and in accordance with a *tuksinnama*, dated 5th April 1854, the property fell to the share of Ram Sahye Singh, the father of the first three defendants, other properties [210] being allotted to the plaintiff ; that Ram Sahye and his sons continued in possession of the property ; that his sons borrowed money from the sixth defendant, Neaz Mahomed, and gave him a bond, mortgaging this property ; and that the property had been sold in execution of a decree obtained on the bond and purchased by themselves. The Subordinate Judge dismissed the suit, finding the facts as alleged by the defendants. On appeal, the High Court found that the property had been in the joint possession of the plaintiff and his two brothers, and afterwards, on the death of one brother, in the possession of the plaintiff and the other brother, and gave a decree in favour of the plaintiff for one-half of the property claimed.

The defendants applied for a review of judgment, and a rule being issued to show cause why the application should not be granted, other evidence was brought forward to show that the plaintiff had, before the death of his brother, separated from them, taking one-third of the property, and that, therefore

* Application for review against the judgment of Mr. Justice MITTER and Mr. Justice MACLEAN, dated the 9th May 1881, in appeal from Original Decree, No. 25 of 1879.

the decree should be altered; and it was contended that, in case the review was granted on this ground, the whole case should, under s. 630 of the Civil Procedure Code, be re-heard. On the review the Judges differed in opinion in one point,—*viz.*, as to whether the plaintiff was, on his cause of action and allegations, entitled to the relief he had obtained; MITTER, J., being of opinion, that he was, and MACLEAN, J., that he was not.

Mr. *Branson*, Baboo *Mohesh Chunder Chowdhry*, and Baboo *Chunder Madhub Ghose* in support of the application.

Baboo *Mohinimohun Roy* and Baboo *Taruknath Palit*, *contra*.

The **Judgments** of the Court, omitting the portion on the merits as not being material to this report, were as follows:—

Mitter, J.—It has been contended that, if the review be granted on a particular ground, we are bound to re-hear the whole case under s. 630 of the Code of Civil Procedure; but the words “or make such order in regard to the re-hearing as it thinks fit,” in the section in question, leave it to our discretion either to re-hear the whole case or any particular point [211] that seems to us fit. The observation of the Judicial Committee in *Bhugwandeem Doobey v. Myna Bacc* (11 Moore's I. A., 499) supports this view. As we have re-heard the case with reference to the question of share, I am of opinion that we are in a position to make the final decree without another hearing. Our decree, therefore, should be altered as directed above. The petitioners are entitled to recover costs of this hearing, which I would assess at Rs. 200.

Maclean, J.—I find with regret that I am of a different opinion from my learned and more experienced colleague upon one of the points raised in this application,—namely, the first point discussed in the judgment just read.

On this question however, our former decision must stand for the present under s. 628 of the Code.

• On the other questions I do not differ from my colleague, and I think that we are not precluded from dealing with the case in part or as a whole by anything in s. 630, it being within our discretion to define the extent to which the review should be carried; see *Bhugwandeem Doobey v. Myna Bacc* (11 Moore's I. A., 499).

Decree varied.

NOTES.

[REVIEW ON PARTICULAR GROUND—

See also 10 B. H. C. 360; 5 Cal. 89; 12 C. L. R. 64; 6 B. L. R. 126; 11 I. C. 102; (1889) P. R. 158; 7 O. C. 345.]

[9 Cal. 211 : 12 C.L.R. 329]

APPELLATE CIVIL.

The 12th July, 1882.

PRESENT :

SIR RICHARD GARTH, KT. CHIEF JUSTICE, AND MR. JUSTICE BOSE.

Beer Chunder Manickya.....Plaintiff

versus

Hurro Chunder Burmon.....Defendant.*

Limitation—Rent Law (Beng. Act VIII of 1869), s. 30—Special agreement.

The defendant was tehsildar of one of the plaintiff's zamindaris, and after his dismissal on the 24th of August 1876, he submitted an account, which was found to be incorrect, and time was given to him to make good certain items on his executing an ikrar, promising to pay whatever balance should be found due from him to the plaintiff. In a suit brought on the 28th of October 1878 to recover the balance found on inquiry to be due,—*Held*, that s. 30 of Act VIII of 1869 had no application, the special agreement taking the case [212] out of the scope of that section, and therefore the suit was not barred by reason of having been brought more than one year after the defendant's dismissal.

Baboo *Kali Mohun Dass* and Baboo *Durga Mohun Dass* for the Appellant.

Munshi *Seraful Islam* and Baboo *Chunder Madhub Ghose* for the Respondent.

THE facts of this case are sufficiently stated in the judgment.

The **Judgment** of the Court (GARTH, C. J., and BOSE, J.) was delivered by

Garth, C. J. The circumstances under which this case arose are these :—

The plaintiff Moharaja appointed the defendant as tehsildar in one of his zamindaries on the 22nd Aghran 1283 T. S. The defendant worked as such up to the 9th Bhadur 1285 T. S., when he was dismissed. The defendant, on the 14th Bysack 1286 T. S., submitted an account of the collections and disbursements during the period of his service, but the Moharaja's officers took exception to several of the items, and made out a balance of Rs. 2,578 annas 15 pie 6 against him. The Moharaja was prepared to sue the defendant for recovery of this balance, but the defendant asked for time in order to enable him to make good the items by producing vouchers, as also by mofussil inquiry. The Moharaja consented to give time to the defendant upon his executing an ikrar, with a promise to pay whatever balance would be found due from him upon such inquiry. The defendant accordingly gave a registered ikrar on the 23rd Chyot 1286 T. S., which (amongst other things) provided that he, the defendant, "would furnish lowazima papers in support of his said account, and would wait on the Moharaja's officers in the mofussil while making the inquiry, and come to an adjustment of his account within six months from the date of ikrar; and would pay, without objection, whatever money should be found [213] due from him upon such mofussil inquiry and investigation by the Moharaja's agent within three months from the date of its ascertainment."

* Appeal from Appellate Decree, No. 1784 of 1880, against the decree of W. F. Meres, Esq., Officiating Judge of Tipperah, dated the 11th June 1880, affirming the decree of Baboo Kalidus Dutt, Second Subordinate Judge of that district, dated the 9th of May 1879.

An inquiry was subsequently made by the Moharaja's agent in the presence of the defendant, when, on the 25th Ashar 1287 T. S., a sum of Rs. 1,870 annas 7 pie 6 was found to be due from him. The Moharaja accordingly brought this suit on the 28th October 1878 for recovery of the said amount.

Both the lower Courts have applied s. 30 of the Rent Act to the case, and have held that the suit is barred, because more than one year has elapsed since the date of the defendant's dismissal, as also since the date when the misappropriation by the defendant was first detected.

We are clearly of opinion that the suit is not governed by s. 30 of the Rent Law. It is not a suit brought under ordinary circumstances for money in the hands of an agent, or for the delivery of accounts or papers. It is brought upon a special agreement, by which it was agreed on both sides that, for the purpose of ascertaining the correct amount due from the defendant to the plaintiff, an investigation was to take place and certain accounts and other papers were to be supplied by the defendant, in order to enable the plaintiff's agent to arrive at the truth, and a certain time was to be given to the defendant to pay the money, after this investigation had taken place.

A special agreement of this kind takes the case entirely out of the scope of s. 30. It would be a positive fraud upon the plaintiff, who has behaved very fairly in the matter, to allow him to be defeated by limitation under such circumstances; and it was nothing short of a fraud for the defendant to take such an objection.

Had a promissory note been given by the defendant for payment of the amount due at the end of two years, that clearly would have taken the case out of s. 30, and here we have a specific agreement for good consideration on both sides, which has the same effect.

If agreements such as these are virtually to be disregarded, the Rent Law would indeed be made a means of the grossest fraud and injustice.

• [214] The case will be accordingly remanded to the first Court for retrial on the merits. And as the defendant has set up the plea of limitation in fraud of his own arrangement, he must pay the costs of all the proceedings as far as they have gone.

The costs of the new trial will, of course, be in the discretion of the Subordinate Judge.

Case remanded.

NOTES.

[LIMITATION UNDER BENG. ACT VIII OF 1869—

See also 5 Cal. 303 ; 20 Cal. 425.]

APPELLATE CIVIL.

The 30th June, 1882.

PRESENT:

MR. JUSTICE TOTTENHAM AND MR. JUSTICE BOSE.

Nihal Chand, *alias* Chutto Lal, and others.....Decree-holders

versus

Rameshari Dassee.....Judgment-debtor. *

Execution of decree --Stay of execution—Appeal from order—Civil Procedure Code (Act X of 1877), ss. 243, 244, 588.

A decree-holder having attached the property of his judgment-debtor in execution, the latter applied for a stay of execution until the decision of a pending suit brought by him against the judgment creditor. The Court allowed the application, continuing the attachment on the property, and struck the execution-case off the file. The decree-holder applied to the High Court.

Held, that no appeal lay.

THE facts of this case are fully set out in the judgment of the Court.

Baboo *Tarruck Nath Sen* for the Appellants.

Baboo *Rama Churn Banerjee* for the Respondent.

The following **Judgment** of the Court (TOTTENHAM and BOSE, JJ.) was delivered by

Tottenham, J.—The order against which this appeal has been preferred purports to have been passed under s. 243 of the Code of Civil Procedure, on the application of the judgment-debtor, on the ground that the judgment-debtor had brought a suit against the present decree-holders and others. The Court, in its discretion, stayed the execution of the present [215] appellants' decree pending the decision of the regular suit brought by the judgment-debtor. It ordered that the attached property should remain under attachment, but proceeded to strike the execution-case off its file.

It appears to us that the appellants have no right of appeal to this Court in this matter. They contend that it is an order determining a question between themselves and the judgment-debtor under s. 244, and that, that being so, the order amounts to a decree within the meaning of s. 2.

We think that there are two reasons against this contention being allowed. First of all we think that an order staying execution under s. 243 is not one which comes within the purview of s. 244: and secondly, if it could be said to come within the purview of s. 244, we do not think that this order amounts to a decree as defined by s. 2, as it is not an adjudication of any right claimed, nor does it appear to us to be a determination of any question mentioned in s. 244. It seems to us that the Court below has not finally determined any question as between the parties; it has simply postponed the determination of a matter before it. It is quite clear that, unless this order amounts to a

* Appeal from Original Order, No. 45 of 1882, against the order of Baboo P. N. Banerjee, Officiating Subordinate Judge of Burdwan, dated the 16th January 1882.

decree, there is no appeal against it; for it is not one of those mentioned in s. 588, against which an appeal is allowed as against an order; and we being of opinion that it is not a decree, we are compelled to dismiss the appeal with costs.

Appeal dismissed.

NOTES.

[STAY OF EXECUTION—APPEAL—

In (1881) 7 Cal. 733; (1886) 13 Cal. 111; (1884) 7 All. 73; (1888) 10 All. 389; (1888) 12 Bom. 279; it was held that an order staying execution fell within sec. 244, C. P. C. 1877; 1882: Sec. 47, C. P. C. 1908. In 1888, the C. P. C. of 1882 was amended *inter alia*, by the insertion of the words 'or to the stay of execution thereof' after the words 'relating to the execution, discharge or satisfaction of the decree' in Sec. 244 cl. (c.), with a view to remove the conflict of cases. In the C. P. C. 1908, Sec. 47, those words have been omitted. Messrs. Woodroffe and Ameer Ali are of opinion that stay of execution "is a matter clearly coming within the words 'all questions'" (C. P. C. (1908) First Edn. p. 231). With reference to this case they remark, at page 235, "in so far as it held that the matter does not relate to execution, is no longer law, the section having been amended in this respect in 1888, though the question whether there is an appeal is another matter depending on whether the order is a decree."

As regards appealability of orders, see also (1900) 23 Mad. 568; (1901) 8 C. W. N. 257 (260).]

[9 Cal. 215]

CRIMINAL REFERENCE.

The 26th July, 1882.

PRESENT:

MR. JUSTICE MACLEAN AND MR. JUSTICE MACPHERSON.

Tamiz Mandal

versus

Umid Karigar.

Security for good behaviour—Code of Criminal Procedure (Act X of 1872), ss. 504, 505.

An accused person was convicted of theft and sentenced to two years' rigorous imprisonment, and was further ordered to enter into his own recognizances for Rs. 50 and find two sureties, each for a like sum, for his good [216] behaviour for one year after the term of his imprisonment had expired; in default to suffer rigorous imprisonment for one year.

* Criminal Reference, No. 149 of 1882, from the order made by W. V. G. Tayler, Esq., Magistrate of Nuddca, dated the 20th July 1882.

Held, that the latter part of the order was bad, and that the Magistrate should have proceeded under the provisions of s. 501, cl. 2, of the Code of Criminal Procedure.

The *Empress v. Partab* * followed.

THIS was a criminal reference made by the Magistrate of Nuddea, under s. 296 of the Code of Criminal Procedure (Act X of 1872). The terms of the reference were as follows:—"Umid Karigar was convicted by the Assistant Magistrate of Kooshtea, under s. 380, Indian Penal Code, and was ordered to be rigorously imprisoned for two years, to enter into his own recognizances in Rs. 50, and to find two sureties, each in a like sum, to be of good behaviour for one year after the term of his imprisonment had expired. In default, to suffer rigorous imprisonment for another year. The order for security and for a further term of one year's rigorous imprisonment failing security does not appear to be legal. The Assistant Magistrate, on being asked to report why this part of the sentence should not be quashed, stated that he was guided by the case of *The Empress v. Partab*; * but I am still of opinion that it is illegal to call [217] upon an accused person to find security for future good behaviour in addition to a sentence passed upon him for a specific offence, and this view appears to be concurred in by the Sessions Judge, who has lately in another case reversed a similar sentence. This portion of the sentence should, therefore, I think, be quashed."

No one appeared to argue the case.

The **Judgment** of the Court (MACLEAN and MACPHERSON, JJ.) was delivered by

Maclean, J.—It would have been better had the Assistant Magistrate followed the course pointed out by the presiding Judge in the case of *The Empress v. Partab* * as the proper course to be adopted.

We direct that the order passed under s. 505 of the Criminal Procedure Code be set aside, and leave it to the Assistant Magistrate to follow the course prescribed in s. 501, cl. 2, if he thinks proper.

* I. L. R., 1 All., 666. In this case SPANKIE, J., said:—"In making an order for security for good behaviour, I presume that the Magistrate holds the powers of a first class Magistrate, and that he was acting under s. 505 of the Code of Criminal Procedure. I have some doubt whether the Magistrate had adduced before him such evidence as to general character as to justify his dealing with the accused for the offence of which he found he was guilty, and in the record of the trial I find no evidence from which it could be gathered that the accused was by repute a receiver of stolen property. But the prisoner certainly allowed that he had been punished twice for theft, and here he was again tried and found guilty of receiving stolen property. I am therefore unwilling to disturb the order. But the order should be no part of the sentence for the offence of which accused was convicted. There should have been a proceeding drawn out representing that the Magistrate, from the evidence as to general character adduced before him in this case, was satisfied that Partab was by repute an offender within the terms of s. 505 of the Criminal Procedure Code, and therefore security would be required from him. But as he had been sentenced to two years' rigorous imprisonment, which term has not expired, an order should have been recorded to the effect that, on the expiration of the term, the prisoner should be brought up for the purpose of being bound (cl. 2, s. 504)."

[9 Cal. 217 : 7 Ind. Jur. 308]

APPELLATE CIVIL.

The 14th June, 1882.

PRESENT :

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

Dinobundhoo Pal.....Auction-purchaser

versus

Shoshee Mohun Pal and others.....Decree-holders.*

Insolvency—Execution of decree—Decree against insolvent—Official Assignee—Purchaser at execution-sale—Setting aside sale—Code of Civil Procedure (Act X of 1877), s. 313.

Where, in execution of a decree passed against a person who had previously been adjudicated an insolvent, portions of his property (then vested in the Official Assignee) are attached and sold, the purchaser is entitled to have the sale set aside under s. 313 of the Code of Civil Procedure, notwithstanding that the Official Assignee acquiesces in the sale, and is content to receive the sale-proceeds.

THE facts of this case are fully set forth in the judgment of the Court. The auction-purchaser appealed against the order [218] of the Subordinate Judge, on the ground that he should have found the judgment-debtor had no saleable interest in the property at the time of the sale, and that he was wrong in taking into account the conduct of the Official Assignee subsequent to the sale.

Baboo Chunder Madhub Ghose for the Appellant.

Baboo Bycunt Nath Dass for the Respondents.

The **Judgment** of the Court (McDONELL and FIELD, JJ.) was delivered by

Field, J.—In this case the appellant before us was the purchaser of a property sold at an execution-sale, and he applied to the Court below, in accordance with the provisions of s. 313 of the Code of Civil Procedure, to have the sale set aside, on the ground that the person whose property purported to be sold had no saleable interest therein. The facts of the case are briefly as follows:—The judgment-debtor, under the decree in execution of which the property was sold, was adjudicated an insolvent by the High Court on the 19th January 1881. The decree was made in February 1881. The attachment in execution of the decree was in June 1881; and the sale was in August 1881. From this it appears that before the dates on which the decree was made, the attachment was made, and the sale was made, the judgment-debtor had been adjudicated an insolvent. Now the effect of that adjudication was, that all the property of the judgment-debtor vested in the Official Assignee. Section 7 of the Act, to consolidate and amend the laws relating to Insolvent Debtors in India, 11 and 12 Vict., c. 21, provides as follows (omitting the parts not essential to the present question):—“And be it enacted that it shall be lawful for the said Court to order that all the real and personal estate and effects of such petitioner, except the wearing apparel, etc., do vest in the Official Assignee for the time being of the said Court, and such order shall be entered on record in the said Court, and such notice thereof shall be

* Appeal from Original Order, No. 21 of 1882, against the order of Baboo Gunga Churn Sircar, Subordinate Judge of Dacca, dated the 10th of December 1881.

published as the said Court shall direct; and such order, when so made, shall, by virtue of this Act, relate back to, and take effect from, the [219] filing of the said petition, and shall instantly, and without any conveyance or assignment, vest all the real and personal estate, effects and debts as aforesaid in the said Official Assignee, who shall have full powers for the recovery thereof, and shall hold and stand possessed of the same for the purposes and in manner hereinafter mentioned." Now we think that the effect of these provisions was, that this particular property vested in the Official Assignee from the 19th January 1881, and this being so, we are of opinion that the judgment-debtor had no saleable interest in the property at the time when the attachment and the sale were made. Section 266 of the Code of Civil Procedure describes the property which is liable to attachment and sale in execution of a decree, and concludes thus:—"All other saleable property, moveable or immovable, belonging to the judgment-debtor, or over which, or the profits of which, he has a disposing power, which he may exercise for his own benefit." We think that, at the time of the attachment and sale, this particular property could not be said to have belonged to the judgment-debtor; nor could it be said that he had over that property or the profits thereof any disposing power which he could exercise for his own benefit. But it is contended that although the judgment-debtor may have had no saleable interest in the property at the time of the attachment and sale, yet that, inasmuch as the Official Assignee afterwards consented to receive the money for which the property had been sold, he by that act confirmed and ratified the sale. This is the view which has been taken by the Subordinate Judge, who says: "It is true, as appears from certain documents filed on the part of the Official Assignee, that, before the property was attached and sold in this execution-case, all the properties belonging to the judgment-debtor, excepting certain moveable articles, had been vested in the Official Assignee by a vesting order passed by the Court for the Relief of the Insolvent Debtors at Calcutta, still, as the Official Assignee, by his letter dated the 17th September 1881, and subsequently by his plea, has applied only for the assets realized by the aforesaid sale and not taken any objection to the sale, I am of opinion that the sale should not be set aside but affirmed, and the entire amount realized in this [220] case be remitted to the Official Assignee after necessary deductions." Now the assent of the Official Assignee can be put no higher than a conveyance by him to the appellant. We think that, as the judgment-debtor had no saleable interest in the property, the appellant, the purchaser, could not obtain any title to the property by virtue of the execution-sale. If, in consequence of the assent of the Official Assignee and his subsequent ratification of the sale, the appellant would have a good title in so far that the Official Assignee might be afterwards estopped from disputing that title, it is clear that this title would be acquired not by reason of the sale, but by estoppel as against the Official Assignee; and we think that the purchaser is entitled to exercise his option as to whether he will accept the title which the Official Assignee can give him, is entitled to say, if he chooses, that he declines to take a title which, notwithstanding the Official Assignee's assent, might afterwards be called in question, on the ground that the Official Assignee had no power to allow the sale to stand; or had, by doing so, obtained less than the market-value of the property. The real question which we have to decide is, whether, within the terms of s. 313 of the Code of Civil Procedure, the person whose property purported to be sold had any saleable interest therein,—that is, at the time of sale; and we think that, in consequence of the vesting order, the judgment-debtor had, at the time of the sale, no saleable interest in this property; and therefore, under the provisions of this section, the purchaser is entitled to have the sale set

aside. We must, therefore, reverse the order of the Subordinate Judge, and decree this appeal with costs. The purchase-money will be refunded to the purchaser. The costs will be paid by the decree-holder. We allow no costs against the Official Assignee.

Appeal allowed.

NOTES

[See also (1882) 11 C. L. T. 389.]

[221] CRIMINAL MOTION.

The 7th August, 1882.

PRESENT :

MR. JUSTICE McDONELL AND MR. JUSTICE O'KINEALY.

In the matter of the Petition of Sreenath Banerjee and another.

The Empress

versus

Sreenath Banerjee and another.*

Wrongful confinement—Penal Code (Act XLV of 1860), s. 346.

In an order to render person liable under s. 346 of the Penal Code, it must be shown that the wrongful confinement was of such a nature as to indicate an intention that the person confined should not be discovered.

On the 17th of February a Hindu woman went to the Court of the Magistrate of the 24-Parganas to complain of having been ill-treated and tortured by certain persons, relatives of the petitioners. The hearing of her complaint was not finished on the 17th, and she was told by her pleader to go away and come back the next day. The remaining facts are thus told by the Judge of the 24 Parganas in his judgment :—"As she was departing, she says she was accosted by the appellants, Gangadhar Dhali and Sreenath, who contrived to put her into a carriage, and drove her away, taking her to various places, at the time strange and unknown to her, at one or other of which she was kept, until a stir having arisen in the meantime on account of her disappearance after having had such a complaint recorded, she was brought back by the present appellants and produced by them before another pleader of the Magistrate's Court, in whose premises she remained till next day, the 9th March, when she was made over to the Police. It is for this abduction, and for this keeping the woman away from Court and from prosecuting her case there, that the present appellants have been convicted." The Deputy Magistrate convicted the accused under ss. 201 and 346, but passed sentence under the latter section only. On appeal the Sessions Judge quashed the conviction under s. 201, but affirmed the conviction [222] and sentence under s. 346. It was objected before the

* Criminal Motion, No 205 of 1882, against the order of J. P. Grant, Esq., Sessions Judge of the 24-Parganas, dated the 29th June 1882.

Judge that, "granting the truth of the woman's story as to her having been taken here and there, such treatment, she having been left admittedly to her own desires at each place of so-called confinement, and at liberty to go whither she pleased, and to invoke the assistance of the Police, is not confinement in law." But the Judge, in consideration of the timid and submissive natures of the lower class women of the country, when brought into contact with influential middle class men and Brahmins, and of the fact that the woman was taken away to strange places, miles from her home, overruled the objection. The Petitioners then moved the High Court to set aside the order of the Sessions Judge and have the conviction quashed.

Baboo *Umbica Churn Bose* for the Petitioners.

Baboo *Ram Chundra Mitter* for the Crown.

The **judgment** of the Court (McDONELL and O'KINEALY, JJ.) was delivered by

McDonell, J. In this case the prisoners were convicted of offences under ss. 201 and 346 of the Penal Code. On appeal, the Sessions Judge properly acquitted them of any offence under s. 201, but upheld the conviction under the latter section. We are of opinion that the conviction cannot be sustained. To render a person liable under s. 346, it must be shown that the wrongful confinement was of such a nature as to indicate an intention that the person confined should not be discovered. In the present case it is clear that the element is wanting.

Again, it appears to us that the complainant was not at all in wrongful confinement. The Judge himself says that she was induced, not forced; and that her confinement was not actual, but, as he calls it, potential. This is not sufficient. We, therefore, set aside the conviction and sentence, and acquitting the prisoners direct their release.

Conviction quashed.

[- 11 C.L.R. 427]

[223] CRIMINAL MOTION.*The 1st August, 1882.*

PRESENT :

MR. JUSTICE WILSON, MR. JUSTICE MACLEAN AND
MR. JUSTICE MACPHERSON.

In the matter of the Petition of Henry Kyte.*

The Crown

versus

Henry Kyte.

*Excise Act (Beng. Act VII of 1878), s. 61—Imported liquor—Possession—
Pass—Consignee—Agent.*

Certain liquors arrived in Calcutta per s.s. *Navarino*, consigned to M. & Co. at Agra, who requested A to pay on their behalf the duty and landing charges, and forward the goods to Agra. While on the way from the steamer to the railway station, the goods were seized as being in the possession of A without a pass, within the meaning of s. 61 of Beng. Act VII of 1878, and A was convicted and sentenced to a fine under the provisions of that Act.

Held, that the conviction was bad.

IN this case Henry Kyte was, on the 1st of December 1881, charged before the Presidency Magistrate with having in his possession, in the Strand Road, Calcutta, on the 30th of November 1881, imported liquor without a pass or license (to wit thirty cases Port and twenty cases Sherry, each one dozen), in contravention of ss. 17 and 61 of Beng. Act VII of 1878, as amended by s. 8, Beng. Act IV of 1881. The accused pleaded not guilty. The facts of the case are fully set out in the judgment of Mr. Justice WILSON and Mr. Justice MACPHERSON. In convicting the accused the Magistrate said: "If the accused had a wholesale license, he would still require a pass to protect the liquor in transit. In this case he had neither a license nor a pass, and under the law he is liable to punishment, and the liquor to confiscation. Under all the circumstances of the case, however, I fine the defendant Rs. 30 (thirty) and order one-fifth of the liquor seized.—*viz.* 10 cases,—to be forfeited.

The accused now moved the High Court to quash the Magistrate's order.

Baboo *Kalichurn Banerjee* and Baboo *Umerendro Nath Chatterjee* for the petitioner.

[224] The following **Judgments** were delivered :—

Maclean, J.—The vakil for the petitioner has failed to satisfy me that the conviction, dated 1st December 1881, is not founded upon a correct view of the law; and, under any circumstances, I object to re-opening a case after the lapse of six months from the date of the conviction.

I am not prepared to say that the petitioner was not in possession of the liquor. It had, it is admitted, been passed out to him from the Customs, and he was about to despatch it to the consignee at Agra. Neither am I satisfied that the holder of a license, not granted by the Excise authorities here, is a licensed vendor within the meaning of Beng. Act VII of 1878. In this view of the law, the petitioner, whether in possession on his own account, or for the

* Criminal Motion, No. 161 of 1882, against the order of B. L. Gupta, Esq., Presidency Magistrate of Calcutta, dated the 1st December 1881.

consignee, was a person "other than a licensed vendor," and being admittedly without a pass from the Collector or other officer duly empowered in that behalf, I see no illegality in his conviction under s. 61, Beng. Act VII of 1878.

Macpherson, J.—I am sorry to differ, but I certainly think the conviction is bad on the ground that no offence has been committed. The facts are, that certain liquor consigned to Martinez and Co., licensed vendors at Agra, was imported in the Steamer *Navarino*. The petitioner, at the request of the consignee, cleared this liquor by paying the duty and landing charges. The Abkari authorities seized it in the Strand Road while it was being conveyed to the Howrah station for despatch to the consignee. The petitioner was convicted of having the liquor in his possession in contravention of ss. 17 and 61 of the Excise Act (Beng. Act VII of 1878). He was not himself a licensed vendor, nor had he a pass from the Collector. The question then is, was the liquor in his possession within the meaning of those sections?

Putting a reasonable construction on the word 'possession,' I hold that it was *not*. There is certainly a distinction between possession and a bare temporary custody or charge on behalf of another person. The liquor belonged to a licensed vendor, and was in course of transit to him. It would be a very strained construction of the sections to say that it was in the [225] possession of the petitioner, who had merely done what was necessary to clear and forward the goods to their proper destination. If it was in his possession, it was equally in the possession of the cartmen who were carrying it. I think it makes no difference, so far as the petitioner is concerned, that the consignee was a licensed vendor not in Bengal, but in the Upper Provinces. If this conviction is right, then *A*, who had imported liquor for his own consumption and use, would be guilty of no offence once the liquor had come into his actual possession; but *B*, who acting for *A* had cleared the liquor and was conveying it from the Custom-house to *A*'s house, would be guilty of an offence under s. 61, because *B* was in possession of it, and the possession was not for his private use and consumption. The Courts must certainly, before convicting, enquire into the *purpose* of the possession, and I think they must also enquire into the *nature*.

It may be noted that, in this case, though the usual notice was given to the Government Solicitor, no one has appeared for the Government to support the conviction; and though the Presidency Magistrate has, in two subsequent cases, come to an exactly contrary conclusion on precisely the same facts, the Excise authorities have accepted the decisions. Apart from this, however, I consider the conviction bad, and would set it aside.

As to the delay in making the application, this has been sufficiently accounted for. The delay might have been some ground for refusing the rule. It is no ground for rejecting the application when the rule has been granted.

The Judges having disagreed, the proceedings were laid before Mr. Justice WILSON, who delivered the following **Judgment**:—

Wilson, J.—I agree on the whole with MACPHERSON, J., that this conviction was wrong.

We must take the facts, I think, to be these, and these only, that certain liquors arrived by the s.s. *Navarino* for Martinez & Co., licensed dealers of Agra, in the North-Western Provinces; that the accused was requested by them to pay, on their behalf, the duty and the landing charges, and to forward the liquor to Agra. The liquor was seized in Calcutta as [226] being in the possession of the accused without a pass, within the meaning of s. 61, Beng. Act VII of 1878.

I do not think we can support this conviction unless we are prepared to lay down broadly that anybody who has anything to do with the transit of liquor is within the section. If the accused was within the section, I do not see why the ship-owners, if they landed the goods, were not equally so. I do not see how the Railway Company, if they had carried the goods, could have escaped the necessity of obtaining a pass, and perhaps a pass for each District of Bengal through which they carried them.

As to the delay that has occurred—taking into consideration the fact, that the Magistrate himself has since disapproved of the conviction, the efforts which the accused has made in other quarters to reverse or nullify it, and that no objection is raised on the part of the Crown,—I think we may properly set aside the conviction and direct the return of the fine and the release of the goods declared to be forfeited.

[9 Cal. 226 : 7 Ind. Jur. 309 : 11 C.L.R. 359]

APPELLATE CIVIL.

The 3rd July, 1882.

PRESENT :

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

In the matter of the Petition of Hemlota Dabee.*

Will—Probate—Execution—Witnesses—Succession Act (X of 1865), s. 50.

Where the testator does not himself sign the will, but some other person signs it in his presence and by his direction, then, besides this other person, there must be two witnesses who must sign the will in the presence of the testator.

In the goods of Roymoney Dassie (I. L. R., 1 Cal., 150) and *Huro Sundari Dabia v. Chunder Kant Bhuttacharjee* (I. L. R., 6 Cal., 17) cited.

THIS was an application under Act V of 1881 for probate of the will of one Girish Chunder Banerji, who died on the [227] 2nd of April 1879. The applicant was Hemlota Dabee, widow of the testator's younger brother. It appeared from the evidence that the will had been written by the Magistrate's clerk; that seven witnesses then signed the will; that the testator and the witnesses then went to the Sub-Registrar's office; that the Sub-Registrar then requested the testator to sign, but he said "I am blind." Then one of the witnesses, Chunder Coomar Chatterji, signed the testator's name at his request in the following manner: "*Girish Chunder Banerji*, by the pen of *Chunder Coomar Chatterji*, of Amelia." And then wrote under this signature,

* Appeal from Original Decree, No. 253 of 1881, against the order of J. Whitmore, Esq., Officiating Judge of Nuddea, dated the 22nd July 1881.

"Identified by *Chunder Coomar Chatterji*, Local Fund Clerk, Ranaghat Sub-Divisional Office. *Chunder Coomar Chatterji*, Local Fund Clerk, Ranaghat." Then follows the signature of the Sub-Registrar.

The District Judge refused probate, on the ground that the witnesses had signed before the testator's signature was affixed at his request. The applicant moved for review of judgment, but the motion was refused, the Judge saying:—"As regards the possibility of proving the will by means of the method suggested in the somewhat similar case of *Hurro Sundari Dubia v. Chunder Kant Bhattacharjee* (I. L. R., 6 Cal., 17), there is this difficulty. In the present case there is no one on the back of the will to second the Sub-Registrar's possible testimony. Chunder Coomar Chatterji, no doubt, identifies the testator; but as he is the very man who signed for the testator, it cannot be said that he saw 'some other person' sign the will in the presence and by the direction of the testator, or received from the testator a personal acknowledgment of the signature of such other person. Section 50 would not, I think, be satisfied if there were only two attesting witnesses, and one of them signed for the testator; and although, perhaps in a strict grammatical sense, it may be said that 'some other' means some other than the testator, and not 'some other than the attesting witness' also, I do not think that that is the natural and proper interpretation of the third rule of the section. The present is a hard case, but I do not see any way of reversing my order." The applicant appealed to the High Court.

[228] Baboo *Surendro Nath Motilal* for the Appellant.

The **Judgment** of the Court (McDONELL and FIELD JJ.) was delivered by

Field, J.—"This is an appeal against an order of the Judge of Nuddea refusing to grant probate of a will. The ground on which the Judge refused to grant probate is, that the witnesses signed before the testator's signature was affixed at his request. It appears that the witnesses first signed the will, which was then taken to the Sub-Registrar; and before the Sub-Registrar, the testator Girish Chunder requested Chunder Coomar Chatterji to sign for him, and Chunder Coomar Chatterji wrote his name for him accordingly at his request.

It is now contended before us, on the authority of the case of *Roymoney Dassee* (I. L. R., 1 Cal., 150) and of *Hurro Sundari Dubia v. Chunder Kant Bhattacharjee* (I. L. R., 6 Cal., 17), that there is in this case a sufficient admission of the signature of the testator, because there is upon the will an endorsement that the executor admitted the execution. Now this endorsement is signed "Girish Chunder Banerji, by the pen of Chunder Coomar Chatterji." Then come the words: "Identified by Chunder Coomar Chatterji, Local Fund Clerk, Ranaghat Sub-Divisional Office." Then come the names of two witnesses, Chunder Coomar Chatterji and the Sub-Registrar. Now it is clear that the signature to the admission was made by Chunder Coomar Chatterji writing the name of Girish Chunder Banerjee at the request of the latter; and this being so, there is, besides Chunder Coomar Chatterji, only one witness, viz., the Sub-Registrar. Section 50 of the Indian Succession Act, cl. 3, is as follows:—"The will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses must sign the will in the presence of the testator. "Now it is quite clear from this language that when

[229] the testator himself signs the will, two witnesses are necessary, who must have seen the testator sign, and who afterwards must sign in the presence of the testator. When the testator does not himself sign, but some other person signs in his presence and by his direction, then, besides this other person who has so signed at the request of the testator, there must be two witnesses. In other words, when the testator does not himself sign, but gets some one else to sign for him, there must be three persons in addition to and besides the testator himself. Now in the present case it is quite clear, that the signature to the admission was made by Chunder Coomar Chatterji at the request of the testator, and there is only one witness, *viz.*, the Sub-Registrar—that is, besides the testator there are only two persons, and not three. This being so, it appears to us that it was the clear intention of the Legislature that the person who signed for the testator at his request could not be one of the two persons who witnessed the admission of the execution itself. We may remark that, in the first of the above cases, *viz.*, that of *Roymoney Dasse* (I. L. R. 1 Cal., 150), the admission before the Registrar was signed by the executrix Roymoney Dasse by the pen of Jadub Chunder Sen, and there were besides two witnesses, *viz.*, Jogendro Nath Sen and C. M. Chatterji, Registrar—that is, there were three persons besides the testator. The facts of the second case in this respect do not appear from the report.

We think, therefore, that the decision of the learned Judge in the Court below is correct, and that this appeal must be dismissed without costs, as no one appears on the other side.

Appeal dismissed.

NOTES

[ATTESTATION--

See also 5 Cal. 738 ; 6 Cal. 17 ; 27 Cal. 169 ; 39 I. A. 218.]

[... 11 C.L.R. 363]

[230] APPELLATE CIVIL.

The 4th July, 1882.

PRESENT :

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

Gopal Chunder Mitter.....Plaintiff

versus

Mohesh Chunder Boral and others.....Defendants.

*Suit for possession—Civil Procedure Code (Act VIII of 1859), s. 246—
Limitation Act (XV of 1877), sched. ii, Art. 11.*

Where, in consequence of an adverse order passed under the provisions of Act VIII of 1859, s. 246, a suit is [since the Limitation Act (XV of 1877) came into force] instituted to

* Appeal from Appellate Decree, No. 317 of 1881, against the decree of J. F. Browne, Esq., Officiating Judge of the 24-Parganas, dated the 15th December 1880, affirming the decree of Baboo Jogesh Chunder Mittra, Munsif of Alipore, dated the 23rd January 1880,

establish the plaintiff's right to certain property and for possession, such suit is not governed by the provisions of art. 11, sched. ii of Act XV of 1877, but by the general limitation of twelve years.

Koylash Chunder Paul Chowdhry v. Preonath Roy Chowdhry (I. L. R., 4 Cal., 610 ; s.c., 3 C. L. R., 25), *Matonginy Dassee v. Chowdhry Jummunjoy Mullick* (25 W. R., 519), *Joyram Loo v. Paniram Dhoba* (8 C. L. R., 54), and *Raj Chunder Chatterjee v. Shama Churn Garai* (10 C. L. R. 435), cited.

THE Judgment of the Court of First Instance in this case was as follows :—
 "This is a suit to establish the plaintiff's right to certain property and to obtain possession thereof jointly with the defendant No. 2. The property was attached in execution of a decree against the defendant No. 3, and the plaintiff preferred a claim under s. 246 of Act VIII of 1859, which was disallowed on the 7th of September 1876. The limitation law which is applicable to this case is Act XV of 1877. The suit is one to establish the plaintiff's right to certain property and to recover possession thereof, not to set aside a summary order. It has been held that, for such a suit, the period of limitation is twelve years in cases in which Act IX of 1871 applies—*Koylash Chunder Paul Chowdhry v. Preonath Roy Chowdhry* (I. L. R., 4 Cal., 610 ; s.c., 3 C. L. R., 25). But under cl. 11, sched. ii of Act XV of 1877 the period is only one year. Before Act IX of 1871 came into operation, [231] the period was only one year by reason of the last twelve words of s. 246 of Act VIII of 1859. The cases of *Brijo Kishore Nag v. Ram Dyal Chudra* (21 W. R., 133), and *Kaminee Debia v. Issur Chunder Roy* (22 W. R., 39) support that view. Be that as it may, the period of limitation prescribed by Act XV of 1877 being shorter than the period of limitation prescribed by Act IX of 1871, this suit, if instituted within two years from the 1st of October 1877, would, under s. 2 of Act XV of 1877, have been saved from limitation. But I find that this suit was instituted on the 9th of October 1879 ; it is therefore barred by limitation. The suit is accordingly dismissed with costs."

The plaintiff appealed to the District Judge, who dismissed the appeal with costs, saying merely that it seemed quite clear that the suit was barred by limitation.

The plaintiff appealed to the High Court, on the grounds : (i) "that art. 2 of the second schedule of Act XV of 1877 cannot be applicable to the present case, as in the present case no order has been passed against the plaintiff under s. 280, 281, 282, or 355 of Act X of 1877 ; (ii) that the Courts below ought to have construed the Limitation Act most strictly, and as such ought to have held that the Act in question makes no provision for a regular suit brought by a party defeated in a claim under s. 246 of Act VIII of 1859. There is no authority for substituting the section of the old for those of the new Civil Procedure Code in the schedules to Act XV of 1877."

Baboo *Pran Nath Pundit* for the Appellant.

Baboo *Byddo Nath Dutt* for the Respondents.

The Judgment of the Court (McDONELL and FIELD, JJ.) was delivered by

Field, J.—The property which forms the subject of this suit was attached in execution of a decree against the defendant No. 3. The plaintiff preferred a claim under s. 246 of Act VIII of 1859 in respect of this property. This claim was disallowed on the 7th of September 1876. The plaintiff now seeks [232] to establish his right to, and obtain possession of, the property which

formed the subject of that claim. The present suit was instituted on the 9th of October 1879, that is more than three years after the order disallowing the claim, which order was made under s. 246 of Act VIII of 1859.

The Munsif was of opinion that the limitation law applicable to this case is Act XV of 1877, and he refers to art. 11 of sched. ii of that Act. Applying that article, he was of opinion that this suit ought to have been brought within one year from the 7th of September 1876, and that, having been brought more than a year after the date of the order disallowing the claim, it was barred by limitation under the article just mentioned.

It is now contended before us in appeal that art. 11 cannot be read as applicable to s. 246 of Act VIII of 1859. Article 11 is as follows :—"By a person against whom an order is passed under s. 280, 281, 282, or 335 of the Code of Civil Procedure, etc." The Code of Civil Procedure here referred to was the Code which was in force when Act XV of 1877 was passed, that is Act X of 1877. Section 3 of Act X of 1877 provides as follows :—"When in any Act, Regulation, or Notification passed or issued prior to the day on which this Code comes into force, reference is made to Act VIII of 1859, Act XXIII of 1861, or the Code of Civil Procedure, or to any other Act hereby repealed, such reference shall, so far as may be practicable, be read as applying to this Code or the corresponding part thereof." There is, however, no provision that when, in any Act passed after the passing of Act X of 1877, reference is made to Act X of 1877, or the Code of Civil Procedure, that reference shall be read as applying to the old Code, Act VIII of 1859, or the corresponding part thereof; and in order to make art. 11 of the Limitation Act applicable to the present case, we would have to import into the law such a provision as that which has been just mentioned, and which has not been specifically made by any Act of the Legislature. We think that we cannot import a provision of this nature more especially in construing the Limitation Act, to which the rule of strict construction is applicable according to [233] the practice of the Courts. The result is, that art. 11 of the present Limitation Act is not applicable to the present case.

Then arises the question, what period of limitation is applicable? It has been decided in the case of *Koylash Chunder Paul Chowdhry v. Preonath Roy Chowdhry* (I. L. R., 4 Cal., 610; s.c., 3 C. L. R., 25), that, in consequence of the repeal of the last twelve words of s. 246 of Act VIII of 1859 by Act IX of 1871, the period of limitation applicable to a suit such as that which the plaintiff has here brought is twelve years. The decision in that case has been followed in a number of cases decided by other Benches of this Court. See *Matonginy Dassee v. Chowdhry Junmunjoy Mullick* (25 W. R., 513), *Joy Ram Loot v. Paniram Dhoba* (8 C. L. R., 54), and *Raj Chunder Chatterjee v. Shama Churn Garai* (10 C. L. R., 435). It has been contended before us by the vakil for the respondents that these decisions are not correct, and that, upon the true construction of the law, the period of limitation is one year; and that it has been so decided by the Bombay High Court and the Madras High Court.* Having regard to the fact that this question was not raised in the Courts below, that it was there assumed that, unless art. 11 of the second schedule of Act XV of 1877 is applicable, the period of twelve years would apply, which is in accordance with several decisions of this Court, and that no cross-objection has been taken on appeal to this Court, we think it unneces-

* See *Krishnaji Yithal v. Bhaskar Rangnath* (I. L. R., 4 Bom., 611); *Venkapa v. Chenbasapa* (I. L. R., 4 Bom., 21); *Jetti v. Sayad Husein* (I. L. R., 4 Bom., 23).

sary to enter into this question upon the present occasion. We think, therefore, that this appeal must be decreed with costs, and the case must be remanded for trial on the merits.

Case remanded.

NOTES.

[See the Notes to 9 Cal., 13; 163 *supra*; also 13 C. L. R., 139 (141); 11 Cal., 673; 6 C. W. N. 157 (158); 1 C. W. N. 24 (28); 8 Mad., 134; 12 Mad., 294.]

[11 C.L.R. 335 : 7 Ind. Jur. 311] [234] APPELLATE CIVIL.

The 13th June, 1882.

PRESENT :

MR. JUSTICE O'KINEALY AND MR. JUSTICE BOSE.

Bhugwan Acharjee and others.....Defendants

versus

Gobind Sahoo Plaintiff.*

Mortgagor and mortgagee - Foreclosure - Suit for possession - Covenant to pay - Conditional sale - Damages, measure of - Costs.

Two out of several co-sharers mortgaged as their own, by way of conditional sale, a portion of the joint family property. The mortgagee foreclosed, and then instituted a suit for possession, which he withdrew with liberty to bring a fresh suit. He afterwards brought a suit for possession against the mortgagors and their co-sharers, on the suggestion of the mortgagors that it would be undefended. It was, however, defended by the co-sharers, and the suit was dismissed. The mortgage-deed contained no covenant to repay the money lent. In an action for damages brought by the mortgagee against his mortgagors—

Held, that the plaintiff was entitled to recover the money lent and interest, and the costs of the second suit.

THIS was a suit for damages. The plaint stated that, by a deed of conditional sale, dated the 17th of April 1869, the defendants mortgaged to the plaintiff's father certain land in consideration of a loan by the latter of Rs. 520. The defendants failed to pay off the amount due, and the plaintiff's father foreclosed. After the foreclosure the plaintiff's father died, and the plaintiff sued to obtain possession of the foreclosed lands. The defendants did not enter any appearance, but their co-sharers did, claiming the land as joint, and denying the right of the defendants to mortgage without their consent. That suit was withdrawn, with liberty to bring a fresh suit. The plaintiff then brought a second suit for possession against the defendants and their co-sharers, at the instance of the defendants, who stated they would get their co-sharers to confess judgment. They did not succeed in doing so, however, and the suit was dismissed. The plaintiff then asked the defendants to come to a partition of the [235] lands, and hand over their shares to him ;

* Appeal from Appellate Decree, No. 497 of 1881, against the decree of A. M. Cochran, Esq., Officiating Judge of Cuttack, dated the 27th December 1880, reversing the decree of W. Wright, Esq., Subordinate Judge of that district, dated the 30th September 1879.

but this they neglected to do. The present suit was for damages calculated on the money advanced and interest and the costs of the abortive litigation. The deed of conditional sale contain no stipulation for the repayment of the debt.

The Court of First Instance dismissed the suit, but this decision was reversed on appeal, the Judge citing *Kishen Mohun Shaha v. Ram Chunder Dey* (3 W. R., 28), *Bykunt Nath Sen v. Goboollah Sikdar* (24 W. R., 391), *Moonshee Syud Ameer Ali v. Syef Ali* (5 W. R., 289), *Sreemutty Debia Chowdhraïn v. Bimola Soonduree Debia* (21 W. R., 423), and *Sh-ikh Eida v. Ram Jug Pandey* (19 W. R., 289). The defendants appealed to the High Court, on the grounds of no cause of action, limitation, no stipulation in the kut-kobala for the return of the money, that the costs of the litigation could not be recovered, and *caveat emptor*.

Baboo *Umbica Churn Bose* for the Appellants.

Baboo *Chunder Madhub Ghose* and Baboo *Obhoy Churn Bose* for the Respondent.

The Judgment of the Court (O'KINEALY and BOSE, JJ.) was delivered by

O'Kinealy, J.—In this suit certain property was mortgaged to the plaintiff by the defendants, under a kut-kobala, in the year 1869; and in that document the property was described as their own exclusive property which they had obtained by purchase. Subsequently, the plaintiff instituted foreclosure proceedings, and issued the usual notice to the mortgagors. After the year of grace had expired, he sued for the mortgaged property; but certain persons intervened, and he withdrew the suit with sanction to bring a new case. From the evidence on the record, which from the observations of the Judge who tried the case in the lower Court appears to have been believed by him, it appears that the mortgagors, on the representation of the [236] mortgagee, said, that if a new suit were brought for possession of the property, they would induce the recusant members of the joint family to which they belonged to confess judgment. This suit was accordingly brought, and those members of the family, instead of confessing judgment, opposed the claim; and the suit was dismissed both in regard to the entire property and also in regard to the share of the mortgagors. Failing thus to follow the property, the plaintiff now sues for the return of the money which his father had lent, and for the costs in the suit which was dismissed. The general rule is laid down in Macpherson on Mortgages at page 233:—"Ordinarily the mortgagee cannot sue for the recovery of the money lent by him instead of for foreclosure and possession, except when good and sufficient cause is shown for his adopting such a course. And only something which, without any blame on his part, renders it impossible for the mortgagee to obtain possession will be considered to be good and sufficient cause."

We concur with the lower Court in holding that the mortgagee is entitled to obtain his money.

Another point for consideration is, whether he is entitled to obtain the costs of the suit. It was decided, so long back as 1853, by the Sadr Dewany, where, in a foreclosure suit by a mortgagee, the suit is dismissed and he is made to pay the costs of the intervenor, that in a fresh suit he is entitled to those costs from the mortgagor and to his own costs in the suit. In the present case not only was the suit brought for the possession of the property as mortgagee, but in addition it is clear that it was brought under the advice of

the mortgagors themselves. We think, therefore, that the mortgagee is entitled to obtain the costs in that suit incurred by him and the costs he paid to the intervenor.

The appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[DAMAGES—COSTS INCURRED—

Compare also 15 Mad., 65; 17 Mad., 469, as regards the right of suit; *Smith v. Compton*; (1832) 3 B. & Ad. 407; *G. W. Ry. Co. v. Fisher* (1905) 1 Ch. 316 as regards recovery of costs incurred; *Williams v. Burrell* (1815) 1 C. B., 402; *Blyth v. Smith* (1843) 5 M. & Gr. 405, as regards the liability arising from the defendant's assent, though tacit.]

[7 Ind. Jur 361]

[237] APPELLATE CIVIL.

The 22nd May, 1882.

PRESENT:

SIR R. GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE MITTER.

Obhoy Churn Ghose and another.....Defendants

versus

Gobind Chunder Dey.....Plaintiff.*

Hindu Law—Joint family property, Suit to recover—Onus of proof—Limitation Act, 1877, Arts. 127, 144.

The plaintiff sued for a share in certain property on the allegation that his ancestor *K* and the defendants' ancestor *R* were uterine brothers who, while they were living in commensality, purchased the property in question with their joint funds in the name of *R*; and that subsequently *K* left his home, and then his daughter, the plaintiff's mother, enjoyed the property jointly with *R* until her death, when the plaintiff succeeded to his right and interest applied to have his name registered as a joint proprietor, but his application was refused; hence this suit.

The defence was that *R* bought the property in question with his own funds after he and his brother *K* had separated; that Radha Mohun, and afterwards the defendants, had been in exclusive possession for more than twelve years; and that the suit was barred by limitation. *Held* (reversing the judgment of FIELD, J.) that the onus was on the plaintiff to prove that the property was joint property.

Before a plaintiff can bring his case within Art. 127 of schedule II of the Limitation Act, 1877, it is incumbent on him to show that the property in which he seeks to recover a share is "joint property."

THE plaintiff's case was that his maternal grandfather Krishto Mohun Raout, and Radha Mohun Raout, the maternal grandfather of the first defendant, were two uterine brothers, living together in commensality; that whilst so living they purchased with the joint funds a 6-anna share of a talook called Lobohai Runject in the name of the elder-brother Radha Mohun; that subsequently to this purchase Krishto Mohun went away and was not heard of for a long time, and during that time his wife messed together with Radha Mohun

* Appeal under s. 15 of the Letters Patent against the decree of Mr. Justice Field, dated the 11th January 1882, in Appeal from appellate Decree. No. 2186 of 1880.

and was in possession of a moiety of the 6-anna share of the above talook ; that on her death the plaintiff's mother was in possession of the said moiety and received rent from the ryots ; and that on the death of the [238] plaintiff's mother, he succeeded to the right, title and interest of Krishto Mohun in the said moiety, and was in possession thereof, but on his applying to the revenue authorities for registration of his name under the Land Registration Act, as proprietor of the said moiety, his application was refused, and he consequently brought the present suit to establish his right to, and for possession of, the said share.

The defence was that the suit was barred by limitation ; that the disputed property had not been purchased whilst the brothers were living in commensality, but was bought by Radha Mohun alone with his own money long after his separation with Krishto Mohun in food ; and that neither Krishto Mohun, nor his wife, nor the plaintiff's mother, nor the plaintiff himself, were ever in possession of the share claimed.

The Munsif found on the evidence that Radha Mohun alone, and after his death the defendants, had been in possession of the disputed share, and that the suit was barred by limitation. He therefore dismissed the suit.

The plaintiff appealed on the ground (*inter alia*) that, as it was admitted that Radha Mohun and Krishto Mohun lived in commensality, it was for the defendants, to prove that the property was acquired by Radha Mohun with his own funds, and this had not been proved.

The Judge agreed with the Munsif in his findings as to possession and limitation, and as to the ground of appeal above mentioned he found that, though it was admitted the brothers lived in commensality, yet it was not admitted that they were so living at the time the talook was acquired, and that it was consequently for the plaintiff to show that the talook was purchased when Radha Mohun and Krishto Mohun were living together, or that it was acquired with funds partly supplied by Krishto Mohun which he had not done. He therefore dismissed the appeal. The plaintiff appealed to the High Court, and the case came before FIELD, J., the material portion of whose judgment was as follows :—

“ As to the view of the Judge that, although it was admitted by the defendants that the brothers were at one time joint, still it lay upon the plaintiff to prove that they were joint at the time when this property was acquired, it is to be observed that this [239] view is not supported by authority. The normal state of a Hindu family is that of coparceners, and it lies upon the person who alleges separation to prove it. Now here it was admitted that a coparcenary existed, and it must be presumed that this coparcenary continued until there was evidence of a separation. The burden of proof was, therefore, on the defendants to prove that there was a separation, and at a time antecedent to the acquisition of this property. Having disposed of the presumption of Hindu law in the manner just indicated, the District Judge proceeded to deal with the question of limitation. He says : ‘ As the defendants have succeeded in proving to the Munsif's satisfaction and to mine that they have been in exclusive possession of the talook for more than twelve years, it is quite clear that the plaintiff cannot succeed in this suit.’ This is not correct as the law now stands. If the property was joint property twelve years' exclusive possession alone will not have the effect of barring the present claim. Article 127 of sch. II of the Limitation Act provides that in a suit by a person excluded from joint family property to enforce a right to share therein, the time from which the twelve years begin to run is when the exclusion becomes known to the plaintiff.

If, therefore, this were found to be joint property, it would be necessary to enquire when the exclusion of the plaintiff, or those under whom he claims, became known to him or them. The decree of the District Judge must be set aside, and the case remanded in order that he may come to a fresh decision with reference to the observations above made."

Baboo Ankhil Chunder Sen for the Appellants.

Baboo Sreenath Banerjee for the Respondent.

The following **Judgments** were delivered by the Court (GARTH, C.J., and MITTER, J.)

Garth, C.J.—I am unable to agree in the view which the learned Judge has taken of this case.

There is no doubt, of course, that as a general principle, when a Hindu family is proved to have been joint, that state of things is presumed to continue, until the contrary is shewn. The question is, how far that principle can properly be applied in this case.

[240] The plaintiff sues to recover an undivided share in certain land, which is now, and has been for many years past, in the defendants' exclusive possession, and his case is this.

He says that his maternal grandfather Krishto Mohun, and the maternal grandfather of the defendant No. 1, were uterine brothers; and that whilst they were living in commensality they purchased the property in question with their joint funds in the name of Radha Mohun; that subsequently Krishto Mohun left his home, and then his daughter (the plaintiff's mother) enjoyed the property jointly with Radha Mohun till her death, when plaintiff succeeded to his right, and applied to the revenue authorities to have his name registered, but that having failed in this application, he sues to establish his right and to recover possession.

The defendants' case is that Radha Mohun bought the property himself with his own money, after he and his brother had separated; that Radha Mohun, and afterwards the defendant No. 1, under Radha Mohun's will, have been in exclusive possession; and that the plaintiff and those under whom he claims never had anything to do with it.

Both Courts have found in favour of the defendants. They say that the plaintiff has entirely failed to show that at the time when the property was purchased the two brothers, Radha Mohun and Krishto Mohun, were living in commensality, or that the property was purchased with their joint funds, or that Krishto Mohun had anything to do with it. It was purchased in Radha Mohun's name; it was left by his will to the defendant No. 1, and the defendants have been in exclusive possession of it for upwards of twelve years, so that the plaintiff is barred by limitation.

But the learned Judge of this Court has held that, as this is a suit brought by a Hindu to recover possession of joint family property, and as it is admitted that Radha Mohun and Krishto Mohun were at one time joint, the presumption is, till the contrary is shewn, that the property in suit was purchased during the time that the brothers were living joint, and that it was incumbent on the defendants to prove that the property was purchased after the separation.

He considers, moreover, that the ordinary rule of twelve years' [241] limitation does not apply; and that the case comes under s. 127 of the Limitation Act; so he has remanded the case for the further enquiry, at what time his exclusion from this property became known to the plaintiff.

Now it seems to me that before a Hindu plaintiff can bring his case within Article 127, he must prove that the property in which he seeks to recover a share is "*joint family property*;" and that it is not enough for him merely to call it joint family property, and to show that 30, 50 or 100 years ago his ancestors, and the defendant's ancestors, were joint; leaving the Court to presume from this, that any property of which the defendant may be possessed at the time of suit brought is joint family property.

In this case, the property in suit is found to have been *in the exclusive possession of the defendants for upwards of twelve years*; and I consider that under s. 144 they have a *prima facie* right to that property by force of the twelve years' limitation rule against all the world. If the plaintiff wants to bring himself within Article 127, which places him in a more advantageous position than other claimants, he is bound to show that the property which he seeks to recover *was at some time joint family property*. In this he has entirely failed.

The doctrine, which the respondent's pleader has advanced, and which has apparently been acted upon by the learned Judge in this Court, appears to me a very dangerous one. If that doctrine were well founded, it would seem to follow that however long a Hindu may have been in the exclusive possession of property, moveable or immoveable, he would always be subject to have his title to it questioned by any distant member of his family, who could prove that at some prior period, even 100 years before, their common ancestors were members of a joint family; and not only so, but that in all such cases the onus of proving that the property was not joint would lie upon the defendant.

I should be sorry to think that this was the law. I consider that in this case these defendants having a twelve years' statutory title to the property claimed, have a *prima facie* case of separate ownership, and that as the plaintiff has given no evidence that the property was ever joint, his suit was properly dismissed. As my brother MITTER is also of this opinion, the judgment of the District [242] Judge will, therefore, be restored, with the costs of both hearings in this Court.

Mitter, J.—I am also of the same opinion.

The plaintiff seeks to recover possession of a share in a property which the defendants claim as the exclusive property of their predecessor in title, Radha Mohun. The plaintiff is the daughter's son of Krishto Mohun, Radha Mohun's brother.

The plaintiff alleged that this property was a joint family property of Radha Mohun and Krishto Mohun. The lower Courts found that the plaintiff had utterly failed to establish that it was at one time their joint family property. They also found that the defendants and their predecessor in title have been in possession of this property for more than twelve years. Upon these findings the lower Courts dismissed the plaintiff's suit on the ground of limitation, as well as on the ground that the plaintiff's title was not made out.

On the second appeal the learned Judge in this Court held that the decisions of the lower Courts were erroneous in law. He is of opinion that the plaintiff's suit ought not to be dismissed as barred by limitation upon the finding that the defendants were in exclusive possession of the property in dispute for more than twelve years. He thinks that Article 127 of the second schedule of the Limitation Act is applicable to the facts of this case. As to the title of the plaintiff, the learned Judge is of opinion that it must be presumed in his favour, because the defendants failed to prove that the property in dispute belonged exclusively to Radha Mohun. He thinks that if two brothers are admitted or proved to have lived as members of a joint Hindu family at one time, it must be presumed that their joint status continued until the contrary was proved.

Acting upon this presumption he has come to the conclusion that at the time of the acquisition of the property in dispute Radha Mohun and Krishto Mohun were members of a joint Hindu family, because the defendants have given no evidence to shew that they had separated before that time.

Having thus arrived at the conclusion, that at the time of the acquisition of the property in dispute the brothers were joint, the learned Judge has thrown the onus of proving that it was the [243] exclusive property of Radha Mohun upon the defendants; because, according to another presumption of Hindu law, a property, purchased in the name of one member of a joint family, must be presumed to be the common property of the family until the contrary is shewn. As the contrary has not been shewn in this case, the learned Judge has come to the conclusion that the property in dispute belonged to the two brothers Radha Mohun and Krishto Mohun.

Now it seems to me that in this case there was no room for either of these presumptions. It was an admitted fact that at the time when the suit was brought the plaintiff and defendants were not members of a joint family; that being so, the case is brought within the ordinary rule, *viz.*, that the plaintiff must succeed on the proof of his title. He must prove that the property in dispute is his, by reason of its being a joint family property belonging to his ancestor, and the ancestor of the defendants. This view of the law is supported by the decision of the Judicial Committee in *Bannoo v. Kashee Ram* (I. L. R., 3 Cal., 315). There also it was admitted, as in this case, that when the dispute arose, the family was separate. The Judicial Committee held that in this state of things no presumption arises in favour of the plaintiff. Their Lordships say: "In the case of an ordinary Hindu family who are living together, or who have their entire property in common, the presumption is that all that any one member of the family is found in possession of belongs to the common stock. That is the ordinary presumption, and the onus of establishing the contrary is thrown on the member of the family who disputes it. Having regard, however, to the state of this family when the present dispute arose, their Lordships think that the presumption cannot be relied upon as the foundation of the plaintiff's case, and therefore, as he seeks to recover property which was in the possession of Ramdyal, and was ostensibly his own at the time of his death, it lies upon him to establish by evidence the foundation of his case, *viz.*, that the property was joint property, to which he and his brother Kashee Ram, as surviving members, were entitled."

[244] As regards the application of Article 127 of the Limitation Act, I fully agree with my Lord the Chief Justice, that it cannot be applied until the plaintiff proves that the subject-matter in dispute is joint family property.

In the opinion of the lower Courts the plaintiff has failed to prove that the property in dispute was at any time the joint family property of Radha Mohun and Krishto Mohun. This finding of fact must be accepted as correct in second appeal.

Appeal allowed.

NOTES.

[JOINT FAMILY PROPERTY—ONUS—

The initial burden of proof is upon the person setting up a claim to certain property on the ground that there was a joint family and the property belonged to it. There is no presumption to begin with in respect of either element:—as regards the former, when there had been some separation, *see* (1895) 18 All. 90; (1908) 32 Mad., 191; (1911) 35 Bom., 293; (1906) 4 C. L. J. 56; (1887) 2 C. P. L. R., 87; as regards the latter, *see* (1888) 18 Bom., 61 (66); (1911) 33 All. 677; (1898) 22 Bom. 922 (931).]

The 3rd July, 1882.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE NORRIS.

Mohadeay KoorerPlaintiff

versus

Haruk Narain and others..... Defendants.*

*Partition—Hindu widow—Revenue-paying estate—
Beng Act VIII of 1876, s. 10.*

A Hindu widow who has succeeded to a share in a revenue-paying estate as heir to her deceased husband is not a person having a proprietary interest in an estate for the term of her life only, within the meaning of s. 10, Beng. Act VIII of 1876. Even if she were, a Civil Court would not be debarred from decreeing partition of a revenue-paying estate at her instance if a proper case for the passing of such a decree be made out by her.

Jadomoney Dabee v. Sarodaprasono Mookerjee (1 Boulnois, 120); *Phool Chand Lall v. Rughoobuns Sahoy* (9 W. R., 108); *Katama Nuchuar v. The Rajah of Shivagunga* (9 Moore's I. A., 539); and *Bhagbutti Dace v. Chowdhry Bholanath Thakoor* (L. R., 2 I. A. 256) referred to.

Principles on which Courts should order partition at the instance of a Hindu widow stated.

IN this case the plaintiff stated that she and the defendants were joint owners of a settled revenue-paying estate, her share in right of her deceased husband being 3 annas 10 gundas; that in order to remove all likelihood of future disputes she applied to the [246] Collector for a butwara of the estate, but that the application was, on the 4th of November 1879, rejected under the provisions of s. 10 of Beng. Act VIII of 1876. It appeared that the widow's application to the Collector was opposed by three of her co-sharers, Haruk Narain Chowdhry and his two brothers, and the widow then filed the present suit on the 9th of February 1880, praying for a reversal of the Collector's order and for partition. The Subordinate Judge dismissed the suit, and delivered the following judgment :—

"The plaintiff, a Hindu widow, seeks in this suit for butwara of her share by the Collector under the law for the partition of estates. She is met by the defendant with the objection that such a partition could not be held under s. 10 of Beng. Act VIII of 1876. I am of opinion that the above section applies. It provides that 'no person having a proprietary interest in an estate for the term of his life only, shall be deemed to be a person entitled to claim partition under this Act.' Now this is the present butwara law, and if the partition were at all to be held, it must be under the provisions of this law. It is contended that a Hindu widow's estate is not that of a proprietor for life, but she holds absolutely as heir to her husband. It may be that her estate is not of a tenant for life, as understood in England, but there cannot be the least doubt that her interest is that of a proprietor for life. If such a person as a Hindu widow or other female heiress under the Hindu law is not intended by the above section, I cannot conceive what other individual could be contemplated by the Legislature. I therefore hold that a Hindu widow is a person within the scope and meaning of the aforementioned section of the law. If that is so, this Court cannot direct the Collector to

* Appeal from Original Decree No. 102 of 1881, against the decree of Baboo Mohendro Nath Bose, Subordinate Judge of Tirhoot, dated the 4th of March 1881.

make a butwara in this case, for that would be directing him to commit an illegality accordingly dismiss the suit and charge the plaintiff with the costs of the opposing defendants with interest. The costs of the consenting defendants will be borne by themselves."

The plaintiff appealed to the High Court on the grounds (1) that the Court below was wrong in holding that a Hindu widow is a person within the scope and meaning of s. 10 of Beng. Act VIII of 1876; (2) that the Court below ought to have held that a Hindu widow, such as the plaintiff is, fully represents the estate inherited by her from her husband, and is not tenant for life; (3) that the Court below ought to have held that the plaintiff was entitled to claim partition.

Baboo *Chunder Madhab Ghose* and Baboo *Gopal Lal Mitter* for the Appellant.

[246] Baboo *Mohesh Chunder Chowdhry* and Baboo *Pran Nath Pundit* for the Respondents.

The **Judgment** of the Court (MITTER and NORRIS, JJ.) was delivered by

Mitter, J.—This is an appeal against the decision of the Subordinate Judge of Tirhoot dismissing the (plaintiff's) appellant's suit for the partition of a revenue-paying estate, a fractional share of which is owned and held by her by right of inheritance from her husband. The defendants, 1st party, who own and hold another share of this estate, and who if they survive the (plaintiff) appellant are presumptively entitled to the share in her possession after her death, alone opposed her claim.

It appears that before this suit was instituted the (plaintiff) appellant had made an application to the Collector of the district to partition the estate under the provisions of Beng. Act VIII of 1876, but the Collector dismissed the application on the ground that the (plaintiff) appellant being in possession of a share of the estate as a Hindu widow was precluded by the 10th section of the Act from applying for the partition thereof.

The present suit was then brought, praying for the reversal of the Collector's order and for an order directing that officer to partition the estate under the provisions of Beng. Act VIII of 1876.

The lower Court framed the following issues:—

First.—"Whether under the butwara law the plaintiff is entitled to have a partition effected of her share."

Second.—"Whether the plaintiff has suffered any inconvenience in the enjoyment thereof by reason of the property being joint."

The suit has been dismissed on the first of these issues, and no evidence was taken with reference to the second issue, although we are informed that the parties were ready with their evidence in the lower Court.

The objections taken before us in appeal are, 1st, that the lower Court is in error in holding that the provisions of s. 10, Beng. Act VIII of 1876 apply to the estate of a Hindu widow; and, 2ndly, that supposing the view taken by the lower Court of the provisions of s. 10 of the Act in question is correct, a Civil Court is not precluded from decreeing partition of a revenue-[247] paying estate at the instance of a Hindu widow, when a proper case for passing such a decree is made out.

We are of opinion that both these objections are valid.

Section 10 of Beng. Act VIII of 1876 is to the following effect:—"Notwithstanding anything hereinbefore contained, no person having a proprietary interest in an estate for the term of his life only shall be deemed to be a person

entitled to claim partition under this Act." In order to decide whether a Hindu widow's estate comes within the purview of this section, we must determine what that estate precisely is.

In *Jadomoney Dabee v. Sarodaprosono Mookerjee* (1 Boulnois, 120, at p. 129) COLVILLE, C.J., said: "But the estate of a Hindu widow is very different from a mere life estate. The case of *Cossinanth Bysack v. Hurro Soondery Dasi* (Clarke's Rules and Orders, Ap. 91), which has long given the law to this Court, and since it is a decision of the Privy Council, ought to have given, if it has not given, the law to the Courts of the East India Company, establishes that the estate of a widow is something higher than a life estate; that it entitles her to the possession of the property without restriction; and that she has a qualified power of disposition in it, the limits of which it is difficult, if not impossible exactly, to define further than by saying that the propriety of any particular exercise of that power must depend upon the circumstances in which it is made, and must be consistent with the general principles of Hindu law regarding such dispositions".

In another case, viz., of *Phool Chand Lall v. Rughoobans Sahoy* (9 W. R., 108), PEACOCK, C.J., said: "The widow takes a widow's estate by inheritance from her husband. It is not an absolute estate for all purposes, and it is *not merely an estate for life*." Then again in *Katama Natchiar v. The Rajah of Shiva-gunga* (9 Moore's I. A., 539), in which one of the questions for decision was, whether a decree obtained against a Hindu widow was binding upon the heirs coming in after her, the Judicial Committee of the Privy Council observed: "For assuming her (a Hindu widow) to be entitled to the zamindari at all the whole estate would for the time be vested in her absolutely for some purposes, though in [248] some respects for a qualified interest, and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants in tail representing the inheritance would seem to apply to the case of a Hindu widow, and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow."

It is clear from these cases (1) that the widow completely represents the estate; (2), that under certain circumstances she has the right to convey an absolute interest in it; and (3), that until her death it is impossible to ascertain who would be entitled to succeed to the estate after her. Such an estate as this cannot be merely an estate for life. The distinction between a mere life estate and a widow's estate is explained by the Judicial Committee in *Mussamut Bhagbutti Dace v. Chowdhry Bholunath Thakoor* (L. R., 2 I. A., 256). In that case one Odan Thakoor executed before his death a deed providing that after his death his property was to be enjoyed by his wife during her lifetime, appropriating the profits derived therefrom, and that after her death it was to devolve on his adopted son. The Judicial Committee of the Privy Council held that the widow obtained in this case an estate for life, and that the remainder was vested in the adopted son. Their Lordships observed, "if she (the widow) took the estate only of a Hindu widow, one consequence no doubt would be that she would be unable to alienate the profits, or that at all events whatever she purchased out of them would be an increment to her husband's estate, and the plaintiffs would be entitled to recover possession of all such property real and personal; but on the other hand she would have certain rights as a Hindu widow; for example she would have the right, under certain circumstances, if the estate were insufficient to defray the funeral expenses or her maintenance, to alienate it altogether. She certainly

would have the power of selling her own estate; and it would further follow that Giridhari (the adopted son) would not be possessed in any sense of a vested remainder but merely a contingent one."

[249] With all these decisions before the Legislature, defining what a widow's estate is, and which definition clearly shows that it is not a proprietary interest for the term of her life only, it seems to us not probable that if, by enacting s. 10 of Beng. Act VIII of 1876 they had intended to disentitle a Hindu widow from claiming partition under the aforesaid Act, they would have described her right as "a proprietary interest in an estate *for the term of her life only*."

The words "a proprietary interest in an estate for the term of one's life only" would imply an interest which, actually in the enjoyment of the owner at the time of his death, would terminate on the happening of that event, and would not pass on to his heirs, or if at that time that interest be in the hands of an alienee under an alienation made by him during his lifetime, it would cease to exist on his death. The first of these alternatives is true in the case of a Hindu widow, but not the second in all cases because, as already shown, she has the right under certain circumstances to convey an absolute interest in the estate inherited by her.

Then again under Regulation XIX of 1814 a Hindu widow was competent to apply for partition of a revenue-paying estate. Clause 2, s. 4 of the Regulation provided that on an application by one, two, or more of the proprietors of a joint estate being made, the Collector should publish an advertisement notifying the same to all parties concerned, and specifying that he should proceed to make the division applied for in 15 days from the date of the advertisement, unless any person in possession of the estate should, before the expiration of that time, deny the right of such claimant or claimants to the share or shares so claimed by him or them. The next clause provided that in the event of any such denial not being offered to the claim for separation, the Collector should proceed to make the division applied for.

It is clear from these provisions that a Hindu widow, who represents the estate of her husband completely, was entitled under Regulation XIX of 1814 to apply for partition of a revenue-paying estate. This Regulation was repealed by Beng. Act VIII of 1876 which has now taken its place. And if it was the intention of the Legislature to take away from a Hindu widow the right of applying to the Collector for partition of a revenue-[250] paying estate—a right which she undoubtedly had under the Regulation of 1814—the Legislature would have done so by a more clear provision than what is contained in s. 10 of Beng. Act VIII of 1876 which, in our opinion, applies only to the case of a simple life estate where the remainder is vested in some known person. The decision of the lower Court upon this point is not in our opinion correct.

But even if s. 10 of Beng. Act VIII of 1876 were applicable to a widow's estate, still a Civil Court would not be debarred from decreeing partition of a revenue-paying estate at the instance of a Hindu widow if a proper case for the passing of such a decree be made out by her. This is clear from the provisions of s. 29 of the Act, which says: "subject to the provisions of s. 11, a Civil Court may at any time direct the Collector to assign to any person lands representing a specified interest in any estate, etc., etc., etc., to be held by such person as a separate estate, etc., etc., etc., provided that an application for such partition and separation shall be presented by such person as required by ss. 16, 17, 18 and 19." But a decree of this nature must be executed in the manner indicated by s. 265 of the Civil Procedure Code.

Although the right of enforcing partition is generally a common incident in a joint undivided property, yet it by no means follows that a Civil Court would be bound to decree partition at the instance of a Hindu widow without a special cause or necessity being established for a partition. The estate of a Hindu widow is peculiar; although she completely represents the estate, yet the persons who take after her do not take it *through* her, but they take it as heirs of the last male owner. There is a further peculiarity, namely that until her death it cannot be known who would succeed to the estate after her death. Under these circumstances it would be the duty of a Court of Justice to see, before decreeing partition, that the interest of the presumptive heir be not affected by such decree. From the peculiar nature of a Hindu widow's estate, we are of opinion that the above restriction should be put upon her right to enforce partition—a right which is inherent in every owner of property: see *Shama Sundari Debi v. Jardine Skinner* (3 B. L. R., Ap., 120).

[251] Therefore, before a decree for partition is given in a suit by a Hindu widow brought for that purpose, the Court ought to be satisfied that it is a *bona fide* claim arising from such necessities as render partition desirable between two joint owners, and that she would properly represent the interest of the estate including that of the person who would come in after her. It is upon the ground of her representing the next-taker after her that a decree for partition at her instance is held binding upon such next-taker. The following observations in Story's Equity Jurisprudence, Vol. I, s. 656A, lend considerable support to the views expressed above: "Doubts were formerly entertained whether in a suit in equity for a partition, brought, only by or against a tenant for life of the estate, where the remainder is to persons not *in esse*, a decree could be made which would be binding upon the persons in remainder. That doubt is, however, now removed; and the decree is held binding upon them upon the ground of a virtual representation of them by the tenant for life in such cases; but if the partition is made in pursuance of an agreement between the tenant for life and the other party, under such circumstances the Court would direct it to be referred to a master to enquire and state whether it will be for the future benefit of the remainder-men that the agreement should be carried into execution without any variations, or, if with variations what the variations ought to be."

The same duty is cast upon a Court of Justice here, namely that it should be satisfied that the decree for partition, if made, would not in any way act injuriously to the interests of the future heir.

For the foregoing reasons we are of opinion that the decision of the lower Court is erroneous. The decree of that Court is, therefore, reversed, and the case remanded for re-trial in accordance with the observations made above. The costs of the hearing before us will abide the result.

Appeal allowed.

NOTES.

[HINDU WIDOWS-PARTITION—

As regards the principles guiding the Court's discretion in such cases, see also, (1885) 12 Cal., 209 (212); (1903) 31 Cal. 214 (222); (1912) 16 I. C. 471 (Oudh).]

[252] APPELLATE CIVIL.

The 23rd June, 1882.

PRESENT:

MR. JUSTICE TOTTENHAM AND MR. JUSTICE NORRIS.

Tirthanund Thakoor.....Plaintiff

versus

Hordu Jha.....Defendant.*

*Landlord and Tenant—Enhancement—Presumption—Beng.**Act VIII of 1869, ss. 3, 4.*

Section 4, Beng. Act VIII of 1869, entitles the holder of land for the time being, however he may have acquired it, to the benefit of the presumption prescribed in that section if he can show that there has been a continuous and uniform payment of the same rent for twenty years.

THIS was a suit to recover rent for the year 1287 M.S. at a rate which the defendant was required to pay by a notice of enhancement, dated the 6th of January 1879, and served on the defendant through the Sub-Divisional Collectorate. The plaintiff admitted that the defendant had previously been paying Rs. 3-4 a year as rent for 6 bighas 6 cottas of land, and the rent now demanded was one rupee per bigha. The defendant alleged that he held 8 bighas of land at a yearly rent of Rs. 3-4 only; that he had received this holding in 1273 M. S. (which commenced on the 12th of April 1865) from one Gopal Sahu, in whose family it had been from the time of the decennial settlement; that his name had been entered on the zamindar's registers; and that his rent was not liable to enhancement. It was found by the Munsif that the defendant had purchased the interest of Gopal Sahu, but on this part of the case the Judge said: Gopal Sahu was examined as a witness, and he says that he caused the defendant's name to be entered in lieu of his own in the zamindar's sherista, but he utters not a word, so far as I can find, about any transfer of rights by sale. On the contrary Gopal Sahu was, he tells us, only fourteen years of age when his father died, and he gave up the jote because he could not carry it on." The learned Judge then went on to say:—

[253] There is no evidence on the record to show that a transfer of a holding under such circumstances gives the transferee any right by local custom to count the previous holder's occupancy as his own. Had the question been whether Herdu Jha could add on to the time of his possession, the time during which Gopal Sahu or his father had held the jote, in order to establish an occupancy right under s. 6, Beng. Act VIII of 1869, it must have been answered in the negative. But the working of ss. 3 and 4 of the Act are peculiar, and if strictly read imply that, without reference to the fact of any transfer, when the rent of any land has not been changed from the time of the permanent settlement, that rent cannot be enhanced without the consent of the tenant for the time being in possession.

In the case of *Ramnath Lal Bhagat v. Watson* (Rev. Jud. & Police Journal Vol. I, p. 54), Sir BARNES PEACOCK observed that "sections 3 and 4 of Act X make no mention of the nature of the pottahs under which the land has been held, or of the right under which a fixed rent has been paid without alteration,

* Appeal from Appellate Decree No. 1773 of 1881, against the decree of F. Comley, Esq., Judge of Purnea, dated the 15th June 1881, affirming the decree of Baboo Hem Chunder Mitter, Munsif of Acarea, dated the 2nd March 1881.

but exempt from enhancement lands which have been held at fixed rents from the time of the permanent settlement under whatever circumstances the land has been so held. This is clearly shown by section 4" (section quoted). "The presumption required to be made is not that the land has been held by the ryot and his ancestors, or by him and the persons who had power to alienate it to him, but simply that it has been held at a fixed rent. The right of exemption from enhancement is founded upon the simple fact of the land having been held at a fixed rate of rent from the time of the permanent settlement." The same principle appears to be involved in *Rajkishore Mookerjee v. Hurreehur Mookerjee* (10 W. R., 117), and *Kashinath Lushka v. Bamasoonduree Debia* (10 W. R., 429). The case of *Luteefoonnissa Beebee v. Poolin Beharry Sein* (W. R. F. B., No. 31), explains the meaning of s. 4 to be that "where at the time of the commencement of the suit land is held by a ryot, and has been held by him, or by some person through whom he claims, at the same rent for a period of twenty years next before the commencement of the suit the presumption specified in the section shall be made. In other words there must have been a holding for twenty years next before the commencement of the suit, at a rent which has not been changed during that period." The words "through whom he claims" are wide enough to cover simple transfers of holding, and were made apparently to guard against the application of the presumption to cases in which there may have been a breach in the continuity of possession. In the present instance the acquittances go back to the year 1268 M. S., which began on the 12th of April 1860, and the plaint in this suit was filed on the 14th of July 1880. The Munsif appears to be correct in holding that the rent has been unchanged for a period of twenty years before [254] the commencement of this suit, and as though not without considerable hesitation and doubt I have come to the conclusion that a mere transfer of a holding with the consent of the zamindar, as in the defendant's case, is a sufficient continuity of tenancy to enable the tenant for the time being in possession to claim the benefit of s. 4 of Beng. Act VIII of 1869, I must dismiss the appeal.

The plaintiff appealed to the High Court against the learned Judge's construction of s. 4 of Beng. Act VIII of 1869.

Baboo *Taruck Nath Sen* for the Appellant.

Baboo *Saligram Singh* for the Respondent.

The **Judgment** of the Court (TOTTENHAM and NORRIS, JJ.) was delivered by

Tottenham, J.—In this appeal it has been contended that the lower Appellate Court has wrongly given the defendant-respondent the benefit of the presumption prescribed in s. 4 of the Rent Act VIII of 1869, although his tenancy commenced less than twenty years before the suit was brought, and he did not, as found by the Judge, acquire the land by any transfer from the previous tenant.

The words of the section are sufficiently plain; and seem to us to entitle the holder of the land for the time being, *however, he may have acquired it*, to the benefit of the presumption, if he can show that there has been a continuous and uniform payment of the same rent for 20 years. This interpretation is not inconsistent with what has been decided in this Court in previous cases, though in those cases it was not necessary to lay down more than this, that the holding of the ryot, or of some person through whom he claims, for a period of 20 years, was enough to raise the presumption.

In the present case it has been found that there was no break in the continuity of the payment of the rent alleged by the defendant, but that he, without any interruption of tenancy, was substituted by the zamindar for the previous tenant, and continued to pay the same rent.

[255] In our opinion, therefore, the lower Court has rightly given him the benefit of the presumption, having found the necessary facts in his favour.

The appeal is dismissed without costs, as nobody appears for respondent.

Appeal dismissed.

[9 Cal. 255 : 9 I. A. 82 : 12 C.L.R. 129 : 6 Ind. Jur. 546 : 4 Sar. P.C.J. 363]

PRIVY COUNCIL.

The 20th April, 1882.

PRESENT :

SIR R. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH AND SIR A. HOBHOUSE.

Huro Pershad Roy.....Plaintiff

versus

Gopal Das Dutt and others.....Defendants.

[On appeal from the High Court at Fort William in Bengal.]

Limitation—Bengal Act VIII of 1869, s. 29—Suit for arrears of rent.

After the expiration of the period prescribed by s. 29 of the Bengal Act VIII of 1869, a plaintiff suing for arrears of rent cannot insist on the pendency of another suit, brought by him for possession of the land, as preventing limitation from running, where there has been no time during which such rent could not have been recovered if he had acted on his right of suing for it.

In *Rani Sarnomoyee v. Shoshee Mookhee Burmonea* (12 Moore's I. A., 244; S.C., 2 B. L. R., P. C., 10), the claimant of rent was, until the setting aside of the sale that had taken place, in the position of a person whose claim had been satisfied. The right to sue in that case had been suspended; and it was, therefore, distinguishable from the present.

The plaintiff's ancestor purchased a talook from the Government, subject to an ijara, therein held by the defendants, which expired in 1866. A suit brought by the plaintiff in 1874 for possession was dismissed finally in 1876, the defendant's claim to remain in possession under another tenure being allowed. The plaintiff in 1876 sued the defendants for arrears of rent for the years 1866—1872.

Held, that the suit was barred under s. 29, notwithstanding the proceedings of 1874.

APPEAL from a decree of the High Court (May 16th, 1878) affirming a decree of the Subordinate Judge of the district of the 24-Pargannahs (20th November 1876).

[256] The suit out of which this appeal arose was to recover from the defendants, who held certain chakdari tenures within the plaintiff's zamindari of Kassinagar in the 24-Pargannahs, the rent of their holdings from April 1872

to July 1876. Both the Courts in India held the claim barred by limitation under s. 29 of Act VIII of 1869, the "Landlord and Tenant Act, 1869," prescribing a three years' limitation in suits for rent.

The question raised was whether limitation had been prevented from running by the continuance of litigation between the parties.

The predecessors in estate of the respondents had formerly been proprietors of Kassinagar in which their zamindari interest was brought to sale by the Government for arrears of revenue in 1838. The Government at the sale purchased the proprietary right, and having held it khas for some years, granted portions of it in ijara to members of the family of the former proprietors. These leases expired in 1866. Meantime in 1861 the Government had sold to Tarapersad Rai, father of the present appellant Huopersad Rai, the zamindari interest in Kassinagar.

In 1866 Huopersad Rai having succeeded his father as zamindar, sued those who had been the lessees under the expired ijaras to obtain direct possession. These tenants then alleged their right to remain in possession under certain old chakdari tenures existing within the zamindari, and held by them under their own relations from before the time of the settlement and subsequent sale, as above-mentioned, of Kassinagar. Litigation ensued, commencing in 1872, when Huopersad Rai filed his plaint for possession, contending that these tenures, of which he denied the existence, had been, if they ever existed, rendered void by the sale for arrears of revenue in 1838, and the dealing with the estate by the Government afterwards. In 1874 this suit was dismissed, and in January 1876 the High Court confirmed this decision. Huopersad Rai then brought the present suit on the 7th February 1876, to recover arrears of rent from the years 1876 to 1872 on the basis that the chakdari tenures existed.

Meantime he appealed to Her Majesty in Council against the [257] decision of the High Court of January 1876, but without success. In advising the dismissal of the appeal, on the 26th May 1881, their Lordships expressed their opinion that the defendants, even if not in possession under a well-proved legal title, were in possession under colour of a title which had not been avoided, though it might have been, as far back as the year 1838, and that since then time had run in their favour. It had not been shown that the Government did anything to avoid the tenures under which the defendants were in possession.

The Subordinate Judge of the 24-Pargannahs district dismissed the suit for rent on the issue of limitation under s. 29 of Act VIII of 1869. The High Court on appeal upheld that decision. The judgment of the Court (GARTH, C.J., and McDONELL, J.) is reported in I. L. R., 3 Cal., 819.

Mr. R. V. Doyné appeared for the Appellant.

The Respondents did not appear.

For the appellant it was argued that during the continuance of the litigation of 1874, in which the present appellant, *bonâ fide* believing that the alleged chakdari tenures did not exist, had contested the tenant's right of possession, he was unable at the same time to insist on his right against them as tenants, and, therefore, the course of limitation was suspended. Reference

was made to *Ranee Surnomoyee v. Shoshee Mookhee Burmonea**; *Dindyal Paramanik v. Radhakishori Debi* (8 B. L. R., 536); [258] *Eshan Chandra Rai v. Khaja Asanula* (16 W. R., 79); *Mohes Chandra Chaklidas v. Ganga Moni Dasi* (18 W. R., 59); *Watson v. Dhorendra Chunder Mookerjee* (I. L. R., 3 Cal., 6).

Their Lordships' **Judgment** was delivered by

Sir R. P. Collier.—In this case, the sole question is as to the application of the Law of Limitation. The claim is for rent from April 1866 to June 1872. The terms of the 29th section of Act VIII of 1869 of the Bengal Council are these: "Suits for the recovery of arrears of rent shall be instituted within three years from the last day of the Bengal year, or from the last day of the month of Jeyt of the Fasli or Willayatti year in which the arrear claimed shall have become due." It is admitted that in this case the suit was not instituted within three years from the end of the year when the last rent became due, and, therefore, *prima facie*, it is barred by the Law of Limitation. This *prima facie* case is endeavoured to be answered in this way: The plaintiff says that in 1874, that is to say, two years after the last instalment of the rent sued for had accrued due, the Statute ceased to operate because he instituted a litigation which had the effect of preventing it from running, and that, therefore, a portion at least of his claim is not barred. That litigation was this: He brought three suits in the year 1874 against the tenants with respect to whose arrears of rent the present action is brought, for the purpose of ejecting them from their holdings, which were called chukdari holdings, in a certain zamindari of which he was possessed. These suits were dismissed by the first Court, and on the 25th July 1876, by the Appeal Court, on the ground of limitation.

On the 7th September 1876 the appellant commenced the present suit, concurrently with which he prosecuted an appeal to Her Majesty in Council from the decree of the 25th July 1876. His appeal was dismissed on the 26th May 1881.

The appellant contends that the Statute did not run against his claim for rent after the year 1874, when he commenced these suits; and for that proposition he relies solely on the authority of the case of *Ranee Surnomoyee v. Shoshee Mookhee Burmonea* (12 Moore's I. A., 244; s.c., 2 B. L. R., P. C., 10). [259] Both Courts in India have decided against the appellant upon the ground that the Statute applies, and that his case does not come within the exception to the operation of the Statute established in the case of *Ranee Surnomoyee*—an exception rather apparent than real.

The effect of that case may be very shortly stated. The zamindar brought a certain patni taluk to sale, and sold it to a purchaser who was put in possession of it, and out of the purchase-money the arrears of rent were paid. Subsequently this sale was set aside for irregularity; the zamindar had to refund the purchase-money received by her, and the patnidar, who succeeded

* 12 Moore's I. A., 244; s.c., 2 B. L. R., P. C., 10. In that case an auction sale under Beng. Reg. VIII of 1819 of the rights of patnidars in a patni talook by the Zamindar for arrears of rent, was set aside by the Zilla Court for informality in the notices, under that Regulations and the patnidars who had been dispossessed were restored with mesne profits. The zamindar then brought a suit against the patnidars, under Act X of 1859 to recover the arrears of rent, which had accrued before and during the time they were out of possession. A decision that this suit, not having been brought within three years from the time when the rent first became due, was barred by s. 32 of Act X of 1859; was reversed on appeal. The Judicial Committee held that the cause of action accrued at the date of the decree cancelling the auction sale, and that the suit having been brought within three years from the date of that decree, limitation had not run.

in setting it aside, obtained also the mesne profits for the time during which he was ousted. Under those circumstances this Committee, whose judgment was delivered by Sir JAMES COLVILLE, observe: "It is clear that until the sale had been finally set aside, she"—that is, the plaintiff—"was in the position of a person whose claim had been satisfied, and that her suit might have been successfully met by a plea to that effect." In other words, the effect of the judgment of this Board is, that under the peculiar circumstances, the patnidar having recovered possession, together with mesne profits, it was equitable that he should pay the amount of rent which was in arrear; but that amount of rent did not accrue until the sale of the patni had been set aside, and, therefore, until that time the Statute could not run. This examination of that case shows it altogether to differ from the present. Here there was no period of time in which the rent could not have been recovered. There was no period of time in which, therefore, the Statute might not have run.

This case, therefore, being inapplicable, and no other case being relied upon, their Lordships have only humbly to advise Her Majesty that the judgment appealed against be affirmed, and that this appeal be dismissed.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *Barrow & Rogers*.

NOTES.

[LIMITATION—HOW AFFECTED BY PENDENCY OF SUIT—

Limitation will begin to run notwithstanding the pendency of a suit for setting aside of *patni* and recovery of *khas* possession:—12 Cal. 258; 17 Cal. 251; 23 Cal. 191; 7 C. W. N. 720; for enhancement of rent 3 Cal. 791; A suit for enforcement of patta was held to save limitation:—27 Mad. 143 P. C., approving 17 Mad. 225, and overruling 19 Mad. 21; See 22 Mad. 248; 249. As regards the applicability of the Limitation Act, Sec. 19, see also (1909) 10 C. L. J. 517.]

[—12 C.L.R. 81 : 6 Ind. Jur. 438 : 4 Sar. P.C.J. 351]

[260] PRIVY COUNCIL.

The 17th March, 1882.

PRESENT:

SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH
AND SIR A. HOBHOUSE.

Chandi Churn Shashmal.....Defendant

versus

Durga Churn Mirdua.....Plaintiff.

[On appeal from the High Court at Fort William in Bengal.]

Appeal—Failure to produce evidence at hearing.

At the hearing of a suit a party, though he had sufficient warning of what was necessary, did not take the proper steps to cause the production of the documentary, and only admissible, evidence of a material fact which had to be proved by him; and the decision was against him.

The record of another proceeding would, it was said, have supplied this evidence; and an application had been previously made on which the order of the Judge was that "the matter would be decided when the case was tried, and the record would be sent for, if necessary." No further application to the Court was made, and no attempt to supply this evidence. *Held*, that if there had been, as there might have been, an oversight by the party in not calling the attention of the Judge to the above order, and in not tendering the evidence, there had been no omission on the Judge's part affording ground for appeal.

APPEAL from a decree of a Divisional Bench of the High Court (26th June 1878) affirming a decree of the Judge of the Midnapur District, (31st December 1877) affirming a decree of the Subordinate Judge of the same district (18th November 1876).

The question raised on this appeal, preferred by a defendant against, whom a decree for the possession of land had been made, related to the proceedings at the hearing of a suit in the Court of the Subordinate Judge of the Midnapur district, who finding no proof of a material fact, the affirmative whereof was a necessary part of the defendant's case, had decided against him.

All the facts relevant to this report are fully stated in their Lordships' judgment.

After an appeal to the District Court had been dismissed by the Officiating Judge, a special appeal was dismissed by a Divisional Bench of the High Court (L. S. JACKSON and TOTTENHAM, JJ.).

Among the grounds of appeal filed in the High Court was one to the following effect *viz.*, that even if the non-filing of the record (which would have supplied the required evidence), had [261] arisen through the inadvertence of the defendant's pleader, yet it would have been the duty of the District Judge, under the circumstances, to have admitted the same in regular appeal, as he was asked to do; and that as he had not done so, the Divisional Bench of the High Court should have remanded the case.

On this appeal --

Mr. *R. T. Doyne* appeared for the Appellant.

Mr. *C. W. Arathoon* for the Respondent.

Their Lordships **Judgment** was delivered by

Sir R. Couch.—This suit is brought for two parcels of land, containing 290 bighas, which are part of a parcel of 632 bighas. The case of the plaintiff is, that Mohunt Hoigrib Dass had obtained a money decree against Adjudhia-nath Manna and Sambhunath Manna, who held the 632 bighas on the 14th of January 1863, and had purchased the lands at the sale in execution thereof, and sold them to the plaintiff.

The defendant claims under a lease from the Government which was made in December 1871 for three years, and was renewed in April 1874.

The facts with regard to the 632 bighas, of which the 290 in suit form a part, are these:—The Government before 1816 was in possession of a large tract of land along the sea-shore in the district of Midnapur, which was used for the purpose of making salt. In 1816 it granted a perpetual lease of 632 bighas of that land to Koinolokant Manna, the predecessor in title of the above mentioned Mannas. The Government after that made an embankment by which the land thus leased was left outside next to the sea, and subsequently, in 1858, there was an arrangement between the Government and the Mannas by which, as the lands which were left outside the embankment became less valuable for the purpose of cultivation, but were valuable for the purpose of

making salt, the Mannas were to have an equal portion of land inside the embankment, and the Government was to take the lands which were outside. Before this a local Rajah, who (and whose successor) was called in the suit "the Rajah," had brought a suit against the Government to recover the lands [262] which lay outside the embankment, and had obtained a decree for all the lands which were outside. In consequence of this the Government directed the Mannas to pay to the Rajah the rent which had been reserved on the lease; and thus after the arrangement the Mannas were in possession of 632 bighas lying inside the embankment, but paying rent to the Rajah as for the land which was outside. The Mannas having allowed their rent to fall in arrear, the Rajah brought a suit, on the 19th of July 1862, to recover arrears of rent from 1855 to 1862. The suit was brought for a moiety of the rent, as, in consequence of death, it would seem that the Rajah's estate had become divided. A decree was obtained by him on the 27th of March 1863, and an order for attachment and sale was made on the 18th of August 1863. It was contended by the defendant that on the 27th of February 1865, at the sale under that attachment, the whole of the 632 bighas outside the embankment was sold, and the Government was ousted from it, and that in consequence thereof the Government ejected the Mannas from the land which had been taken in exchange, and which was inside, the suit having been brought about, and the loss of the outside land by the Government having been caused by the failure of the Mannas to pay the rent. Therefore the material question in the case was, whether the outside land originally leased had been sold at the auction on the 27th February 1865, and an issue was framed raising that question. It was the third issue, "Whether or not, in consequence of Sambhuram and another's"—that is the name used for the Mannas—"non-payment of the rent of their mal lands, the zamindar obtained a decree and effected the sale of those lands; and the Government, again taking the disputed lands from Sambhuram and another,"—being the lands inside the embankment,—“were in possession from 1865, and settled the lands with the defendant,” referring to the lease in 1871. An application appears to have been made shortly before the suit came on for hearing on the part of the defendant in which he asked to have the documents relating to the exchange of the land in dispute, which had been filed in another suit numbered 141, referred to in this suit, and the order made on that occasion was, that the matter would be decided when the case [263] was tried, and the record would be sent for, if necessary. The other suit was one which had been brought by the defendant against a brother of the plaintiff, and related to another portion of the 632 bighas. It was said that the exhibits in that suit would furnish evidence of what was sold on the 27th February 1865.

The case came on to be heard before the Subordinate Judge, and it would appear that no further application was made to him to send for the record of the other suit, and no attempt was made to use the documents which had been filed in that suit, but the case was decided upon the oral evidence, and the Judge held that it had not been satisfactorily proved that the lands outside the embankment had been sold. He said: "It is true that some of the plaintiff's witnesses have said in their depositions that the lands on the outside were sold, but it has not been satisfactorily proved;" and upon the said oral evidence it cannot be said that the lands on the outside were sold on account of debts due to the zamindar, nor, supposing they were sold, does it appear for what reason they were sold. "The defendant should have given evidence to prove this matter by means of papers of the Court." If there had been, as there

might, an oversight on the part of the pleaders for the defendant in not calling the attention of the Judge to the order which had been made on the 3rd of November 1876, or in not tendering in evidence, which might have been done, the sale proceedings of the 27th of February 1865, he might have applied to the Judge for a review ; and if he had refused it, the case might have been carried to the Court of Appeal, and an application made that the evidence should be received. There was an appeal, but in the grounds of appeal, instead of this matter being brought to the attention of the Court, the ground taken was that "it has been proved by the evidence of the witnesses of both the parties that the lands given in exchange by Adjudhianath were sold by auction, and that the sale certificate has been filed." The sale certificate which was filed did not prove it. "The plaintiff does not object on the ground that the said lands were not sold." The issue had been raised on that very point. "Consequently the lower Court should [264] have held that the lands given in exchange had been sold by auction." The Court, in the judgment on the appeal, stated that it had been urged before it "that the Subordinate Judge ought to have sent for the record of the suit No. 141 abovementioned, which contains copies of the papers relating to the auction sale of February 1865, in order that it might be seen that the lands formerly held by Adjudhianath"—that is, the Mannas—"outside the embankment were really sold;" and therefore, although the objection was not taken in the grounds of appeal, it seems to have been allowed to be taken at the hearing. The judgment was : "This Court is of opinion that it ought not to interfere with the judgment appealed against. It was the duty of the defendant-appellant, who raised a special plea, to adduce proof in support of it ; but he failed to do so ; and he neither pressed for the production of the misl. of suit No. 141 in the lower Court, nor urged any objection on this subject in his petition of appeal. To allow the objection now would be taking the plaintiff-respondent by surprise. Oral evidence is, of course, inadmissible to prove the particulars of the auction sale of February 1865. No objection in point of law could be taken to that judgment, considering what had been done. It was a perfectly correct judgment. There was a special appeal from it ; and the High Court, as might have been anticipated, held that there was no ground for the special appeal. The defendant, the appellant, now comes on appeal to Her Majesty in Council, and says :—

"This appellant now humbly submits there is error in the judgment of the lower Appellate Court, and of the High Court, and that they should be reversed or varied for (among others) the following reasons : because the fact on the supposed non-proof of which the Judge put his judgment was not in issue or disputed ; and if supposed to be disputed, this appellant should have been allowed to prove it by the production from the other record of the papers therein relating to the said sale in execution."

Their Lordships have already mentioned that it was put in issue and was disputed, and the present appellant had no right to assume that he need not prove it. He had sufficient warning that it was necessary for him to do so ; and as to his saying that he should have been allowed to prove it by the production from [265] the other record of the papers, the answer is that if he had produced those papers or if he had taken the proper steps to have them in the first Court, and had tendered them in evidence, he might, if they had been rejected, have made it a ground of appeal. But he did not do what was proper and necessary, and their Lordships are of opinion that he has shown no ground for reversing the decisions of the lower Courts.

Their Lordships will, therefore, humbly advise Her Majesty that the appeal be dismissed ; and the appellant will pay the costs.

Appeal dismissed.

Solicitors for Appellant : Messrs. *Miller, Smith and Bell.*

Solicitor for Respondent : Mr. *T. L. Wilson.*

[9 Cal. 265 : 9 I. A. 147 : 6 Ind. Jur. 549 : 4 Sar. P. C. J. 384]

PRIVY COUNCIL.

The 11th May, 1882.

PRESENT :

SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH,
AND SIR A. HOBHOUSE.

Poreshnath Mukerji and others.....Defendants

and

Anathnath Deb.....Plaintiff.

[On appeal from the High Court at Fort William in Bengal.]

Estoppel—Evidence Act, s. 115—Sale in execution of decree—

Intervenor in rent suit.

A purchase by a mortgagee, at a sale in execution of a decree upon his mortgage, of the right, title, and interest of the mortgagor, who has been estopped from asserting a title to the property as against certain parties, does not place such mortgagee in a better position as regards the estoppel.

A suit for rent by a zamindar and patnidar against a darpatnidar, was defeated by the defence of the latter that he had conveyed his interest to others, against whom the former afterwards obtained a decree, and brought the darpatni to sale in execution, buying their right, title, and interest therein himself. From the darpatnidar, who had thus disclaimed title, a third party claimed to be mortgagee, and set up a decree on his mortgage followed by a purchase of the tenure at a sale in execution. He was thereupon allowed to intervene in a suit for rent brought by the zamindar and patnidar against an ijaradar of lands within the darpatni estate.

Held that, notwithstanding this purchase, the intervening mortgagee was bound by the estoppel arising out of the mortgagor's disclaimer of title in the suit abovementioned.

APPEAL from a decree of a Divisional Bench of the High Court, [266] (21st November 1878), see *Anathnath Deb v. Bistu Chundra Rai*, I. L. R., 4 Cal., 783) reversing a decree of the Judge of the Birbhum District 1877, and dismissing the suit of the plaintiff, now represented by the appellant, with costs.

Among certain patni, darpatni, and se-patni tenures, under the zamindari of Shah Alampur, of which the late Aushotas Deb and Promotho Nath Deb

were formerly joint proprietors, a certain darpatni estate, having been sold under Regulation VIII of 1819, for arrears of rent, was purchased in 1852 by Ishan Chandra Sein. In 1858 Ishan Chandra Sein executed a document purporting to convey this estate to his wife Kripamoyi, his son Dhun Krishna, (and another son, then a minor), and in their favour were executed instruments, completing the darpatni title by the executors of Aushotas Doh's estate. In 1871 Bistu Chandra Rai took an ijara for five years of lands called Loba Bhadra, within this darpatni estate.

The present respondent, Anathnath Deb, son of Promotho Nath Deb, succeeded to the zamindari, and also patnidari, as well as other estates in that part of Shah Alumpur which included the darpatni estate; and on the 22nd August 1872, he sued Ishan Chandra Sein in the Court of the Subordinate Judge of Birbhum for rent due in respect of Loba Bhadra. In answer to that suit Ishan Chandra Sein put forward the above-mentioned conveyance of 1858 of the darpatni, including the mehal Loba Bhadra, to his wife and son, alleging that he had sold the estate to them for value, and had no title therein himself. The suit for rent was, accordingly, on this evidence supported by Dhun Krishna's, dismissed.

Thereupon Anathnath Deb, on the 13th March 1873, sued Kripamoyi and Dhun Krishna, for the rent of the mehal, and obtaining a decree, he brought it to sale in execution, purchasing their right, title, and interest therein himself. The present suit was brought by Anathnath Deb on the 5th June 1876, against Bistu Chandra Rai, the ijaradar, to recover the rent due from him for the last seven months of his term, amounting with interest, and with the addition of a sum due for road-cess, to about Rs. 1,024. The defence was that the person entitled as darpatnidar to the rent of the Loba Bhadra mehal, was Poreshnath Mookerjee, who was permitted to [267] intervene in the suit. His allegation was that before the suit of 13th March 1873 was brought, viz., on the 11th January 1873, Ishan Chandra Sein, being in debt, hypothecated the Loba Bhadra mehal to him, and that he, afterwards in September 1875, obtained a decree upon his mortgage, and in the same month purchased at a sale in execution of that decree all Ishan Chandra's rights in Loba Bhadra.

Whether the representatives of Poreshnath Mookerjee, (who had died pending these proceedings), were not bound by an estoppel that would have prevented Ishan Chandra Sein from contesting the title made through the conveyance of 1858 to his wife and sons, was the question now raised.

The judgment of the Court of First Instance was that the intervenor's allegation was proved, and that the plaintiff Anathnath Deb had no right to the rent claimed against the ijaradar of Loba Bhadra. On appeal to the High Court that decision was reversed. It was held that Anathnath Deb had acted on the belief, induced by Ishan Chandra's representations, that the darpanti estate had been transferred by him and that he had purchased from those who had thus been represented to be the owners; and that as Ishan Chandra would himself have been precluded from setting up the opposite state of facts, so also Poreshnath Mookerjee was estopped.

The judgment of the Divisional Bench (SIR R. GARTH, C.J., and TOTTENHAM, J.) is reported in the I. L. R., 4 Cal., 783.

On this appeal Mr. *J. F. Leith*, Q. C., and Mr. *R. V. Doyne*, appeared for the Appellants.

Mr. *J. T. Woodroffe* for the Respondents.

For the appellants it was argued that the evidence showed that Anathnath Deb had notice that the transfer by Ishan Chandra Sein in 1858 to his

wife and sons was only benami; nor was it merely the representation of Ishan Chandra Sein, that he had *bonâ fide* transferred to them, that had induced the respondent to purchase from the benamidars. The decisions of the Courts had led him to treat them as the owners. On the other hand Poreslnath Moorterjee had not set up a claim founded only on a mortgage or [268] assignment from Ishan Chandra Sein, but claimed as purchaser at the sale in execution of the decree obtained by him.

Reference was made to the Evidence Act 1872, s. 115. Co. Litt. 352a; Comyn's Digest title Estoppel: *Richards v. Johnston* (4 H. and N., 660 and *Dinendronath Sanial v. Ramkumar Ghose* (I.L.R., 7 Cal., 107; s.c., L. R., 8 I. A., 65).

Mr. J. T. Woodroffe, for the Respondent, was not called upon.

Their Lordships' **Judgment** was delivered by

Sir R. Couch.—The question in this appeal, which is from a decision of the High Court at Calcutta on an appeal from the District Court, is stated by the learned Chief Justice in giving the judgment of the High Court, in which he says: "The point upon which, in our opinion, this case should be decided is rather of a peculiar nature. The plaintiff is the zamindar of a share in a property called lot Shah Alumpur, and he also claims to be the darpatnidar of a portion of the same property. In his character of darpatnidar, he brings this suit against the defendant No. 1, Bistu Chandra Rai, as ijardar of part of the estate for rent and for road-cess. The defendant resists the claim upon the ground that Poreslnath, the defendant No. 2, is the real owner of the darpatni; and the defendant No. 2 has intervened for the purpose of supporting his title to the rent as against the plaintiff. It appears that some time ago, in the year 1259 (A.D. 1852), one Ishan Chandra purchased, and was the undoubted owner of this darpatni estate. In the year 1265 (A. D. 1858), Ishan Chandra, being in difficulties, sold or professed to sell the darpatni to his wife Kripamoyi and his son Dhun Krishna; and thereupon the names of Kripamoyi and his son Dhun Krishna were entered in the plaintiff's *serishta* as the owners of the darpatni." It has been suggested that this is not correct; there is a question whether it was in the plaintiff's *serishta*, but it is not material: "After this sale, the rent of the darpatni being in arrear, the plaintiff (whether in ignorance of the sale or not does not appear) brought a suit for the rent against Ishan Chandra who defended the suit upon the express ground, that he was no longer the tenant, and that he had parted with his interest in the darpatni to his wife [269] and son; and he not only defended the suit on this ground, but he stated in his evidence that the sale to his wife and son was an absolute and *bonâ fide* one; that the darpatni really belonged to them, and that he had no right or interest in it."

It appears from what has been stated by the learned Counsel for the appellant that in this suit Ishan Chandra put in a written statement to this effect on the 7th November 1872, and the suit was dismissed on the 18th November 1872. The learned Chief Justice proceeds: "Upon the strength of this evidence Ishan Chandra defeated the plaintiff's suit, and the plaintiff had to pay the costs of it. Having failed in that suit, the plaintiff then brought another suit for the same rent against Kripamoyi and Dhun Krishna. He obtained a decree against them, and under that decree the darpatni was sold, and the plaintiff himself became the purchaser of it. Upon the title thus

acquired the plaintiff brings the present suit against the defendant No. 1"—Bishtu Chandra Rai,—“the ijardar of that portion of the property; and assuming that the title derived in this way is a good one, there is no doubt as to his right to recover the rent as against the defendant No. 1.” Then the learned Chief Justice alludes to the question of the amount to be recovered which the appellant was willing to give up, and, in order to avoid the necessity of a remand, says: “Consequently the only point for our consideration is, whether the plaintiff on the one hand, or the intervening defendant on the other, is entitled to the rent of the darpatni. The claim which the intervening defendant sets up is by right of Ishan Chandra. He says that Ishan Chandra mortgaged the property to him, and that such proceedings have been taken upon that mortgage that he is now entitled, in Ishan Chandra's rights, to the rent of this property as the owner of it.”

The proceedings thus alluded to were these: On the 11th January 1873, about three months after the written statement had been put in by Ishan Chandra and the suit had been dismissed, a mortgage bond was given by Ishan Chandra to Poreshnath, who brought a suit upon it and obtained a decree on the 6th September 1875, which Mr. *Leith*, who was counsel for the appellant, stated, although the form of the decree does not appear, was the ordinary decree as upon a mortgage bond. On the 13th September [270]ber 1875 he obtained an order for sale in execution of that decree, and the sale took place on the 18th December 1875, being a sale of the right, title, and interest of Ishan Chandra, and Poreshnath became the purchaser for the sum of Rs. 5,600. The certificate of sale was granted on the 24th March 1876, and in that it is stated that Poreshnath purchased the property for Rs. 5,600, and had put in a receipt crediting the amount of consideration against the decretal amount receivable by him. In fact, he did not pay any money upon the purchase which he had made at the sale, but became the owner of the property in satisfaction of his mortgage. It was decided by the first Court that the intervening defendant had a right to go into the question whether Ishan Chandra were the real owner of the darpatni or not, and that Court found upon the evidence that the sale by him to his wife and son was a benami transaction, and that Ishan Chandra was the owner. Consequently the question really is, whether Poreshnath is estopped by the written statement which Ishan Chandra made in the former suit. The learned Chief Justice says: “It appears to us that, inasmuch as the intervening defendant claims under Ishan Chandra and can take no better title than Ishan Chandra himself, and as Ishan Chandra has directly induced the plaintiff to believe that he had sold his property absolutely to his wife and son, and led him to bring a suit against them for the rent, and under the decree obtained in that suit to purchase their interest in the property, it does not lie in the mouth of Ishan Chandra, or any one claiming under him by a subsequent title, to set up a claim to the rent in this suit as against the plaintiff.”

Their Lordships think that is a right conclusion; that, looking to what took place, Poreshnath cannot be considered as having put himself, by reason of his purchase at the sale which he had brought about in execution of his decree on the mortgage bond, in a better position than he was in as mortgagee taking from Ishan Chandra. It is admitted that if he had claimed as a mortgagee or as an assignee of Ishan Chandra he would be estopped: and their Lordships think that he is substantially in the same position; that he did not by purchasing in this way put himself in a better position, and consequently that he is estopped by the statement which [271] Ishan Chandra made, and that the decree of the High Court is correct.

Their Lordships will therefore humbly advise Her Majesty to dismiss the appeal; and the costs thereof will be paid by the appellant.

Appeal dismissed.

Solicitors for the Appellants, Messrs, *Oehme and Summerhays.*

Solicitor for the Respondent, Mr. *T. L. Wilson.*

NOTES.

[ESTOPPEL—EXECUTION PURCHASER—]

The execution-purchaser is bound by an estoppel binding on the judgment-debtor, as his right, title and interest are purchased; so that, where the judgment-debtor allowed another to be in possession of the property and the latter mortgaged the property, the mortgage was held binding on the purchaser at an execution-sale of the right; title and interest of the judgment-debtor:—(1895) 22 Cal. 909 P. C. affirming 18 Cal. 188; (1908) 35 Cal. 877; (1905) 10 C. W. N. 313; (1892) 20 Cal. 296. Note also the distinction drawn in 20 Cal. 236; 14 Cal. 401.]

[9 Cal. 271 11 C.L.R. 466]

APPELLATE CIVIL.

The 23rd June, 1882.

PRESENT:

MR. JUSTICE MITTER AND MR. JUSTICE NORRIS.

Bal Mokoond Lall and another.....Defendants

versus

Jirjudhun Roy and others.....Plaintiffs.*

Sale for arrears of revenue, Suit to set aside—Act XI of 1859, ss. 6, 20, 35

—Beng. Act VII of 1868, s. 8—Certificate of title—Secretary of State—

Parties—Civil Procedure Code (Act X of 1877), s. 32, 424.

A notification by the Collector under s. 6 of Act XI of 1859, fixing the 31st May 1879 as the date for holding the sale, was affixed in the places mentioned in the section on the 2nd May 1879. Subsequently the 31st May being ascertained to be a holiday, and the 1st June being a Sunday, the Collector, purporting to act under s. 20 of the Act, issued a notification on the 26th May, postponing the sale till the 2nd June. On that day the sale was held, and the Commissioner having upheld it on appeal, a certificate of title was given to the purchasers.

Held, in a suit to set aside the sale, that inasmuch as the notification under s. 6 of the Act had not been affixed thirty days before the day fixed by it for holding the same, the requirements of that section had not been fulfilled, and the irregularity was not cured by the notification of the 26th May.

Held further, that the Court was not bound under s. 8 of Beng. Act VII of 1868 to presume conclusively that the provisions of s. 6 of Act XI of 1859 as regards the fixing of the date of sale, had been complied with. Under s. 8 of Beng. Act VII of 1868 the effect of a certificate of title having been given to the purchaser is merely that the Court is bound to presume conclusively the due service and posting of notices.

[272] The Secretary of State is not a necessary party to a suit to set aside a sale for arrears of revenue, but the Government have such interest as would, on their application, entitle them to be made a party.

* Appeal from Original Decree, No. 80 of 1881, against the decree of Baboo Abinash Chunder Mitter, Rai Bahadoor, Officiating Subordinate Judge of Sarun, dated the 14th February 1881.

Section 424 * of the Civil Procedure Code does not preclude a Court from adding the Secretary of State as a necessary party under s. 32 of the Code.

THE facts and arguments in the case appear from the **Judgments** of the Court (MITTER and NORRIS, JJ.).

Baboo Mohesh Chunder Chowdhry and *Baboo Srinauth Banerjee* for Appellants.

Baboo Chunder Madhub Ghose and *Baboo Abinash Chunder Banerjee* for the Respondents.

Mitter, J.—This suit was brought to set aside a revenue sale held under Act XI of 1859 on the ground that the sale was made contrary to the provisions of the aforesaid Act, and that the plaintiffs had sustained substantial injury by reason of the irregularity complained of in the plaint. The suit was brought under the provisions of s. 33 of the Act. The lower Court has awarded a decree in favour of the plaintiffs. It has found that the notification required to be affixed in the Court of the Judge of the District, and in the Office of the Collector under s. 6 of the Act was not affixed 30 days before the date fixed in the notification for holding the sale. The lower Court has further found that the notifications required by s. 7 of the Act to be affixed in his own office, as well as in the Munsif's Court and Police Thanahs within which any part of the estate is situated, as also at the cutcherry of the owner of the estate, or at some conspicuous place upon the estate, were not duly affixed and promulgated. Upon the question whether the plaintiffs have sustained any substantial injury or not, the finding of the lower Court is that the property sold is worth at least Rs. 10,000, and that it was sold for Rs. 2,200 only. With reference to this last point, which involves only a question of fact, the evidence bearing upon it has been placed before us, and we agree with the lower Court that the conclusion to which it has come is correct. As to the question raised with reference to the provisions of s. 6, Act XI of 1859, the admitted facts are these: The sale notification under that [273] section was affixed in the particular places mentioned in the section on the 2nd May 1879, and the date fixed in that notification for holding the sale was the 31st May of that year. It so happened that the 31st May was a holiday, and the day following, *viz.*, the 1st of June, was a Sunday. The collector, therefore, professing to act under the provisions of s. 20, Act XI of 1859, issued a notification, either on the 25th or 26th May 1879, that the sale was to be held on the 2nd of June, and accordingly the sale in question was held on that date. The question is whether under the circumstances stated above the notification was issued and affixed in accordance with the provisions of s. 6, Act XI of 1859.

Section 6, omitting the words, which are not material to the question now before us, is to the following effect “The Collector or other officer duly authorized to hold sales under this act, shall issue notifications in the language of the district, to be affixed in his own office, and in the Court of the Judge of the district, specifying the day on which the sale of the same will commence, which day shall not be less than thirty clear days from the date of

* [Sec. 424 :—No suit shall be instituted against the said Secretary of State in Council or against a public officer until the expiration of two months next

after notice in writing has been in the case of the Secretary of State in Council delivered to, or left at the office of a Secretary to the Local Government or the Collector of the District, and, in the case of a public officer delivered to him or left at his office, stating the cause of action and the name and place of abode of the intending plaintiff; and the plaint must contain a statement that such notice has been so delivered or left].

affixing the notification in the office of the Collector or other officer as aforesaid." It is contended on behalf of the appellant that this section should be read as if laying down two distinct provisions, *viz.*, one requiring the issuing and affixing of a notification in which the date of the sale should be specified, and the other laying down that the actual sale should not take place until after the lapse of 30 clear days from the date of the affixing of the notification. I am of opinion that this construction cannot be reasonably put upon the section in question; because it says that the notification shall specify the day on which the sale of the estate will commence, *which day* shall not be less than 30 clear days from the date of affixing the notification in the Office of the Collector or other officer as aforesaid. Therefore *the date of sale to be specified* in the notification should be one which should happen to be more than 30 days from the date of its affixing. If this is the proper construction of this section it is quite clear that its provisions were not complied with in this case, because in the notification which was affixed on the 2nd of May the date of sale specified was the 31st May, and therefore it was less than 30 days from the date of affixing the [274] notification. If the other construction had been intended by the legislature, then in that case we should have found some other provision in the Act which would have authorized the Collector, in a case like this, to alter the date of the sale. It was contended before us that this power is given to the Collector under the provisions of s. 20 of the Act, but I am of opinion that under s. 20 the Collector had no power in a case like this to alter the date of the sale. Section 20 says: "In case the Collector or other officer as aforesaid shall be unable, from sickness, from the occurrence of a holiday, or from any other cause, to commence the sale on the day of sale fixed, etc." It was contended that the words "any other cause" would authorize the Collector to alter the date of the sale in a case like the present, but I am of opinion that this contention is not correct. It is a well-known rule of construction that general terms following particular ones apply only to such things as are *ejusdem generis*. The particular causes for altering the day of sale under section 20 are sickness or the occurrence of a holiday. "Any other cause" mentioned after these words must be one similar in its kind to those specified in the section. Therefore I do not think that the Collector could, in a case like this, under s. 20, alter the date of the sale. That being so I am of opinion that the requirements of s. 6 were not fulfilled.

Then it was contended that under the provision of s. 8, Beng. Act VII of 1868, the Court is bound to presume conclusively that the provisions of s. 6, Act XI of 1859 even as regards the fixing of the date of the sale were complied with. Section 8, Act VII of 1868 is to the following effect: "Every certificate of title which may be given to any purchaser under the provisions of s. 28 of the said Act XI of 1859, or of s. 11 of this Act, shall be conclusive evidence in favour of such purchaser and of every person claiming under him, that all notices in or by this Act, or by the said Act XI of 1859, required to be served or posted, has been duly served and posted." In this case it is not disputed that the defendant obtained a certificate of sale under the provisions of s. 28, Act XI of 1859. The effect of obtaining that certificate under Act VII is in my opinion simply this: That the Court will be bound to presume conclusively [275] that any notice or notification required to be posted or served under Act XI of 1859 and Beng. Act VII of 1868 was *duly served and posted*. This section does not mean that the Court is bound to presume that the notification was affixed in the places mentioned in s. 6 thirty days before the date fixed in the notification as the date of sale. This view is further confirmed by the latter part of the section itself, which says: "And the title of any person who may have obtained any such certificate, shall not be impeached

or affected by reason of any omission, informality, or irregularity as regards the *-serving* or *posting* of any notice in the proceedings under which the sale was held, at which such person may have purchased." This shows that any omission, informality, or irregularity *as regards the serving or posting* of the notification would not be a ground for setting aside the sale, but it does not lay down that an omission to fix the date of sale, in accordance with the provisions of s. 6, Act XI of 1859, would not affect the title of the purchaser. I, therefore, entirely agree with the lower Court that in this case the provisions of s. 6, Act XI of 1859 were not complied with. In this view of the case it is immaterial to enquire whether the finding of the lower Court with regard to the serving or affixing of the notification under s. 7 is correct or not.

The learned pleader for the appellant has raised another question before us, *viz.*, that under s. 33 of the Act under which the present suit was brought, the plaintiff is not entitled to succeed in this action unless he shows that the ground of irregularity, upon which he impeaches the sale, was the ground upon which he preferred the appeal to the Commissioner which is provided for in the Act. Now s. 33, so far as it is material with reference to this point, is to the following effect: "No sale for arrears of revenue or other demands, realizable in the same manner as arrears of revenue are realizable, made after the passing of this Act, shall be annulled by a Court of Justice, except upon the ground of its having been made contrary to the provisions of this Act, etc." Therefore, it seems to me that if the plaintiff had impugned the sale before the Commissioner in his application for appeal upon the ground that the sale was made contrary to the provisions of Act XI of 1859, it would be a sufficient compliance [276] with the provisions of s. 33. Referring to the petition filed by the plaintiff before the Commissioner, we find that the ground taken was sufficiently general to bring it within the purview of s. 33. The sixth ground is to the effect "that irregularities took place in all the proceedings of sale, hence the sale is by all means fit to be set aside." This is tantamount to saying that the sale was made contrary to the provisions of Act XI of 1859. I am, therefore, of opinion that this ground of appeal also should fail. This disposes of all the questions raised before us regarding the merits of the case.

Then a question was raised to the effect that the plaintiff was bound to make the Secretary of State a party to this suit, and in support of the appellant's contention upon this point our attention was drawn to the provisions of s. 35, Act XI of 1859. That section says: "In the event of a sale being annulled by a final decree of a Court of Justice, and the former proprietor being restored to possession, the purchase-money shall be refunded to the purchaser by Government, together with interest at the highest rate of the current public securities." Comparing this section with the analogous section in Regulation VIII of 1819, *viz.*, s. 14, which is to the effect that "the purchaser shall be made a party in such suits, and upon decree passing for reversal of the sale, the Court shall be careful to indemnify him against all loss, at the charge of the zamindar or person at whose suit the sale may have been made," it appears to me that this section 35 by itself does not afford any ground for the contention that the Secretary of State was a necessary party to the suit. It merely provides that in the event of a sale being annulled by a final decree of a Court of Justice, and the former proprietor being restored to possession, the purchase-money shall be refunded to the purchaser by Government, together with interest at the highest rate of the current public securities. But although it appears to me to be clear that s. 35 does not afford any support to the contention raised before us, yet it is by no means clear that the Government was not interested in the question raised in the suit, because,

if the sale be set aside, the Collector will have to proceed *de novo* in the matter for the realization of the arrears of revenue. The Government, therefore, [277] have such interest in the suit as would, on their application, entitle them to be made a party to it.

Further the lower Court was not, in my opinion, right in holding that under the provisions of s. 32 it could not add the Secretary of State as a party to the suit. The section referred to by the lower Court, *viz.*, s. 424 of the Procedure Code, does not preclude the Court from adding the Secretary of State as a necessary party under the provision of s. 32 of the Act. Section 424 only says that no suit *shall be instituted* against the Secretary of State in Council or against a public officer in respect of an act purporting to be done by him in his official capacity, unless a certain notice be given. But be that as it may, I am of opinion that in this case the defect of parties (if there was any) does not entitle the defendants on the record to contend that the present suit should be dismissed. I am, therefore, of opinion that this ground of appeal should also be overruled.

Then there remains the question of costs. It is true that in this case if any party should have been made liable for the costs of the suit it was the Collector, by whose irregular proceedings the sale took place; but the Collector was not made liable, and he is not before us in this appeal. It would be, in my opinion, unjust to make the defendants liable for the costs of the lower Court, and, therefore, the defendants should have been declared entitled to recover the costs of the lower Court from the plaintiff; but then after the decree was passed in favour of the plaintiffs, the defendants had no valid grounds of appeal to come up to this Court. They have, therefore, rendered themselves liable to pay the costs of the plaintiffs, respondents, in this appeal. Under these circumstances we think it will meet the ends of justice if we direct that each party should bear their own costs throughout the litigation.

Norris, J.—This is an appeal from the decision of the Officiating Subordinate Judge of Sarun, dated 14th February 1881, setting aside a revenue sale on the ground of irregularity, and that consequential injury had taken place. We are now asked to set aside the decision of the Court below. I agree with my learned brother that that judgment should be confirmed, and I will [278] deal very shortly with the points made by the learned pleader who has appeared for the appellant before us to-day. His first ground of argument was that, assuming the Court below was right in holding that there had been an irregularity in the advertisement of the sale, that irregularity was not sufficient to warrant the sale being set aside; secondly, he urged that there was no irregularity; thirdly, that the plaintiffs could not be permitted to urge that ground here to-day, because they had not, in their petition of appeal to the Commissioner, complied with the requirements of s. 33, Act XI of 1859; and, lastly, it was urged before us as a matter of fact that the evidence on the paper book did not prove substantial injury. I will notice the last ground—the question of fact—first, beginning with the general observation that I should hesitate to reverse a decision passed in the Court below on a question of fact unless irresistibly compelled so to do, for this reason, that the Judge in the Court below has the inestimable advantage of having the witnesses examined and cross-examined before him, and is, therefore, able to form a far better opinion as to the value of their evidence than we can do sitting here in a Court of appeal. Upon that general ground I should hesitate long before I reversed a decision of a lower Court on a question of fact. But in this case the evidence abundantly bears out the facts necessary for the plaintiffs to prove that there had been substantial injury or damage caused to them by reason of the irregularities which have taken place

in the conduct of the sale. I need not go into the evidence in detail ; it has been laid before us at length by the learned pleaders, and it satisfies my mind fully that on the question of fact the plaintiffs' case was made out.

The next point to consider is, has there been an irregularity in the proceedings connected with the sale ? That depends upon the construction to be placed upon s. 6, Act XI of 1859. (His Lordship read the section.) Now the object of this Section, I apprehend, was to give what the Legislature thought, reasonable publicity to the sale, and the real meaning of the section is that this should be done by means of affixing the prescribed notices strictly in time, or not less than thirty days before the date fixed for the sale. That is the real meaning of the [279] section and if that be so, we have to consider whether that has been done in this case. It is admitted that this notice was not posted till the 2nd of May, and it is said that the sale was to take place on the last day of May. It is clear, therefore, that if the sale had taken place on the 31st of May the statutory period would not have elapsed. Then it is urged that this irregularity may be cured by reference to s. 20 of the Act of 1859, the marginal note of which is "adjournment of sales." The section is as follows: "In case the Collector or other officer as aforesaid shall be unable, from sickness, from the occurrence of a holiday, or from any other cause, to commence the sale on the day of sale fixed as aforesaid, or if, having commenced it, he be unable, from any cause, to complete it, he shall be competent to adjourn it to the next day following, etc." I agree with all that my learned brother has said as to the non-applicability of this section to cure the defect under s. 6, but further, when in s. 20 we find the words "to commence the sale on the day of sale fixed," this must refer to a day of sale which has been legally fixed. You could not adjourn a meeting which an Act of Parliament requires to be convened at 12 days' notice if only an 11 days' notice has been given ; you cannot adjourn an illegally called meeting, and you can only adjourn a sale fixed for a certain day when it has been legally fixed for that day. Therefore s. 20 will not avail to cure the defect which, in my opinion, manifestly has arisen under the provisions of s. 6. Then the learned pleader says: "Assume all that against me I crave in aid s. 8, Beng. Act VII of 1868. I am of opinion that this section will not avail to help the appellant in this case. The Act does not say that it shall be conclusive evidence that the proper statutory notice was given ; it does not say it shall be conclusive evidence that a notice having been posted the right notice was posted, and that the contents of the notice were such as by s. 6, Act XI of 1859, they are required to be ; all that this section intended to do was to render it unnecessary to call evidence to show that the notice itself had been posted, but it is still necessary to prove that the contents of the notice are such as are required by s. 6, Act XI of 1859. Then it is further urged that this ground of appeal was not available because the provisions of s. 33 of [280] the Act of 1859 had not been complied with. Section 33 says: "No sale for arrears of revenue or other demands realizable in the same manner as arrears of revenue are realizable, made after the passing of this Act, shall be annulled by a Court of Justice, except upon the ground of its having been made contrary to the provisions of this Act ; and then only on proof that the plaintiff has sustained substantial injury by reason of the irregularity complained of ; and no such sale shall be annulled upon such ground, unless such ground shall have been declared and specified in an appeal made to the Commissioner under s. 25 of this Act." Therefore what the plaintiffs have to show is, in sending in this petition of appeal, that substantial injury has been sustained, and that the sale has been made contrary to the provisions of this Act. Now it seems to me that if the petition of appeal to the Commissioner, instead of being as precise and elaborate as it is, had simply said that the sale had been made

contrary to the provisions of the Act, and that the plaintiff had sustained substantial injury, and confined itself to these two narrow statements, it would have been amply sufficient to have enabled the plaintiffs to raise the point here to-day.

Upon the questions of the non-joinder of the Secretary of State and of costs I entirely concur with my learned brother, and I do not think that I should add anything to what he has said.

On the whole I agree that this appeal should be dismissed.

Appeal dismissed.

NOTES.

[I. PROVISIONS AS TO NOTICE—

These have to be complied with strictly, providing as they do, a statutory minimum period of time for preferring objections, etc.:—34 Cal. 470 : 11 C. W. N. 356 : 5 C. L. J. 669 ; 11 Cal. 200 ; 2 C. W. N. 360 ; 1 C. L. J. 560 explaining 21 Cal. 70 ; 10 C. W. N. 137 : 2 C. L. J. 825.

II. DESCRIPTION OF MOUZAS—

As to what is sufficient, see 10 Cal. 63 : 13 C. L. R., 131.

III. EFFECT OF ISSUE OF CERTIFICATE—

It does not prevent the consideration whether the notice itself was in accordance with law:—7 C. W. N. 377 ; 30 Cal. 1 ; 10 C. W. N. 137 ; 2 C. L. J. 325.

IV. NOTICE TO THE SECRETARY OF STATE—

Being intended for the benefit of the defendant, it can be waived:—34 Cal. 257.

Such waiver can be inferred from failure to take objection at the right time:—*Ibid.*

V. THE SECRETARY OF STATE WHETHER A NECESSARY PARTY—

Not a necessary party in suits as to revenue sales:—7 C. W. N. 377 ; 25 Cal. 833 ; but is under the Public Demands Recovery Act, 31 Cal. 159 : 8 C. W. N. 657.]

[9 Cal. 280]

APPELLATE CIVIL.

The 7th July, 1882.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE AND MR. JUSTICE ROSE.

Imam Buksh Mondul.....Defendant

versus

Momin Mondul.....Plaintiff.*

Limitation—Beng. Act VIII of 1869, s. 27 —Landlord and tenant—Possession, Suit for, on dispossession by landlord —Title, Claim for declaration of.

Where a suit by a tenant against his landlord is both in form and [281] substance one to recover possession on the ground of illegal dispossession by the landlord, and no question of the plaintiff's title is raised, the insertion in the plaint of a claim for declaration of the plaintiff's title is not sufficient to prevent the application of the limitation prescribed by s. 27 of Beng. Act VIII of 1869.

Mussamut Dhurjobutty Chowdrain v. Chamron Mundul (25 W. R., 217), distinguished.

THE plaintiff, alleging that his father Sona Mondul had been in possession of a certain jote, and that on his death the plaintiff and other co-sharers had succeeded to, and had been in possession of, the jote until the 14th July 1878,

* Appeal from Appellate Decree, No. 1429 of 1880 against the decree of L. B. B. King, Esq., Judge of Dinagapore, dated the 14th May 1880, affirming the decree of Baboo Nil Madhub Shamunto, Munsif of Patnitola, dated the 5th January 1880.

when the landlord had illegally dispossessed them, instituted this suit on the 30th August 1879 against his co-sharers and the landlord, for possession of his share in the joto on his title thereto being established.

The landlord alleged that the plaintiff and his co-sharers had voluntarily relinquished possession of the joto.

Both the lower Courts having decided in favour of the plaintiff, the landlord appealed to the High Court upon the ground, amongst others, that the suit was barred by limitation under s. 27 of Beng. Act VIII of 1869.

Baboo Kishori Mohun Roy for the Appellant.

Baboo Ram Churn Mitter for the Respondent

The **Judgment** of the Court (GARTH, C.J., and BOSE, J.) was delivered by

Garth, C.J.—The plaintiff, as one of the sons of Sona Mondul, a deceased Mahomedan, sued for possession of a 4-anna share in a certain joto, on the allegation of dispossession therefrom by the defendant (landlord) in Assar 1279 (June 1872). The defendant pleaded that the plaintiff and his brothers, not being able to hold on the joto by paying its rent, relinquished the same in Joisto 1279 (May 1872), and fled away to a different village.

Both Courts have found that the plaintiff and his brothers were forcibly turned out from the lands by the defendant's predecessors, [282] and have consequently decreed the plaintiff's claim; the lower Appellate Court holding that one year's limitation under s. 27 of the Rent Law did not apply to the suit.

It has been argued here that the lower Appellate Court was wrong on this question of limitation; and we think the contention is well founded. The plaintiff's suit, both in form and substance, was to recover possession of his joto, having been forcibly dispossessed by the defendant.

The defendant's answer was that he did not dispossess the plaintiff, but that he voluntarily relinquished his holding. No question of title was raised in the case; and it was not denied that at the time of the dispossession or relinquishment, as the case might be, the plaintiff held the joto which he claims.

Under these circumstances it seems to us that this is a suit for possession within the meaning of section 27 of the Rent Law, and that the plaintiff cannot make it other than a suit for possession by inserting in his plaint that he desires to have his right established. If this were enough to take the case out of the operation of the section, a plaintiff might always get rid of the one year's limitation by inserting a claim of right in his plaint.

A case, decided by MITTER, J., was referred to—*Mussamut Dhurjobutty Chowdhram v. Chamroo Mundul* (25 W. R., 217), in which that learned Judge appears to have held, under circumstances somewhat resembling the present, that the case did not come within s. 27 of the Rent Law, because the suit was brought to establish the plaintiff's title. The case is not very fully reported, and is very probable that it did involve some claim of title. It was upon that ground entirely that the decision proceeded, and it is, therefore, distinguishable from this case, because here we consider that no claim of title was involved.

The judgments of the lower Courts will, therefore, be reversed, and the plaintiff's claim will be dismissed.

Appeal allowed.

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NOTES.

[See also (1886) 12 Cal. 606 (608); (1890) 17 Cal. 926 (928).]

[= 12 C.L.R. 434]
[283] APPELLATE CIVIL.

The 17th July, 1882.

PRESENT:

MR. JUSTICE MITTER AND MR. JUSTICE NORRIS.

Monohur Lall and others..... Defendants

versus

Gouri Sunkur.....Plaintiff.*

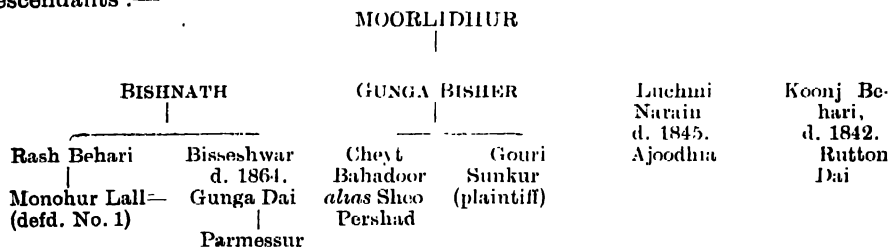
Civil Procedure Code (Act VIII of 1859, ss. 7, 8, 9, 10)--

Cause of action, including whole claim arising out of - Mesne profits,

Suit for—Possession, suit for.

Under s. 7, read with ss. 8, 9 and 10 of Act VIII of 1859, a plaintiff suing for mesne profits of land is not precluded from afterwards maintaining a suit for possession of such land.

Pratap Chandra Burua v. Rani Swarnamayi (1 B. L. R., F. B., 113), commented on. THIS suit, in which the defendants are persons in possession, namely Monohur Lall and three others, claiming title through him, was instituted on the 24th September 1879, for possession of the difference between a one-third and a one-fourth share in all property left by the plaintiff's uncle Koonj Behari, except in mouzah Balwa, and of the difference between a two-thirds and a one-fourth share in mouzah Balwa, and for a declaration of the plaintiff's title to such larger shares. The property in dispute belonged to the plaintiff's grandfather Moorlidhur. The following is a genealogical table of his descendants :—



On the death of Moorlidhur each of his four sons inherited a four-anna share. Luchmi Narain, the third son, died in 1845 without issue, leaving his widow Ajoodhia him surviving. Ajoodhia died some time before the year 1864. Koonj Behari also died without issue in the year 1842, leaving him surviving a widow Rutton Dai. On the death of Ajoodhia, Rash Behari, the eldest son of [284] Bishnath, retained possession of the whole of Luchmi Narain's share under ticcalseases, etc., alleged to have been executed by Ajoodhia.

Some time after the death of Koonj Behari, Rash Behari similarly took possession of his share under a deed of gift executed by his widow Rutton Dai.

On the 5th March 1864, Gouri Sunkur, the plaintiff in this suit, brought an action for the recovery of possession of a four-annas share of the properties left by his uncles Luchmi Narain and Koonj Behari, against Rash Behari as the principal defendant, making his brother Cheyt Bahadoor, his cousin

* Appeal from Original Decree, No. 31 of 1881, against the decree of Baboo Poresnath Banerjee, Subordinate Judge of Patna, dated 30th of September 1880.

Bisseshwar, and Rutton Dai, the widow of Koonj Behari, *pro forma* defendants. Ajoodhia the widow of Luchmi Narain was not then alive. One of the reliefs sought for in this suit was the cancellation of the deed of gift alleged to have been executed by Rutton Dai.

While this suit was pending Bisseshwar died. On the 10th January 1865, Gouri Sunkur obtained a decree in this suit. Rash Behari appealed to the High Court against that decree. The High Court, on the 29th November 1865, affirmed the decree, with this modification, that Rash Behari was entitled to retain possession of the share of the estate transferred to him by Rutton Dai, widow of Koonj Behari, during the lifetime of the said Rutton Dai.

On the 28th January 1865, a similar suit was brought by Gouri Sunkur's brother, Cheyt Bahadoor, and on the 11th December 1866, a similar decree was made in that suit.

In the year 1867, Parmessur, son of Bisseshwar, brought a similar suit against Rash Behari and other members of the family, and obtained a similar decree in the Court of First Instance; but on appeal the High Court modified it, dismissing his suit in respect of Koonj Behari's estate.

Rutton Dai, the widow of Koonj Behari, died on the 10th May 1870. On her death the plaintiff, Gouri Sunkur, made an application to execute his decree for possession in respect of Koonj Behari's estate; he was, on the admission of Rash Behari's son, Monohur Lall (Rash Behari having died in the meantime) put in possession of a one-fourth share of that estate which had been decreed to him in his suit. The plaintiff thus obtained possession of a one-fourth share of Koonj Behari's estate in the year 1874.

[285] The plaintiff Gouri Sunkur then, on the 30th May 1874, brought a suit against Monohur Lall, the defendant No. 1, for mesne profits in respect of a one-fourth share of the estate of Koonj Behari from the date of the death of Rutton Dai to the date of his recovery of possession thereof. In the plaint in that suit he stated that at the time when his first suit was brought, Bisseshwar having been alive, he had claimed only a one-fourth share of Koonj Behari's estate; but Bisseshwar died during the lifetime of Rutton Dai, and therefore on her death the estate of Koonj Behari devolved on his surviving brother's sons, namely, himself, his brother Cheyt Bahadoor, and his cousin Rash Behari. The plaintiff further alleged in that plaint that he was entitled under the Hindu law of inheritance to one-third of Koonj Behari's estate, but as he was in possession of one-fourth only he would bring a suit for the difference. This wassilat suit was decreed on the 27th August 1865.

On the 28th December 1872 the rights of Cheyt Bahadoor in one of the mouzahs in dispute, *viz.*, Balwa, were sold in execution of a decree and purchased by the plaintiff Gouri Sunkur.

An application was made by the plaintiff Gouri Sunkur for registration of his name under the Land Registration Act, in respect of a one-third share of the estate of Koonj Behari in mouzahs other than Balwa, and in respect of a two-thirds share in that mouzah; this application was opposed by the defendant Monohur Lall, who alleged that the plaintiff was entitled only to a one-fourth share; the order in the Land Registration Act was passed in accordance with the defendant's contention.

The lower Court having made a decree in the plaintiff's favour for the relief sought in the present suit, the defendants appealed to the High Court on the ground, amongst others, that the present suit was barred under s. 7 of Act VIII of 1859.

Baboo *Rajender Nath Bose* for the Appellants.

Mr. *M. L. Sandel* for the Respondent.

The **Judgment** of the Court (MITTER and NORRIS, JJ.) was delivered by **Mitter, J.**, who after stating the facts as above, continued—

[286] “The main ground urged in appeal by the defendants, appellants, is that the present suit is barred under the provisions of s. 7 of Act VIII of 1859. It is contended that the present suit is based upon the same cause of action upon which the suit for possession during the lifetime of Rutton Dai, and the suit for wassilat after her death, were brought.

As regards the first of these two suits, it is quite clear that it was not brought upon the same cause of action upon which the present action is based. The succession to the estate of Koonj Behari devolved upon the plaintiff, respondent, and his other co-heirs on the death of Rutton Dai; therefore, the cause of action of the present suit accrued on the date of her death, viz., 10th May 1870; consequently it is not identical with the cause of action of the suit which the plaintiff, respondent, brought during the lifetime of Rutton Dai. The cause of action in this latter suit was that the plaintiff, respondent, as one of the presumptive heirs of Koonj Behari after the death of his widow Rutton Dai, was entitled to have the property alienated by her restored back on the ground of waste committed by the widow; therefore, the contention raised before us upon the basis of the first of these two suits has no validity.

But the question is not altogether free from difficulty as regards the other suit. It was brought after the death of Rutton Dai; it was also brought upon the same title upon which the present suit is founded; and if s. 7 had stood alone, it would have been difficult to say that the claim for the mesne profits of the estate of Koonj Behari, and the claim for the recovery of that estate, were not parts of a claim arising out of one cause of action, namely the death of Rutton Dai and the unlawful possession of the whole of Koonj Behari's estate by the defendants, appellants, to the exclusion of the other heirs. But s. 7 must be read along with the provisions of the following three sections, viz., 8, 9 and 10. It has been uniformly held, with reference to these sections, that a plaintiff, suing for possession of land first, is not precluded from maintaining a second action for mesne profits of such land.

In the Full Bench decision of *Protap Chandra Burua v. [287] Rani Swarnamayi* (4 B. L. R., F. B., 113) the plaintiff first brought a suit for possession of land in the month of April 1855 with mesne profits from the date of Ouster, viz., 14th September 1852 to the date of suit. A decree was passed in his favour for the possession of the land only on the 18th February 1863. In execution of that decree he obtained possession on the 25th December 1864, and on the 28th August 1865 he brought a second suit for mesne profits from the 14th September 1852 to the 25th December 1864. The Division Bench, before which the case was first heard, held that the claim for mesne profits from September 1852 to April 1855 was clearly barred by limitation, and as regards the remaining portion of the claim, the learned Judges who constituted the Bench were inclined to the opinion that it was barred under the provisions of s. 7 of Act VIII of 1859. But as there were decisions conflicting with their view, they referred the point to a Full Bench. PEACOCK, C. J., in delivering the judgment of the Full Bench, said: “Section 7 says that every suit shall include the whole of the claim arising out of the cause of action. The plaintiff's claim to mesne profits from the time he might obtain a decree to the time he might obtain possession under that decree, was not a claim which he had at the time when he filed his plaint; and he could not therefore include

that claim for mesne profits in his plaint. Independently of that, I think that he was not bound to include his claim for mesne profits in the suit for possession.

“Section 10 of Act VIII of 1859 is very clear upon that point, etc., etc., etc.”

It appears to us that this decision was based upon two grounds: 1st, that assuming s. 7 was applicable, the suit was maintainable, because the claim for mesne profits from the date of decree to the date of recovery of possession had not arisen when the first suit was brought; and, secondly, s. 7 was not applicable by reason of the provisions of s. 10 (see also upon this point *Chowdhry Imdad Ali v. Boonyad Ali* 14 W. R., 92); and *Mussamut Rookminee Kooer v. Ram Tokul Roy* (21 W. R., 223). The present is the converse of these cases. There, suits for land were brought first, and then the suits for mesne [288] profits were brought. Here, the suit for mesne profits was brought first. But this difference is immaterial, so far as the question of construction of ss. 7 to 10 is concerned. We are, therefore, of opinion that the contention of the appellant is not valid. We, therefore, dismiss the appeal with costs.

Appeal dismissed.

NOTES.

[MESNE PROFITS AND POSSESSION, DISTINCT CLAIMS—

This case was followed in 11 Mad. 210; 31 Mad. 495. Conversely it has been held that a first suit for possession does not bar a second suit for mesne profits:—19 Cal. 615; (1902) P. R. 78; (1889) P. R. 129; 17 Cal. 968; 32 Mad. 330.]

[9 Cal. 288]

APPELLATE CRIMINAL.

The 31st August, 1882.

PRESENT:

MR. JUSTICE WILSON AND MR. JUSTICE O'KINEALY.

—
The Empress

versus

Hurro Kole.*

Jurisdiction—Appeal—Revision—Offence committed out of British India.

The High Court has no power, either by way of appeal or revision, to interfere with a sentence passed by the Superintendent of the Tributary Mehals when exercising jurisdiction over offences committed in Mohurbunj, a place not situated within the limits of British India.

Empress v. Keshub Mahajun (I. L. R. 8 Cal., 985); and *Hursee Mahapatro v. Dinabundhu Patro* (I. L. R., 7 Cal., 523), referred to.

In this case the appellant, Hurro Kole, was charged with murder by intentionally causing the death of one Ghashye Kole on the 6th October 1881, at Higli, in Mohurbunj. The prisoner was tried and convicted by the Superintendent of the Tributary Mehals, at Balasore, on the 1st of March 1882, and sentenced to transportation for life. He thereupon appealed to the High Court.

* Criminal Appeal No. 166 of 1882, against the order of A. Smith, Esq., Superintendent, Tributary Mehals, Cuttack, dated the 1st March 1882.

No one appeared to argue the case.

The **Judgment** of the Court (WILSON and O'KINEALY, JJ.) was delivered by

Wilson, J.—This is an appeal from a conviction by the Superintendent of the Cuttack Tributary Mehals. The offence was committed in Mohurbunj. The accused is a native of Mohurbunj. The trial took place at Balasore. It has been decided by a Full Bench that Mohurbunj is not a part of British India.—*The [289] Empress v. Keshub Mohajan* (I. L. R., 8 Cal., 985). The Superintendent of Tributary Mehals and his Assistant exercise jurisdiction over offences committed in those mehals, including Mohurbunj, under regulations and instructions which were examined in the case just referred to and in *Hursee Mahapatro v. Dinabundhu Patro* (I. L. R., 7 Cal., 528).

We have not now to consider whether the jurisdiction as exercised is in accordance with law or not, but only whether we have any power to interfere with the decision of the tribunal. We think this Court has no such power, either by way of appeal or of revision. The Letters Patent now in force (those of 1865) by s. 27, make this Court a Court of Appeal "from the Criminal Courts of the Bengal Division of the Presidency of Fort William and from all other Courts subject to its superintendence." Those words, according to the well-known rule of construction, must mean British Indian Courts, that is to say Courts established in and for British India. Section 28 makes the Court "a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction." This section, therefore, carries the case no further. The Criminal Procedure Code gives an appeal to this Court only from Sessions Judges and certain other specified officers, all of whom are British Indian officers and exercise their functions in and for British India. The revisional powers given by the Code are likewise limited to the Courts subordinate to this Court, which, for the reasons already pointed out, must be restricted to British Indian Courts. This appeal must be rejected on the ground that we have no power to entertain it.

Appeal dismissed.

[290] FULL BENCH.

The 13th July, 1882.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE McDONELL,
MR. JUSTICE WILSON, MR. JUSTICE TOTTENHAM
AND MR. JUSTICE FIELD.

Huro Prosad Roy.....Plaintiff

versus

Kali Prosad RoyDefendant.*

*Civil Procedure Code (Act X of 1877), s. 326—Scheme for satisfying
decree—Stay of public sale of attached property.*

Where the Collector has applied to the Court under s. 326 of the Civil Procedure Code, proposing a scheme for the payment of decretal money in order to avoid a sale of attached pro-

* Rule No. 988 of 1881.

perty, it is in the discretion of the Court to authorize the Collector or not, as it thinks fit, to provide for the satisfaction of the decree in the manner proposed; and the Court is bound to hear any objections which may be made by the decree-holder to the feasibility of the proposed scheme, and any evidence that may be offered, in support of those objections; and if after hearing the decree-holder's objections, and the evidence which may be offered in support of them, the Court is not fully satisfied that the proposal is feasible or that it can in all reasonable probability be carried out within the specified period, the Court ought, in the exercise of its discretion to refuse its sanction.

THE facts of this case, so far as they are material, are fully set forth in the order of reference, which was as follows:—

An important question has arisen in this case as to the proper construction of s. 326 of the Civil Procedure Code; and as there appears to be some difference of opinion upon the subject, we think it right to refer the point to a Full Bench.

After 50 years' litigation, the plaintiff, Huro Prosad Chowdhry, had at last succeeded in obtaining a decree in the Privy Council against the defendants Kali Prosad Roy Chowdhry and others, for a sum of Rs. 36,000, and a further sum of Rs. 6,000, for interest.

Execution upon this judgment was first issued by the decree-holder in the 24 Pergunnahs; but as there was little or no property there to satisfy the amount, the proceedings were transferred to the District Court of Jessore, where the Judge ordered certain properties of the judgment-debtor to be sold on the 1st of April 1880.

[291] On the 30th of March 1880 (two days before the sale), an application was made by the Collector of Jessore, under s. 326 of the Civil Procedure Code, proposing a scheme for the payment of the decretal money within eight years.

The Subordinate Judge made an order approving of this scheme, but the order was afterwards set aside upon a point of law upon application to this Court.

Upon this, the Collector proposed an amended scheme, which was also approved by the Subordinate Judge, for payment of the debt within ten years; but that was again set aside by an order of this Court.

The Collector then proposed a third amended scheme to the Subordinate Judge, proposing to pay the decretal debt within thirteen years; and on the hearing of this application, the decree-holder (amongst other objections) contended that the scheme of the Collector was not feasible, and stated that he was prepared to prove by evidence that, having regard to the real income of the property, it was impossible that the scheme could be carried out within the thirteen year's period.

The Subordinate Judge, however, overruled the objection upon the ground that "*the Court in a matter of that kind ought to take the Collector's statement of the scheme as a sufficient guarantee for its fulfilment,*" and that in case the Collector should fail to fulfil the terms proposed, the decree-holder would be at liberty to move the Court to reconsider its order.

The Subordinate Judge then made an order sanctioning the Collector's scheme.

Upon this, a rule was obtained before the First Bench, calling upon the judgment-debtors and the Collector to show cause why the last-mentioned order of the Subordinate Judge should not be set aside, upon the ground that

he had accepted the representation of the Collector without inquiry, and without allowing the decree-holder to show, by argument or evidence, that the scheme of the Collector was not feasible.

Upon this rule coming on to be argued, it was contended on behalf of the Collector and the judgment-debtors :

First.—That according to the true meaning of s. 326, the Court was bound to accept the representation of the Collector [292] as true, without any inquiry at all as to whether the scheme which he proposed is reasonable or feasible ; and

Secondly.—That at the most the Court could only inquire as to whether the period within which satisfaction of the decree was to be obtained, is a reasonable one.

It was further contended that if the scheme upon the face of it appeared feasible, the decree-holder had no right to call evidence to show that it was not so.

In support of this view, we were referred to a decision of Mr. Justice WHITE and Mr. Justice FIELD, dated 9th September 1880, in which those learned Judges had apparently expressed an opinion, that it was not competent for the judgment-creditor to go into evidence to contest the feasibility of the Collector's scheme.

On the other hand, it was contended by the decree-holder that the Court was bound to make inquiry into the feasibility of the scheme, and to allow the decree-holder to call evidence.

We were rather disposed to think that the Subordinate Judge was wrong in refusing to allow the decree-holder to go into evidence ; and we had great doubt whether the Court had any right, having once sanctioned the scheme, to reconsider its order.

But having regard to the doubtful language of the section, and the opinion which had been expressed by Mr. Justice WHITE'S Bench on a previous occasion, we have thought it right to refer the matter to a Full Bench.

The questions which we desire to refer are

First. Whether under s. 326 of the Code, the Court is bound to accept the representations of the Collector with regard to the scheme which he proposes as being reasonable and feasible ?

Second.—Whether upon such representation being made to the Court, the decree-holder is at liberty to satisfy the Court, if he can, by argument and evidence, that the scheme proposed by the Collector is not feasible ; or that satisfaction of the decree cannot be made within the period mentioned by the Collector ?

Mr. Evans in support of the rule.

The Advocate General (Officiating, Mr. Phillips) showed cause.

[293] The following **Judgments** were delivered by the Full Bench.

Garth, C.J.—(MCDONELL, WILSON and TOTTEHAM, JJ., concurring)—We think that under s. 326, it is in the discretion of the Court to authorize the Collector or not, as it thinks fit, to provide for the satisfaction of the decree in the manner which the Collector recommends, and for the purpose of effectually exercising that discretion we consider that the Court is bound to hear any objections which may be made by the decree-holder to the feasibility of the proposed scheme, and any evidence that may be offered in support of those objections.

It is clear that under s. 320, the word "may" is used in a discretionary sense only, and it would appear to be used in the same sense in the intervening sections; and there certainly seems good reason why the Court should enquire closely into the feasibility of the Collector's proposal, seeing that its effect would be to deprive the decree-holder of the right, which the law gives him, of executing his decree, and not only so, but to protect the debtor's property during all that time from execution at the suit of other creditors.

If upon hearing the decree-holder's objections, and the evidence which may be offered in support of them, the Court is not fully satisfied that the proposal is feasible, or that it can in all reasonable probability be carried out within the specified period, the Court ought, in the exercise of its discretion, to refuse its sanction.

Field, J.—Section 326 of the Code of Civil Procedure is as follows: "When, in any local area in which no declaration under s. 320 is in force, the property attached consists of land or of a share in land, and the Collector represents to the Court that the public sale of the land or share is objectionable, and that satisfaction of the decree may be made within a reasonable period by a temporary alienation or management of the land or share, the Court may authorize the Collector to provide for such satisfaction in the manner recommended by him, instead of proceeding to a sale of the land or share." In the case which has led to the present reference, the Collector proposed two schemes, both of which were set aside for reasons which it is unnecessary to refer to. The Collector then proposed a third scheme, and the decree-[294]holder alleged that this scheme was not practicable, and asserted that if he were allowed to do so, he could prove this allegation by evidence.

The Subordinate Judge was of opinion that he was bound to take the Collector's statement of the scheme, and he declined to receive the evidence offered by the decree-holder.

Now, in order to understand the provisions of s. 326, it is, I think, necessary to refer briefly to the preceding ss. 320 to 325C. Section 320 provides as follows: "The local Government may, with the sanction of the Governor-General in Council, declare, by notification in the Official Gazette, that in any local area the execution of decrees in cases in which a Court has ordered any immovable property to be sold, or the execution of any particular kind of such decrees, or the execution of decrees ordering the sale of any particular kind of, or interest in, immovable property, shall be transferred to the Collector;" and then follow certain provisions which enable the Collector to proceed in a particular manner, in order to the execution of any decree that has been so transferred.

Now, the object of these provisions is well known. In different parts of India, the effect of sales in execution of decrees was to transfer landed estates from the old families to modern speculators. A strong opinion was entertained by certain Members of the Government of India, that these results of the administration of civil justice were impolitic and inexpedient; and it was suggested that some procedure might be devised by which the Chief Executive Officer of the district would be enabled to liquidate the debts of encumbered land-holders without the immediate sale of their estates, and so to preserve the old landed gentry of the country. The provisions of ss. 320 to 325C were inserted in the Code of Civil Procedure, in order to give effect to these suggestions. Now, there can be no doubt that when the local Government makes a notification under s. 320, in regard to any local area, the execution of all decrees of the class specified in that notification, is transferred from the Civil Court to the Collector, and the Civil Court has no option whatever

in the matter. Then comes s. 326, and this section is clearly intended to provide for isolated cases, in which the Collector is of opinion that the [295] public sale of the land is objectionable, and that satisfaction of the decree may be had, within a reasonable period, by a temporary alienation or management of the land. There is an important difference between the language used in s. 326 and the language used in preceding sections, which latter is imperative. It appears to me that the words in s. 326, "Court may authorize," are not imperative, but leave a discretion to the Civil Court. If then the Court has a discretion, that discretion can only properly be exercised upon materials placed before it, and I think that it is open to the decree-holder to place those materials in the shape of evidence before the Civil Court, and to satisfy the Court, as well by evidence as by argument, that the proposal of the Collector is not feasible or practicable. In this view, I would answer both the questions referred to the Full Bench in the affirmative.

NOTES.

[See also (1906) P. R. 63 : (1906) P.L.R., 121.]

[9 Cal. 295 : 12 C.L.R. 311 : 9 I.A. 174 : 4 Sar. P.C.J. 392 : 6 Ind. Jur. 547]

PRIVY COUNCIL.

The 18th May, 1882.

PRESENT :

SIR B. PEACOCK, SIR R. COLLIER, SIR R. COUCH, AND SIR A. HOBHOUSE.

Nilmoni Singh Deo.....Decree-holder

versus

Taranath Mukerjee.....Judgment-debtor.

[On appeal from the High Court at Fort William in Bengal.]

Superintendence of the High Court 24 and 25 Vic., c. 104, s. 15 - Execution of decrees for rent Act X of 1859, ss. 23, 77 and 160—Civil Procedure Code (Act VIII of 1859), ss. 284, 294—(Act X of 1877) ; ss. 223, 228.

Whether a decree for rent, under Act X of 1859, made in one district, can be transferred to another for execution, is a question which the High Court can decide in the exercise of its "superintendence over all Courts subject to its appellate jurisdiction," under 24 and 25 Vic., c. 104, s. 15. Decrees for rent made by the Collector under s. 23 of Act X of 1859 can be executed by a Civil Court to which they may be transferred under the sections of the Code of Civil Procedure relating to "the execution of a decree out of the jurisdiction of the Court by which it was passed."

APPEAL from an order of the High Court (7th July 1880), made in exercise of its power of superintendence over all Courts subject to its appellate jurisdiction under 24 and 25 Vic., c. 104, s. 15. This stayed proceedings upon an order made by the Deputy [296] Commissioner of Manbhūm on 11th March 1872 as Collector of the District, transferring a decree of rent made in that district to another for execution ; it also cancelled a similar order dated 29th May 1879.

The respondent held for some years a *patni* in the district of Manbhūm under a grant made in 1861 by the appellant Rajah Nilmoni Singh ; and during his tenure two decrees for rent one in 1863 and another in 1864 were made against him under Act X of 1859, s. 23, in favour of the Rajah. Afterwards the respondent having ceased to hold the *patni* in that district, in which also unsuccessful attempts had been made to execute the above decrees, application was made by the decree-holder for a transfer of them to another district. On this the Deputy Commissioner of Manbhūm as Collector of the district, on the 11th March 1872, made the earlier of the two orders, in regard to which the question on this appeal arose. This order referring to the application made for execution of the decrees for rent in the district of Nuddea, in which district it was stated that the judgment-debtor then resided and had property, recorded that the Deputy Commissioner found nothing in Act X of 1859 to prevent such a transfer, and directed that a copy of the proceedings should be sent to the Judge of Zillah Nuddea with a view to the amount of the decrees being realized.

The decree-holder not having obtained satisfaction in Nuddea again applied to the Deputy Commissioner for a transfer of his rent decrees under s. 223 of Act X of 1877 in May 1879. He applied for execution of them in twelve other districts which he named, undertaking that execution should be issued in not more than one at a time. The second of the two orders was thereupon made on the 27th May 1879, and copies of the rent decrees, with certificates of their non-satisfaction, were sent to the different districts.

The respondent, after attempting in vain to obtain the withdrawal of the above orders, petitioned the High Court to cancel them on the ground that they had been made by the Deputy Commissioner of Manbhūm in excess of his jurisdiction as Collector. On the 7th June 1880 a Divisional Bench (MITTER [297] and MACLEAN, JJ.) stayed proceedings on the order of 1872, and cancelled that of 1879, giving judgment as follows : -

" If the orders complained of are passed without jurisdiction, we think we have the power to interfere under section 15 of the Act of Parliament constituting this Court. (See *In the matter of the petition of Gobind Koomar Chowdhry* (B. L. R. Sup. Vol., 714 : s.c., 7 W. R., 520).)

" We are also of opinion that a Revenue Court under Act X of 1859 has no power to transfer a decree of its own to be executed by another Court within the jurisdiction of the latter. Such power cannot exist without an express provision of the law granting it. It is clear, therefore, that both the orders complained of are such as the Deputy Commissioner of Manbhūm had no authority to pass under Act X of 1859, or any other law applicable to rent suits in that district.

" But one of the orders was passed so far back as the 11th March 1872, and we understand that sales and other proceedings have been held and completed under it without any objection on the part of the applicant. Under these circumstances, we do not think it right, in the exercise of our extraordinary power under s. 15 of the Statute referred to above, to quash it now.

"The other order complained of is comparatively of a recent date, *viz.*, the 27th May 1879, and from the time the petitioner came to know of it he has been diligently endeavouring to have it set aside. Besides, if proceedings be allowed to proceed in accordance with it, it may unnecessarily involve the parties to this suit (and possibly also third parties) in profitless litigation. Under these circumstances, we think it right to exercise our extraordinary jurisdiction in respect of this order. We accordingly set it aside, and direct the Deputy Commissioner to recall the certificates of non-satisfaction from the District Courts to which they have been sent, informing them at the same time that the order under which they were sent has been reversed.

"We are informed by the parties that proceedings are still pending in the District Court of Nuddea under the first-mentioned order. Although we decline to quash it formally on the grounds mentioned above, we have yet expressed our opinion that it was [298] also *ultra vires*. We think, therefore, that the District Court of Nuddea should be informed that it should not proceed further in the matter, and return the record back to the Court of the Deputy Commissioner of Manbhum."

On this appeal -

Mr. R. V. Doyne appeared for the Appellant.

Mr. J. F. Leith, Q. C., Mr. T. H. Cowie, Q. C., and Mr. C. W. Arathoon for the Respondent.

For the appellant it was argued that, assuming this question to fall within the High Court's jurisdiction under s. 15 of 24 and 25 Vic., c. 104, it had been wrongly held that the Collector had acted without legal authority in transferring the rent-decrees for execution. On a review of the past state of the law on this point, it was contended that so long as suits for arrears of rent were brought (Regulation V of 1831) before the ordinary Court as civil suits, the law relating to the execution of rent-decrees, as well as that relating to other decrees, was given by Act XXXIII of 1852, until its repeal when superseded by the provisions of the Code of Civil Procedure, by Act X of 1861, the repealing Act. Originally a rent decree might have been treated like any other decree, and the Deputy Commissioner's order of March 1872 correctly stated that there was nothing in Act X of 1859 to alter the law in this respect.

The latter enactment in s. 23 providing that all suits for rent should be cognizable by the Collector, did not alter the law relating to the execution of decrees out of the jurisdiction of the Courts by which they were passed. The Code of Civil Procedure, as enacted in Act VIII of 1859, was extended to Manbhum, by notification under s. 385, in June of that year; and the contention was that the procedure provided in s. 284-296 for such execution superseded the former law. The High Court had taken for granted that these sections were inapplicable, and this was the error in the judgment under appeal. If, however, that Court had correctly supposed that the provisions of the Code on this point were inapplicable, then the previously existing law should be held to prevail. The latter view was, however, not the correct one, which, in effect, was that the sections of the Code had come [299] into force with reference to the execution of rent-decrees out of the jurisdiction of the Collectors making them.

For the respondent it was argued that the judgment of the High Court was correct, there being neither express language conferring the power to transfer rent-decrees from district to district for execution, nor any, intention, apparent upon the construction of Acts VIII of 1859 and X of 1859

to confer this power. Rent suits had been made cognizable by the Collector by Act X after Act VIII had become law, so that Act VIII would not, of its own force, apply to the proceedings of Courts afterwards established; nor did Act X refer generally to the procedure of Act VIII. On the contrary it contained special provisions on the subject of procedure thereby furnishing a presumption against the intention to supplement its sections by any implied reference to s. 284 *et seq.*, of Act VIII, and showing what appeared in several parts of Act X (to which reference in detail was made) *viz.*, that rent suits were not treated as "civil" suits.

Mr. R. V. Dwyer was not called upon to reply.

Their Lordships' **Judgment** was delivered by

Sir A. Hobhouse.— The question presented to their Lordships in this appeal is whether the Deputy Commissioner of Manbhum, who has made decrees in rent suits under the Bengal Rent Act No. X of 1859, can transfer those decrees for execution into another district. That officer possesses the jurisdiction conferred on Collectors of Land Revenue, and having made decrees in exercise of such jurisdiction, has further proceeded to make two orders transferring two decrees for execution. The High Court in the exercise of their power of revision, have substantially quashed his orders; in point of form, they have quashed one of the orders; and they have stayed proceedings on another. It is hardly necessary to enter into the details of the litigation. The High Court have decided that the Deputy Commissioner, as Judge of the Rent Court of Manbhum, had no authority to pass the orders under Act X of 1859, or any other law applicable to rent suits in that district.

A question was raised with respect to the jurisdiction of the High Court to entertain this question in revision at all. Their Lordships do not think it necessary to say anything upon that [300] point, except that they entirely agree with the view taken by the High Court of their own jurisdiction.

The other question depends upon the construction of Act X of 1859. That Act was passed for the purpose, among other things, of transferring suits for arrears of rent to the jurisdiction of the Collectors of Land Revenue; and it provided by s. 23, paragraphs 4 and 7, that all such suits "shall be cognisable by the Collectors of Land Revenue, and shall be instituted and tried under the provisions of that Act, and, except in the way of appeal, as provided in this Act, shall not be cognisable in any other Court, or by any other officer, or in any other manner."

It is not contended on behalf of the appellant that Act X of 1859 in any express way gave to the Collector the power of transfer which has been exercised. Neither is it contended for the respondent, that the words which have been read would, without more, prevent the provisions of Act VIII of the same year from applying to the execution of a Collector's decrees beyond the jurisdiction of his Court. The contention of the respondent is, that there is something in the language of Act X of 1859 which excludes this power from the jurisdiction of the Collector sitting as the Judge of the Rent Court established by that Act. For that purpose the respondent's counsel refer to a number of sections which may be illustrated by a single one. Section 77 deals with cases in which a third party appears to claim title in a rent suit; it gives the Collector certain powers of deciding the question before him, and then contains this proviso: "The decision of the Collector shall not affect the right of either

party who may have a legal title to the rent of such land or tenure to establish his title by suit in the Civil Court." There are a number of other sections of similar frame; and the contention is, that the expression "Civil Court" is used in all those sections in such a way as to show that the framers of the Act X of 1859 did not consider that the Rent Courts established by that Act are Civil Courts.

It must be allowed that in those sections there is a certain distinction between the Civil Courts there spoken of and the Rent Courts established by the Act, and that the Civil Courts referred to in s. 77 and the kindred sections mean Civil Courts exercising all the powers of Civil Courts, as distinguished from the [301] Rent Courts, which only exercise powers over suits of a limited class. In that sense there is a distinction between the terms; but it is entirely another question whether the Rent Court does not remain a Civil Court in the sense that it is deciding on purely civil questions between persons seeking their civil rights, and whether, being a Civil Court in that sense, it does not fall within the provisions of Act VIII of 1859. It is hardly necessary to refer to those provisions in detail, because there is no dispute but that, if the Rent Court is a Civil Court within Act VIII of 1859, the Collector has, under s. 286, the power of transferring his decrees for execution into another district.

The consequence of holding, as the High Court have held, is, that wherever Act X of 1859 applies, persons seeking their rent against a tenant who is insolvent, in the district in which he is sued, have absolutely no remedy against him, though he may be possessed of great wealth in another district. No reason has been assigned, or so much as suggested, why such a distinction should exist between a person who is claiming a debt, founded on rent, and a person who is claiming a debt, founded on any other transaction. The distinction does not exist in any other part of India, neither indeed does it exist in those provinces of Bengal in which Act X of 1859 has been repealed, and the Bengal Act VIII of 1869 has taken its place. Therefore, although it is not impossible that the Legislature should have intended to establish in Manbhum and adjacent districts a distinction between claims for rent and all other claims which does not exist elsewhere, it requires very clear and cogent evidence on the face of the enactments to support the conclusion that they really do intend such a distinction.

That consideration is somewhat emphasised by referring to Act XXXIII of 1852, which was an Act passed to facilitate the enforcement of judgments in places beyond the jurisdiction of the Courts pronouncing the same. It provides that with respect to all Courts—not making a distinction between one Court and another, but with respect to all Courts—judgments may be enforced in the manner provided in the Act *viz.*, by a transfer of the judgment out of the district of the Judge who pronounces it, into the district of some other Judge within whose jurisdiction [302] the debtor possesses property. It is true that in this Act it is said that the word "judgment" means a judgment in a civil suit or proceeding. But suits for the recovery of rent are civil suits or proceedings; and nothing can be clearer on the face of this Act than that the Legislature intended that everybody, who obtained a decree in a Court of Justice, should have a remedy against his debtor, wherever the property of that debtor might be.

The provisions of the Act of 1852 are substantially repeated in Act VIII of 1859; and though that Act speaks of Civil Courts, and not all Courts as Act XXXIII of 1852 does, yet the intention expressed is the same, *viz.*, that

all Courts entertaining civil suits of any kind should have this power of transferring their decrees for execution into another district. We find that Act XXXIII of 1852 was repealed in the year 1861, and it is repealed as being simply obsolete, the only reason expressed for repealing it being that Act VIII of 1859 had been passed. If Act VIII of 1859 covered the same ground as Act XXXIII of 1852, the earlier Act had become useless, and might be swept out of the Statute Book. But the earlier Act would not have become useless unless the latter Act covered the same ground.

In the opinion of their Lordships it is clear that looking outside Act X of 1859, no intention of making a distinction between rent suits and other suits in respect to the point now under consideration can be ascribed to the Legislature.

Turning to Act X of 1859, the preamble recites that "it is expedient to re-enact, with certain modifications, the provisions of the existing law in connection with demands of rent, to extend the jurisdiction of Collectors, and to prescribe rules for the trial of such questions." It was pointed out by Mr. Doyno that the particular process now under consideration was not the trial of any question regarding rent. But when we look at the provisions of the Act, it is clear that they go beyond the trial of such questions, and provide for the execution of decrees. At the same time the scope of the Act appears to be only to provide for the execution of the decrees of the Collector within his jurisdiction. There is nothing in the Act which provides for any execution beyond his [303] jurisdiction, and there is nothing to forbid the conclusion that such executions are left to the operations of Act XXXIII of 1852, or the corresponding portion of Act VIII of 1859.

Section 160¹ of Act X of 1859 has a bearing on this question. That section provides that an appeal from the judgment of a Collector or Deputy Collector shall lie to the Zillah Judge. But the Zillah Judge is a Civil Court to all intents and purposes. It was not disputed that if an appeal went from the Collector to the higher Court, to the Zillah Judge or to the High Court, and the decree of the Collector for rent was there affirmed, it would become the decree of a Civil Court, which could not be excluded from the operation of Act VIII of 1859. Then this consequence would follow, that the act of the parties would alter the nature of the decree; as long as the decree remains the decree of the Collector it is incapable of enforcement in any other district; but let the decree be affirmed by a Court of appeal, and though it is between the same parties for the same subject matter, it then becomes enforceable in another district. It is very difficult to suppose that any such result as that could possibly have been intended by the Legislature.

These considerations lead to the conclusion that the Rent Courts, established by Act X of 1859, must be held to fall within s. 284 of Act VIII of the same year.

The result is, that their Lordships will humbly advise Her Majesty that the order of the High Court of the 7th July 1880 be set aside, and that it be

* [Sec. 160:—In all suits other than those in which when tried and decided by a Collector

In what suits appeal to lie to Zillah Judge.

Deputy Collector shall lie to

To Sudder Court.

the judgment of the Collector is declared to be final, or when tried and decided by a Deputy Collector an appeal is allowed to the Collector, an appeal from the judgment of the Collector or the Zillah Judge, unless the amount or value in dispute exceed five thousand rupees, in which case the appeal shall lie to the Sudder Court. (Repealed.)]

ordered that the rule *nisi* of the 17th of May 1880, therein referred to, be discharged with costs. The respondent must pay the costs of the appeal.

Appeal allowed.

Solicitors for the Appellant, Messrs. *Lambert, Petch, and Shakespear.*

Solicitor for the Respondent, Mr. *T. L. Wilson.*

NOTES.

[I. REVENUE COURTS—CIVIL PROCEDURE CODE—X OF 1859, HOW FAR A COMPLETE CODE—

To preserve the summary character of the proceedings in the Rent and Revenue Courts, VII of 1888 inserted in sec. 4A in the C. P. C. of 1882; this is reproduced in the C. P. C. of 1908 as sec. 5. The present tendency has been towards applying the provisions of the C.P.C. to proceedings of a civil nature in the Revenue Courts, wherever the special Acts are silent. This point is fully discussed with reference to the previous authorities in the early case of (1883) 5 All. 406 F.B. and in the later case of (1911) 38 Cal. 832 : 15 C.W.N. 863 : 14 C.L.J. 284. The question in the latter case arose with regard to the applicability of C.P.C. 1882 sec. 310 A., and it was held that it applied. The following sections have been similarly applied:—Appeals under C.P.C. 1882 s. 588, *appeal*, (1908) 35 Cal. 799 : 7 C.L.J. 426 : 12 C.W.N. 888 ; sec. 492, *injunction* (1908) 36 Cal. 252 : 9 C. L. J. 125 : 13 C. W. N. 791 not following 16 All. 496 ; sec. 43, (1883) 5 All. 409 ; sec. 373, held inapplicable in (1893) 21 Cal. 428, (1894) 21 Cal. 514 ; (1908) 35 Cal. 990 ; but see the criticism in 38 Cal. 832 ; Limitation Act, sec. 14, (1891) 18 Cal. 368 ; sec. 584 *second appeals*, (1901) 28 Cal. 533 : 5 C.W.N. 279 ; sec. 588. (28), *order of remand*, (1902) 26 Mad. 518 (Mad. VIII of 1865) ; sec. 244, not applicable when decree sought to be set aside for fraud, (1887) 15 Cal. 179.

The term 'Civil Courts' in Chota Nagpur Encumbered Estates Act VI of 1876 ss. 3, 12 as amended by Beng. III of 1909 sec. 4 includes Revenue Courts :—(1910) 7 I.C. 787.

II. TRANSFER OF DECREE FOR EXECUTION FROM COURT OF ONE KIND TO COURT OF ANOTHER—

In this case it was held that the decree of a rent Court might be transferred to a Civil Court ; the converse case was decided in (1910) 13 O.C. 119.

III. REVISIONAL POWERS—

Order without jurisdiction, *e.g.*, issuing commission on grounds other than those mentioned in the Code, set aside under the Charter Act, (1907) 31 Mad. 60, sec. 622 of the C.P.C., single Judge ; (1898) 22 Mad. 68 : 8 M.L.J. 231. See also (1902) 30 Cal. 155 (criminal cases).]

[11 C.L.R. 447]
[304] APPELLATE CIVIL.*The 14 April, 1882.*

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Narain Roy.....Defendant

versus

Opnit Misser and others.....Plaintiffs. *

Right of Occupancy, Conditions necessary for acquiring—Non-payment of Rent—Beng. Act VIII of 1869, ss. 6, 22 and 52.

Two conditions only are necessary for the acquiring of a right of occupancy, *viz.*, (1), the cultivation or holding of land for a period of twelve years ; and (2), that the person holding or cultivating the land should be a ryot.

The essential conditions of s. 6, Beng. Act VIII of 1869 are fulfilled without showing the payment of rent, that only being a condition necessary for the maintaining of the right when created.

In a suit brought to evict a tenant who had been in possession of certain land for a longer period than twelve years, when it was shown that rent had not been paid, and notice to quit had been given —

Held, that a right of occupancy had been acquired, and that the ryot had the power to prevent forfeiture under the provisions of s. 52, Beng. Act VIII of 1869.

THIS was a suit brought by the plaintiffs to evict the defendant and obtain khas possession of certain land after serving him with a notice to quit. The facts of the case are sufficiently stated in the judgment of the Court.

Baboo Mohesh Chunder Chowdhry and Baboo Shreesh Chunder Chowdhry for the Appellant.

Mr. Branson, Baboo Chunder Madhub Ghose and Baboo Aubinash Chunder Banerjee for the Respondents.

The following **Judgments** were delivered by the Court (MITTER and MACLEAN, JJ.) :—

Mitter, J—The land in dispute in the possession of the defendant in this case amounts to 13 bighas out of an area of 78 bighas. The whole of the 78 bighas at the time of the thakbust in the year 1864, was the subject-matter of [303] a dispute between the Maharajah of Domraon on the one hand, and Dewan Ram Jewan Singh and Ram Coomar Singh on the other. The former claimed it as a part of Chuk Nowrunga, which is in the district of Gazeepore, and the latter as part of Baharwar in the district of Shahabad. The land in question was entered in the survey map as part of Baharwar.

The plaintiffs seek to evict the defendant after serving him with a notice to quit.

In September 1876 two suits were brought (one by the plaintiffs Nos. 1 to 4, and the other by the plaintiff No. 5), to recover possession of the whole of the aforesaid 78 bighas against the present defendant and several other persons. It was alleged by the plaintiffs that the defendants were trespassers, who had, under the color of some favourable orders passed by Criminal Courts, taken possession of the disputed land in the year 1283 (1876-77) the

* Appeal from Appellate Decree, No. 1692 of 1880, against the decree of T. D. Beighton, Esq., Officiating District Judge of Shahabad, dated the 4th June 1880, affirming the decree of Baboo Bhugobutty Churn Mitter, First Munsif of Arrah, dated the 7th February 1880.

defendants took exception to the form of the suit on the ground that they were separately in possession of separate plots of land, and that they should not have been sued jointly in one suit. On the merits they alleged that they were in possession of the land as tenants and not as trespassers.

The plaintiffs obtained decrees in the lower Court which were confirmed on appeal. Two special appeals were preferred to this Court, and it was urged on behalf of the (defendants) appellants that the suits should have been dismissed both on the grounds of multifariousness as well as of limitation.

A Division Bench of this Court decreed these appeals. The learned Judges were of opinion that, although the suit, as framed, was bad on the ground of multifariousness, yet the defendants were not prejudiced thereby. They further held that as the defendants had held the land in dispute *as tenants* from 1265 (1858-59), limitation could not be set up against the landlords. But they dismissed the suits upon the ground that the defendants having been in possession as tenants could not be evicted by suits brought on the allegation that they were trespassers.

Then the plaintiffs joined together and brought this and five other suits giving to the defendants in Baisak 1286 (April-May 1879) notices to quit.

[306] The defendants contend that they are guzashta tenants, and therefore cannot be ejected otherwise than under the provisions of. 52, Beng. Act VIII of 1869.

They allege that the whole of the 78 bighas is part and parcel of 200 bighas which formed their guzashta holding in Mouzah Sarendra, the property of the Maharajah of Domraon. That by the action of the river Ganges the 78 bighas remained submerged for a certain time. That when the land reappeared Dewan Ram Jewan Singh and Ram Coomar Singh claimed it as appertaining to Baharwar, a mouzah contiguous to Sarendra. The Maharajah did not choose to claim it as part of Sarendra, but alleged that it appertained to Chuk Nowranga. The takbust authorities ultimately decided the dispute in favour of the Dewans. That at the time of the settlement in the year 1868 it was treated *as lowfir* land of Baharwar, and was settled with Dewan Ram Jewan and Ram Coomar, their (the defendants') rights as cultivators being recognized. They further alleged that they were always willing to pay to the settlement-holders the proper rent due, but it was not received, the landlords demanding higher rents. They admit that the rent was not deposited in Court as provided by law.

The Munsif decreed the suits, holding that the defendants could not plead right of occupancy, as they, upon their own showing, had not paid any rent on account of the land in dispute either to the plaintiffs or to the *maliks*. The District Judge has upheld the decrees upon the ground that the defendants had failed to prove possession of the identical land now in dispute for more than twelve years.

It is clear that the ground taken by the District Judge is untenable. In the former suit this Court came to the conclusion that the defendants were, upon the judgments of the lower Courts, found to have been in possession of the land in dispute from 1265 (1858-59). Therefore the fact that they held the disputed land as tenants of the plaintiffs and their lessors for more than twelve years was conclusively found in the former litigation. The learned counsel for the plaintiffs fairly admitted this; but he contented that the Munsif's view of the law is correct, and that the payment of rent is a condition precedent to a ryot's acquiring a right of occupancy.

[307] Several cases were cited in the course of the arguments; but it seems to us that none of them contain any authoritative ruling upon this point. They contain mere expressions of opinion supporting either the one or the other view of the question.

Neither have we been able ourselves to find any case in point. The question, therefore, comes on for decision for the first time before us.

We are of opinion that the decision of the Munsif upon this point is not correct. Section 6, Act VIII of 1869, says: "Every ryot who shall have cultivated or held land for a period of twelve years shall have a right of occupancy in the land so cultivated or held by him, whether it be held under pottah or not, so long as he pays the rent payable on account of the same." It is clear from the language of the section that for the acquiring of the right of occupancy two conditions only are necessary, *viz.*, (1), the cultivation or holding of land for a period of twelve years; and (2), that the person holding or cultivating the land should be a ryot. No doubt in many cases the fact of non-payment of rent would be a valid ground for holding that the land was held not as a *ryot* but as a trespasser. But where, notwithstanding non-payment of rent, the holding or cultivation as a ryot is established for twelve years, the essential conditions of the section are fulfilled. The Munsif was of opinion that the words "so long as he pays the rent payable on account of the same" show that the payment of the rent is an essential requisite for the acquiring of the right of occupancy. But he is mistaken in this, because the section says that a ryot, etc., shall have a right of occupancy so long as he pays the rent, etc.; *i.e.*, a ryot who fulfils the two conditions mentioned above shall have a *right to occupy* the land (which means he cannot be evicted against his will) so long as he pays rent, etc. Therefore, the acquiring of a right of occupancy is dependent only upon the two conditions mentioned above, but the *maintaining* of it is further dependent upon another condition, *viz.*, payment of rent.

It was contended that it would be anomalous to hold that, although a right of occupancy may be acquired by a ryot who has not paid any rent, yet the moment it is acquired it would be extinguished if the payment of the rent be withheld. But [308] reading s. 6 along with ss. 22 and 52 of the Rent Act, it would appear that the construction we adopt is not open to this objection. No doubt non-payment of rent works as a forfeiture of the rights of occupancy and renders a ryot, whether he has a right of occupancy or not, liable to be evicted (see s. 22). But a ryot having a right of occupancy cannot be evicted otherwise than in execution of a decree or order under the provisions of the Rent Act. Therefore, before a landlord can really reap the benefit of the forfeiture of a right of occupancy incurred by non-payment of rent, he must bring a suit to eject the ryot, and whenever such a suit is brought, the ryot will have the power to prevent the forfeiture by paying the arrears of rent under the provisions of s. 52. In this respect s. 52 makes no difference between an occupant and non-occupant ryot. Both have the same privilege of preventing eviction by the payment of the arrears of rent within a certain time.

For these reasons we are of opinion that the defendants are ryots possessing a right of occupancy. The decrees of the lower Courts are, therefore, set aside, and the plaintiffs' suit dismissed with costs throughout.

This judgment governs Ap. Decrees Nos. 1693 to 1697.

Maclean, J.—I concur in dismissing the plaintiff's suits.

The position of the defendants as tenants since 1265 (1858-59) is conclusively established by the decision of this Court, dated 23rd July 1877 ; and , although there are some passages in that decision which may have led the plaintiffs to suppose that the defendants could not successfully set up a right of occupancy, I am unable to find authority for the proposition that an occupancy tenant (ryot) who, from any cause, has not paid his rent during his occupancy, can be ejected save under a decree for arrears. It seems clear to me that an occupancy right is " the right resulting from the connexion between the occupying tenant and the land which he occupies for a space of twelve years." *Narendra Narayan Roy Chowdhry v. Ishan Chandra Sen* (13 B. L. R., 274, see p. 289 per Jackson, J.). It is no doubt true that the right which is acquired by occupation as a tenant must be *maintained* by payment of rent, and [309] that on " the tenant failing to do so either from inability or from unwillingness the possession returns to the proprietor, the contract between him and his tenant being no longer in force ;" *Prosono Koomar Tagore v. Rammohun Doss* (S. D. A., 1855, p. 14). But the law provides for the reentry of the landlord in a particular manner, *viz.*, by ejectment upon a decree for arrears under the provisions of s. 22, Beng. Act VIII of 1869, subject however to the occupying tenant's privilege of avoiding the ejectment by payment within fifteen days of (s. 52, Beng. Act VIII of 1869).

In this view of the law I find that the defendants are not liable to be ejected under notice.

Appeal allowed.

[9 Cal. 309]

APPELLATE CIVIL.

The 1st August, 1882.

PRESENT :

MR. JUSTICE WILSON AND MR. JUSTICE FIELD.

Futtehma Begum and others.....Plaintiffs

versus

Mohamed Ausur and others.....Defendants.*

Second Appeal—Findings of fact—Procedure of the High Court— Interest—Mortgage bond.

Where the lower Appellate Court has clearly misapprehended what the evidence before it was, and has thus been led to discard or not give sufficient weight to important evidence, and to give weight to other evidence to which it is not entitled, and has thus been led not into any mere incidental mistake, but totally to misconceive the case, the High Court will interfere in second appeal, though it is not the ordinary course of procedure for it to interfere in such cases with any findings of fact which have been arrived at by the lower Appellate Court.

In a suit on a mortgage bond the plaintiffs are entitled to recover the agreed rate of interest without any deduction.

THIS was a suit for the recovery of Rs. 1,000 as principal, and a further sum as interest due on a bond executed by defendant No. 1, Mohamed Ausur, and his deceased wife Shurifunnissa Bibi on the 29th Choitro 1274, corres-

* Appeal from Appellate Decree, No. 496 of 1881, against the decree of T.M. Kirkwood, Esq., Judge of Mymensing, dated the 29th December 1880, reversing the decree of Baboo Nobin Chunder Ghose, Subordinate Judge of that district, dated the 29th March 1880.

ponding with the 10th April [310] 1868, in favour of one Khotiza Sultan, the sister of the first two plaintiffs, and the mother's sister of the third plaintiff.

Originally separate suits were brought by plaintiffs Nos. 1 and 2 in the Bazitpur Munsiff's Court, in the year 1875, for their separate shares in this debt, of which they each claimed a $5\frac{1}{2}$ -anna share. The Munsiff in both cases decreed the claims, but the Subordinate Judge, on appeal, reversed that judgment, both on the merits and also on the ground that the plaintiff's could not sue separately, the bond being one and the same. The two plaintiffs then proffered a special appeal to the High Court, when all the proceedings were set aside, and they were directed to bring a joint suit, if so advised, on condition of their depositing the costs of the respondents in all Courts within two months. The Subordinate Judge's order was dated the 11th July 1876, and the High Court's conditional order was passed on the 3rd July 1877, and that was made absolute on the 3rd September following, all costs having been deposited. The present suit was instituted on the 30th May 1879 in the Court of the Subordinate Judge.

Several issues were raised by the defendants, and amongst them were the following:—

(1) Whether the suit could be maintained in the absence of a certificate under Act XXVII of 1860.

(2) Whether the suit was barred as *res judicata* by reason of the judgment of the Appellate Court in the former suit.

(3) Whether, assuming the order to withdraw the former claim to have been unjustly made, a second fresh suit could lie.

(4) Whether by reason of a portion of the money covered by one and the same bond not having been included in the former claim, the same should not now be held to have been relinquished.

(5) Whether the suit was not barred by limitation.

(6) Whether the plaintiffs were the rightful heirs of Khotiza Sultan, and whether the solenama was a *bond fide* document.

(7) Whether the money bond was genuine, and the loan had been actually advanced.

The Subordinate Judge found that a certificate under Act XXVII of 1860 had been granted; that the suit was not barred as *res judicata* as the decision had been set aside by the High Court; and also decided the fourth and fifth [311] issues in favour of the plaintiffs. He also found that plaintiffs Nos. 1 and 2 were the heirs of Khotiza Sultan, who each of them taking a $5\frac{1}{2}$ -anna share had given up by a deed of agreement a 5-anna share to the plaintiff No. 3, who was the son of the first plaintiff.

With regard to the bond he held it proved that defendant No. 1 and his wife had borrowed Rs. 1,000 from Khotiza Sultan, the bond being executed on behalf of the wife by one Amzad, by virtue of an am-mokhtarnama, and that the property was mortgaged for the debt. The bond was duly registered. He accordingly decreed the suit with costs.

On appeal this decree was set aside by the District Judge, and the defendants were awarded their costs in both Courts.

The plaintiffs now preferred a special appeal to the High Court.

Mr. Evans, Moonshi Mahomed Yusoof and Baboo Girish Chundra Chowdhry for the Appellants.

Moulvi Serajul Islam for the Respondents.

The Judgment of the Court (WILSON and FIELD, JJ.) was delivered by

Wilson, J—It is not the ordinary course of procedure for this Court to interfere in 2nd appeal with any findings of fact which have been arrived at by the lower Appellate Court; but we are well within the scope of the authorities in holding that where the lower Appellate Court has clearly misapprehended what the evidence before it was, and has thus been led to discard or not give sufficient weight to important evidence, and to give weight to other evidence to which it is not entitled, and has thus been led not into any mere incidental mistake, but totally to misconceive the case, this Court may interfere. Now in this case there were several material questions to be decided; the first was whether the bond sued upon was executed by Ausur. As to that the Judge of the lower Appellate Court said in his judgment at p. 15 of the Paper Book: "It appears to me that the evidence as to Ausur's signature to the bond is most unsatisfactory, and that that signature is in no way proved; (s. 67)* Evidence Act." If that finding stood by itself it might probably be that we should not interfere with it, [312] but it clearly refers to an earlier paragraph in the judgment, and that earlier paragraph shows that the reason why the lower Appellate Court was dissatisfied with the evidence of the witnesses was that he did not think they were present at the time, for he observes that not one of them says that he saw Ausur execute the bond; in other words he understands them not as speaking of something which was done while they were present, but of a transaction, the description of which they had heard from others. It appears to us that this is a clear misapprehension on the part of the Judge, and that these witnesses clearly intended to speak as of a thing they had themselves seen. That seems to us clear from their direct examination, and in the case of several of them it is made still more clear from their cross-examination, from the tenor of which it seems to us that all parties present at the trial understood that they were speaking of a transaction effected in their presence. This misapprehension on the part of the Judge in the lower Appellate Court justifies us in remanding the case for him to reconsider his finding upon that point. The next point is as to the execution of the bond by Amzad on behalf of Shurifunnissa. As to that the case stands on precisely the same footing as it does as regards the execution of the bond by Amzad. Then there remains the question as to the existence of the mokhtarnama, under which it is said that Amzad executed the bond on behalf of Shurifunnissa, and there the Judge in the lower Appellate Court appears to us to have again fallen into somewhat similar errors. The most important witness as regards this is Gour Chunder Dass, and the learned Judge distrusts the evidence of this witness as to the mokhtarnama on the ground that it was not produced in the 1875 suit. That is an observation that would be entitled to great weight if it was suggested that it had been fabricated since 1875, but when it is clear on the evidence that it existed long before 1868, it appears that the Judge has been seriously misled. Then, again, speaking of the evidence of the same witness, he says that according to him the mokhtarnama was given by Shurifunnissa only and not by her and Ausur; and in this he finds a discrepancy between the evidence of this and the other witnesses. That is also clearly a mistake. The witness only says that a mokhtarnama on the part of Shurifunnissa was produced, and he is [313] speaking of a time at which the only question of the slightest importance would be whether it was executed by Shurifunnissa. Ausur the husband went there to execute for himself, and the question was how was the wife represented.

Proof of signature and hand-writing of person alleged to have signed or written document produced.

* [Sec. 67:—If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the hand-writing of so much of the document as is alleged to be in that person's hand-writing must be proved to be in his hand-writing.]

Then according to him the mokhtarnama on his behalf is produced to prove her authority for the execution of the bond. There is, therefore, a clear misapprehension on the part of the Judge as to the meaning of this evidence. Then speaking of the same document he says that one of the witnesses, Mohurru Mir, to whom a power was given to register the document, and who may have been presumed to have some acquaintance with its contents, has been examined, but has not been asked a word about it, while it appears on the evidence that Mohurru was examined about it, and made certain statements concerning it. These seem to be the considerations which led the Judge of the lower Appellate Court to reject the truth of the story as to this mokhtarnama, and as they seem to us to be founded on mistakes of fact, the learned Judge should have an opportunity of reconsidering his views. In remitting the case to him and asking him to reconsider his findings, we think it right to point out that the matters mentioned by him at page 18 with regard to the registration in 1868, and the use of the mokhtarnama during the same year, and the other evidence in the case as to the existence of this document at and about that time that these matters appear to us entitled to very great weight.

The case will, therefore, go back to the Judge in the Court below for reconsideration. That being so, it becomes necessary to deal with two questions that have been raised before us—one the question of certificate, and the other the question of interest. If the ultimate finding in the lower Appellate Court should be still in favour of the defendants, these two questions do not arise; otherwise they do. It was held in the lower Appellate Court that this suit could not be maintained for want of a certificate to the estate of Rabia. But on the facts of the case it does not appear to be so, because, under the exception in the section in question, no certificate is required when there is no doubt as to the title of the party claiming the money. Section 2, Act XXVII of 1860 says: "Unless the Court shall be of opinion that payment of the debt is withheld from fraudulent or vexatious motives, and not [314] from any reasonable doubt as to the party entitled." Now if the plaintiff's story be true, then the defendants who deny their liability must be acting fraudulently, as there can be no reasonable doubt that all the parties who may be entitled to these sums of money are plaintiffs in the suit. Then the question of interest arises in this way. The Judge says (page 13 of the Paper Book): "But for my finding on the certificate matter, and supposing the bond to be genuine, I should allow 18 per cent. per annum interest from the 10th April 1868 to the 10th October 1868, and (as damages) six per cent. per annum from the date on which the 1875 suit was instituted, to the date of decree in the present suit;" and so on: that is to say, he disallows the interest at the rate agreed in the bond for a certain very considerable period. That, it appears to us, is wholly irregular and contrary to law. If the bond be genuine, the plaintiffs are entitled to recover the agreed rate of interest without any deduction. It would be a grave injustice if it were not so, as the defendants would thereby be allowed to keep the money in their pockets without paying interest for it. The costs will follow the result.

As the case has been pending for a very long time, the record will be sent down at once.

Appeal allowed and case remanded.

NOTES.

[This case which was referred to in (1885) 7 All. 649; (1885) 12 Cal. 563 (565) was overruled by the Privy Council in 1890) 18 Cal. 23.]

[=7 Ind. Jur. 415]
[316] APPELLATE CIVIL.

The 9th August, 1882.

PRESENT :

MR. JUSTICE MITTER, OFFICIATING CHIEF JUSTICE AND

MR. JUSTICE MACLEAN.

Ananda Bibee.....Plaintiff

versus

Nownit Lal and another.....Defendants.*

Hindu Law—Inheritance—Mitakshara—Daughter-in-law.

Under the Mitakshara and usages obtaining in the district of Behar a daughter-in-law, whose husband has predeceased his father, is not in the line of heirs of her father-in-law.

Per MITTER, J.—A daughter-in-law, not being a joint owner with her father-in-law, cannot after his death take his estate by right of survivorship.

THIS suit was instituted on the 10th May 1879. The plaintiff, the widow of Mangli, who predeceased his father Gocul Chand, whose father Muni Lal was the son of one of two sisters Dukho Bibi and Sukho Bibi. The defendants were the representatives of Lal Bahadur and Ram Bahadur, the two brothers of Dukho Bibi and Sukho Bibi.

The plaintiff alleged that by a deed of gift, dated the 17th Magh 1195, F.S. (8th Feb. 1788) Lal Bahadur and Ram Bahadur had granted the ancestral property in dispute to their sister Dukho Bibi, and had put her in possession of it; that on her death Muni Lal had come into possession, and on his death Gocul Chand had come into, and held possession till his death in 1280 (1873); and that since then the plaintiff had been, and still was, in possession. That by an order, dated the 14th December 1878, in a mutation proceeding under Beng. Act VII of 1876, an application by her for the registration of her name as proprietor had been rejected, and the names of the defendants had been ordered to be registered.

She claimed that on her right as proprietor being established, her possession might be confirmed.

The plaintiff did not produce the deed of gift, but alleged that it had been fraudulently taken from her possession by the first defendant.

The defendants denied the gift set up, and the alleged wrongful [316] abstraction of the deed. They alleged that possession of the land had never been parted with by their ancestors or by themselves, and also that Gocul Chand had been their servant. They further questioned the plaintiff's title as heiress of her father-in-law Gocul Chand.

Three issues were framed by the lower Court—

1st.—As to the plaintiff's right as heiress of her father-in-law.

2nd.—As to the truth of the alleged gift to Dukho Bibi and the abstraction of the deed.

3rd.—As to the plaintiff's possession and that of her ancestors.

Except as to the alleged abstraction of the deed of gift by the first defendant, the lower Court found in favour of the plaintiff on the second and third issues, but found against her on the first. The suit was therefore dismissed.

* Appeal from Original Decree, No. 212 of 1880 against the decree of Baboo Koylash Chunder Mookerjee, Officiating Second Subordinate Judge of Mozufferpore, dated the 18th May 1880.

The plaintiff appealed to the High Court on the issue found against her, and the defendants filed a cross appeal.

Baboo *Guru Dass Bannerjee* and Baboo *Golap Chunder Sircar* for the Appellant.

Baboo *Hem Chunder Bannerjee* and Munshi *Mahomed Yusoof* for the Respondents.

The following **Judgments** were delivered :—

Mitter, J., after referring to the facts and evidence, continued as follows :—

The possession of the disputed mouzah by Gocul Chand and his father is not therefore shown by any evidence to have been permissive. Whether this possession was referable to the title derived under the alleged deed of gift to Dukho Bibi is not made clear upon the evidence. If the plaintiff's allegation of the abstraction of the deed of gift from her by the defendant No. 1 be not correct, then there is no evidence to connect the possession of Gocul Chand and his father with the title under the alleged deed of gift. The lower Court has rejected this part of the plaintiff's story. I see no reason to dissent from that opinion.

But although the title under the deed of gift is not proved, the possession of Gocul Chand and his father for more than [317] twelve years being established, and it being not shown that that possession was with the permission of the defendants and their ancestors, it seems to me that we must hold that Gocul Chand had a good title to this property.

This brings us to the question of the Hindu law raised in the case, *viz.*, whether, after the death of Gocul Chand, the plaintiff can claim any right to the disputed property entitling her to the possession of it as against the defendants.

As to the question of possession after Gocul Chand's death it seems to me to be clear upon the evidence that it remained with the plaintiff till the Land Registration order was passed. The Sub-Judge says that the possession of the plaintiff "is not yet extinct"; but it is difficult to understand how it can be said, after the adverse order was passed under the Registration Act under s. 59, that the plaintiff's possession continued. The present suit may, under the Rulings of this Court, be considered as one for recovery of possession. Upon the face of the plaint it is clear that the plaintiff, at the time of the institution of the suit, could not have been in possession, and if she can make out her title she, in my opinion, would be entitled to a decree for possession.

As regards the title of the plaintiff derived from Gocul Chand it has been contended before us (1) that a daughter-in-law, under Mitakshara law, is entitled to inherit; (2), that, supposing that she is not in the line of heirs, the plaintiff is entitled to the property in dispute by right of survivorship, as she, during Gocul Chand's lifetime, was a member of a joint Hindu family with him; and (3), that, supposing that these contentions are not valid, the plaintiff having undoubtedly a maintenance charge upon the disputed property, is entitled to the possession of it, and to have her title declared as against the defendants, who have no sort of right to it.

We shall deal with these three questions in the order in which they have been raised before us.

On a careful examination of the digests of Hindu law which are considered of authority in the district from which this case comes, I am clearly of opinion that the daughter-in-law is not in the line of heirs at all.

The authorities most respected in Behar are the Mitakshara [318] and the Viramitrodaya. It was contended before us that, according to the Mitak-

shara, a daughter-in-law is entitled to succeed as a gotraja sapinda. It has been settled now by more than one decision that the word sapinda is used by the author of the Mitakshara in the chapters on inheritance, in the same sense in which it is defined by him in the Achara Kanda, i.e., in chapters on Rituals. See *Lallubhai Bapubhai v. Mankuwarbai* (I. L. R., 2 Bom., 388); also *Bharmangavda v. Rudrapgavda* (I. L. R., 4 Bom., 181); and *Umaid Bahadur v. Udoi Chand* (I. L. R., 6 Cal., 119). It has been contended that, according to this definition of sapinda, a daughter-in-law comes within that class, and that as the author of the Mitakshara in part II, chapter II, s. 5, page 1 lays down, "if there be not even brothers' sons, gotrajas share the estate. Gotrajas are the paternal grandmother and sapindas and samanadakas"—all female sapindas succeed gotrajas. But this contention cannot be maintained in the face of paras. 3, 4 and 5 of the same section. Para. 3 says that on failure of the paternal grandmother, the heirs are samana-gotraja sapinda; then in para. 4 the author thus explains the rule laid down above: "Here, on failure of the father's descendants, the heirs are successively the paternal grandmother, the paternal grandfather, the uncles and their sons"; then para. 5 says: "On failure of the paternal grandfather's line, the paternal great-grandmother, the paternal great-grandfather, his sons and their issue inherit. In this manner to seventh degree must be understood the succession of kindred belonging to the same family generally."

In these passages the author of the Mitakshara lays down a compact series of heirs from the father down to the issues of the great-grandfather entitled to succeed as sapindas. There is no room for introducing the wives of the sapindas as heirs in this compact series. For instance, on the failure of the father's descendants, the paternal grandmother succeeds. This being an inflexible rule, the wives of the father's descendants cannot have any place in the compact series of heirs from the father down to the grandmother. If the contention under consideration were correct, then, in a competition between the paternal grandmother and a brother's widow, the latter would be entitled to inherit, but in the [319] face of the positive rule laid down in paragraph 4, a brother's widow cannot have any claim to inheritance in preference to the paternal grandmother. The same observations will apply to the wives of the descendants of the paternal grandfather.

But it has been contended that paragraphs, 3, 4 and 5 cited above do not exhaust all the sapinda heirs; they only lay down that collaterals, who are the descendants of the father, grandfather, and great-grandfather, two degrees removed, are entitled to the inheritance in the order laid down in them; and that the other sapindas would come in under the class gotrajas. The words "descendants and sons" used in these paragraphs have been held in the decision of Mr. Harrington, quoted in *Rutheputty Dutt Jha v. Rajunder Narain Rao* (2 Moore's I. A., 132), as used in their generic sense, meaning descendants generally. Mr. Harrington says: "The term *putra* or son, in the Mitakshara and its commentary the *Sabodhene*, is frequently used as a generic term for male issue or descendant, and must be so construed in several parts of the Mitakshara, or the grandson, as well as the great-grandson would be excluded from the immediate succession, though acknowledged in every system of Hindu law to represent their deceased father and grandfather, and entitled with sons to share the estate of a person leaving sons, grandsons, and great-grandsons, the father of the grandson, and father and grandfather of the grandson being previously dead. This principle appears to be recognized in the Mitakshara and both its commentaries, in the third paragraph of the introductory section and notes referring thereto. (See page 238 of Mr. Colebrooke's Translation.) In that paragraph, after stating that the wealth of the father, or of the

paternal grandfather, becomes the property of his sons or of his grandsons in right of their being his sons or grandsons, and this is an inheritance not liable to obstruction,' it is immediately added, 'but property devolves on parents or uncles' brothers and the rest, upon the demise of the owner, if there be no male issue, and thus the actual existence of a son and the survival of owner are impediments to the succession, and on their ceasing, the property devolves on the successor, in right of his being uncle or brother; [320] this is an inheritance subject to obstruction. The same holds good in respect to their sons and other descendants.' Here it is manifest the words translated 'male issue' and a 'son' were not meant to exclude grandsons before mentioned, and the two commentators agree in construing the last clause to intend 'the sons or other descendants of the son and grandson.' The same construction must, I think, be put on the words 'sons' and 'issue' (*putra* and *śiṣya*), in the 4th and 5th paragraphs of the fifth section, and second chapter of the Mitakshara, and this interpretation is indeed indicated by expressions in the same paragraphs, *viz.*, 'on failure of the father's descendants' (*santana*), and 'on that of the paternal grandfather's line' (*santana*). To adopt the construction proposed by the appellant would be to cut off all the descendants below the grandson of the father, grandfather and every other ancestor, and would render nugatory the provisions in the Mitakshara, as well as in the other books of law which expressly state 'the succession of kindred belonging to the same family, and connected by funeral oblations to the seventh degree, or if there be none such, the succession devolves on kindred connected by libations of water, and they must be understood to reach to seven degrees beyond the kindred connected by funeral oblations of food, or else as far the limits of knowledge as to birth and name extend.' (See Translation of Mitakshara, part II, chap. II, sec. V, paras. 5 and 6)".

If this be the correct meaning of the words, "sons and descendants" as used in paragraphs 3, 4 and 5, it is quite clear that they contain an exhaustive enumeration of all the sapindas, and the females, excepting those that are enumerated by name, would be necessarily excluded. But, according to the spiritual benefit theory, which, in the opinion of the author of the Viramitrodaya, determines the position of gotrajas and other heirs the words "sons or descendants" would include only grandsons and great-grandsons. According to Apararka, a digest writer of later date than the Mitakshara, the word "sons or descendants" include only sons, grandsons and great-grandsons. See Tagore Law Lectures, 1880, p. 648. If this latter view be correct, then no doubt paragraphs 3, 4 and 5 cited above would not be an exhaustive enumeration of the sapindas. But the last words [321] of paragraph 5, *viz.*, "in this manner must be understood the succession of samanagotra sapindas," indicate the mode in which the list of enumeration is to be completed. If we are to complete the list by following that mode, then the wives of sapindas would have no place in that list.

Then again the author of the Mitakshara is a very strong advocate of woman's right; he has gone to the length of laying down that where women inherit their right is absolute. If in his opinion the wives of sapindas were entitled to succeed, he would have certainly expressly indicated his opinion in the section treating of the succession of gotrajas.

There is one more consideration arising from the passages cited above, which, in my opinion, almost conclusively shows that it was not the intention of the author of the Mitakshara to confer any heritable rights upon female sapindas not specifically mentioned. It is thus an unmarried daughter of any ancestor within six degrees would be entitled to inherit as a sapinda according to the contention under our consideration. Thus, for instance, an uncle's

unmarried daughter would be entitled to inherit in preference to a brother's great-grandson, and supposing she dies after marriage leaving a son, that son, who is merely a bandhu of the last male owner, would obtain the property, although there is a samanagotra sapinda in existence. This could never have been the intention of the author of the Mitakshara; because, according to the scheme of succession laid down by him, a bandhu has no heritable rights in the presence of a gotraja, however remote his connection may be with the deceased.

Then, again, a married daughter of a sapinda would not be in the line of heirs at all, because she would not be a samanagotra sapinda, neither would she come within the category of bandhus, because it is admitted that the class of heirs indicated by the term bandhu includes males only. It seems to me that it could not have been the intention of the author of the Mitakshara to make such a distinction between a married and an unmarried female sapinda relative. In the one case she would occupy a very high position in the line of heirs; in the other, she would be nowhere.

For these reasons it appears to me that, on the Mitakshara [322] itself, there is no foundation for the contention that the wives of the sapindas are entitled to inherit as sapindas.

Whatever doubts there may be as to the validity of the contention under our consideration with reference to the Mitakshara, the Viramitrodaya is clearly against it. The author of the Viramitrodaya in chapter III, part 7, treats of the succession of gotrajas. He quotes paragraph 1, chapter II, section V of the Mitakshara as defining who the gotrajas are. Then he refers to the opinion of the authors of the Smṛiti Chandrika and Dayabhaga to the effect that the term gotraja is a compound denoting males only; then he controverts this opinion. Having controverted it he says: "According to the previously cited interpretation put upon the text of Sruti (therefore women are devoid of the senses, etc.) by the venerable Vidyaranga in that text Sruti does not refer to a prohibition of inheritance, and therefore no difficulty arises, nor is any explanation necessary. But it should be remarked that how can that interpretation be accepted when it is in conflict with the text of Baudhayana. Granting that the word Indriya does mean the Soma juice in conformity with the context, yet, inasmuch as there is an absence of another text declaring the incapacity of females to inherit, and as it is not possible for the present Smṛiti to be unsupported, and as therefore the inference of the existence of a prohibition is necessary to justify the assertion of a fact, *viz.*, (that females are deemed incompetent to inherit), we should explain the present text just as in the instance, 'therefore an unknown embryo being killed (a man becomes) murderer of a Brahmana.'"

A few words of explanation are here necessary to explain the above passage. The text of Baudhayana, referred to above, is to the following effect: "A woman is not entitled to inherit, for thus says the Veda. Females and persons deficient in the organs of sense are deemed incompetent to inherit." This Vedic text Vidyaranya, a commentator on the Taittiriya Veda, interpreted in a different way, so that it would have no reference to inheritance.

Referring to this interpretation, the author of the Viramitrodaya says that this interpretation cannot be accepted, because it is in conflict with the text of Baudhayana. Then he argues that [323] supposing the interpretation of the Vedic text of Vidyaranya is correct, it must be presumed that there is another text in the Sruti justifying the exclusion of the females, for a text of Smṛiti must have a text of Sruti to support it. The existence of a text of Sruti in this instance must be presumed in the same way as in the instance of the text of Smṛiti to the effect, "therefore an unknown embryo being killed, etc., etc."

According to the opinion of Viramitrodaya, therefore, women are not generally entitled to succeed unless they are specially mentioned. A daughter-in-law is not one of these enumerated female heirs as given in the Viramitrodaya. The author of the Viramitrodaya expresses the same opinion in another passage, see page 175 of Baboo Golap Chunder Sirkar's translation. It is to the following effect: "As for the text of Sruti, viz., 'therefore women are devoid of senses and incompetent to inherit,' and for the text of Manu based upon it, viz., 'indeed the rule is that women are always devoid of senses and incompetent to inherit,' these are both to be interpreted to refer to those women whose right of inheritance has not been expressly declared." Then again in another passage in page 244, the author of the Viramitrodaya expressly lays it down that a daughter-in-law is only entitled to maintenance and not to inheritance. He says, "but the daughter-in-law and others (of the same sex) are entitled to food and raiment only, for the nearness as a sapinda is of no force when it is opposed by express texts. Since a text of the Sruti declares: 'Therefore women are devoid of senses and incompetent to inherit,' and a text of Manu founded upon it says, 'indeed the rule is that devoid of the senses, and incompetent to inherit, women are useless.' The conclusion arrived at by the author of the Smriti Chandrika, Haradatta and other southern commentators as well as by all the Oriental commentators, such as Jimatavahana, is that those women only are entitled to inherit, whose right of succession has been expressly mentioned in texts such as 'The wife and the daughters also, etc.,' but that others are certainly prohibited from taking heritage by the texts of Sruti and of Manu."

The learned pleaders for the plaintiff, appellant, further relied upon passages from Nirnaya Sindhu, Ballambhatta, Subodhini and [324] Baijanti. In none of these works on Hindu law is there any authority for the broad contention that *all* female sapindas are entitled to inherit. All that can be said on their authority is, that some of them have enlarged the list of female heirs entitled to succeed. Of these the daughter-in-law is mentioned as one of the heirs in Baijanti, in Ballambhatta and Nirnaya Sindhu. This last mentioned work treats of Rituals, and is therefore hardly entitled to any authority on a question of inheritance. Kamalakura, the author of Nirnaya Sindhu, is also the author of Vivada Tandava, a treatise on the law of inheritance. In this latter work he in most emphatic words deprecates the heritable rights of women other than those expressly enumerated as heirs. See Tagore Law Lectures of 1880, page 664. Baijanti's and Ballambhatta's opinion being not in accordance with the usage obtaining in Behar and the North-Western Provinces, as will be shown hereafter, cannot be followed in preference to the Vironiboddy.

Before examining the decided cases upon this point it may be noticed here that of the European text writers, Sir Thomas Strange, in Vol. I, page 146, lays down broadly that, "according to the general principles of Hindu law, the sex is not entitled to inherit except in a few specified instances." West and Buhlor discuss this question, and are inclined to the opinion that, in countries governed by the Mitakshara law, wives of sapindas are entitled to inherit as sapindas.

As Smriti Chandrika and Dayabhaga are quite clear upon the point (*i.e.*, their opinion is against the contention of the appellant), we shall not refer to any cases decided in accordance with these two digests. We shall not also refer to any Bombay cases, because the law upon the subject has now been settled in that Presidency by the decision of the Judicial Committee in the case of *Lallubhai Bapubhai v. Cassibai* (I. L. R., 5 Bom., 110). This last mentioned decision is entirely based upon the usage obtaining in the Presidency of Bombay. Their Lordships distinctly say that the Mitakshara is silent upon

the point. They are also of opinion that the contention is not sound according to the Viramitrodaya.

Of the cases decided by this Court and the late Sudder Dewany Adawlut of Calcutta, we find instances in which the right of inheritance [325] of the wife of a deceased sapinda was not set up, although if it had been set up it would have materially affected the decision of the Court. For instance, in *Baboo Shewsahai Singh v. Balwunt Singh* [S. D. A. (1858) 400], the competition to inheritance lay between a daughter's son and a daughter-in-law. The daughter-in-law's right was put upon the question of fact, whether or not her husband survived his father. Similarly in *Maharajah Ram Kissen Singh v. Rajah Sheonundun Singh* (23 W. R., 412), the daughter-in-law's right was not set up. It is quite clear, if it could have been set up successfully in that case, the plaintiff would have been defeated, because he was a mere bandhu. In determining a question of usage, it seems to me that instances, where the particular usage in dispute was not set up, although it was of the utmost importance to set it up, are of great value. Such instances afford a very satisfactory basis for the conclusion that the usage in dispute is not really in existence. The Full Bench decision in *Lala Jot Lal v. Durani Koor* (B. L. R. Sup. Vol., 67), and the Full Bench case cited at page 669 of Tagore Law Lectures of 1880 by Baboo Raj Koomar Surbhadhikari, are also instances of this kind. The questions for decision in these cases were, whether the step-mother and the step-grandmother were heirs according to the Mitakshara law. It was decided that they do not come within the purview of the texts relating to the succession of the mother and the grandmother. It was not contended that, although they did not come within those texts, still they were entitled to inherit as sapindas.

In *Mussamut Soodeso v. Bisheshshur Singh* (S. D. A., N.-W. P., 1864 Vol. II, 375) it was decided that a sister-in-law (deceased brother's widow) is not in the line of heirs according to the Mitakshara law. See also *Thakooranee Deo Koonwur v. Thakooranee Gumbheer Koonwur* (S. D. A., N.-W. P., 1864, Vol. II, 284). In *Mussamut Murachee Koor v. Mussamut Ootma Koor* (S. D. A., N.-W. P., 1864, Vol. I, 171), it was decided that a daughter is entitled to succeed in preference to a son's widow, who is only entitled to maintenance. In *Ditraj Koonwur v. Sooltan Koonwur* (S. D. A., N.-W. P., 1862, Vol. I, 240), it was held that a son's widow is not an heir according [326] to the Mitakshara law. The last case upon the point is the decision of the Allahabad Court in *Gauri Sahai v. Rukko* (I. L. R., 3 All., 45). This case clearly lays down that, of the females, none but those that are specified by name are entitled to succeed. Against this consensus of opinion as expressed in these cases there is a solitary decision of the Court of the N.-W. P., which may be considered to lend some support to the contention of the appellant. It is the case of *Mussamut Bhuganee Daice v. Gopaljee* (S. D. A., N.-W. P., 1862, Vol. I, 306). The plaintiff in that case was the widow of the first cousin of the deceased proprietor, and the defendant was his great grandfather's great grandson. The plaintiff was joint in food with the deceased, while the defendant was separate from him. The case was decided in favour of the plaintiff on the ground of the right of survivorship. The Pundit upon whose opinion it was decided, did not put the right of the plaintiff upon the ground of sapinda relationship. This case has no relevancy to the question now under consideration, because it did not uphold the plaintiff's right on the ground of sapinda relationship. On the other hand, the circumstance that the Pundit consulted did not base his opinion upon the ground of sapinda

relation ship, affords some grounds for the conclusion that the usage in question does not exist in these districts.

Therefore, applying the same test which was applied by their Lordships of the Judicial Committee in the case of *Lalubhai Bapubhai v. Cassibai* (I.L.R., 5 Bom., 110), viz., the test of usage, it seems to me that the contention of the appellant is not sustainable. For all these reasons I am of opinion that, according to the Mitakshara law and usage obtaining in the district from which this case comes, a daughter-in-law is not in the line of heirs at all.

The next contention is that the plaintiff in this case is entitled to succeed by right of survivorship. It has been said that she, while her father-in-law, Gocul Chand, was alive, was living with him as a member of a joint Hindu family, and therefore on his death she is entitled to the property left by him. It seems to me that this contention is wholly untenable. The foundation of the right of survivorship is joint ownership. In this case it cannot for [327] a moment be contended that the plaintiff had any sort of ownership in the property in dispute during the lifetime of her father-in-law, Gocul Chand. This contention, therefore, in my opinion, fails.

Lastly, it has been urged that, as the plaintiff is entitled to her maintenance out of the property in dispute, and that as the defendants have no sort of right to it, she is entitled to have her right and possession confirmed as against them. But this argument proceeds upon the assumption that the defendants have no sort of right to the property in dispute. It seems to me that upon the facts admitted in this case, the defendants, as father's bandhus of Gocul Chand, are entitled to inherit the property left by him. According to the plaintiff, Muni Lal, the father of Gocul Chand, was the sister's son of Dukho, to whom the property in dispute was given by her brothers Lal Bahadur and Ram Bahadur. According to the defendants, Muni Lal was Dukho's own son. Whether the one or the other statement be correct, it is clear that Muni Lal was the sister's son of Lal Bahadur and Ram Bahadur. The defendants are the grandsons of either Ram Bahadur or of Lal Bahadur, therefore Muni Lal and the defendants are sapindas to each other. The defendants consequently being the father's bandhus of Gocul Chand in the absence of nearer heirs are entitled to the property left by Gocul Chand as his heirs. See *Umaid Bahadur v. Udoi Chand* (I. L. R., 6 Cal., 119). The plaintiff is certainly under the Mitakshara law entitled to maintenance out of the property left by Gocul Chand, but she has no title to the property as the heiress-at-law of her father-in-law.

The appeal must, therefore, be dismissed with costs.

Maclean, J., after referring to the facts and evidence, came to the conclusion that if the possession continued with the plaintiff's father-in-law and his father, the proprietary title was still in the defendants and their ancestors, and continued as follows :—

I would therefore reject the plaintiff's claim for a declaration of her title as proprietor. Neither do I think that she is entitled to a decree confirming her possession, inasmuch as (apart from the question as to the position of a daughter-in-law whose husband has predeceased his father) she has failed to prove her title.

[328] Upon the question so elaborately discussed, and depending on considerations of Hindu law, I shall say but little. In the view of the plaintiff's case which I have taken, the decision of the question is not necessary.

The claim of the plaintiff as daughter-in-law is founded upon the 5th section of the second chapter of Part II of the Mitakshara: "If there be not even brother's sons, gentiles (gotraja) share the estate" and again V. 3: "on failure of the paternal grandmother the kinsmen sprung from the same family with deceased and connected by funeral oblations (samana gotraja sapinda) namely, the grandfather and the rest inherit the estate."

It is perhaps unnecessary to say that the wife must be recognised as samana gotraja sapinda. Sapinda because she and her husband are the generators of one body; sagotraja or samana gotraja because on her marriage she enters the gotra of her husband. The next step for consideration is, whether she inherits under the rule "to the nearest kinsman (sapinda) (male or female) the inheritance next belongs," Manu IX, 187.

We have express authority for the heritable right of the widow, daughter, mother, grandmother, &c. (Mitakshara, Chapter II). The commentaries of Kiseswara and Balambhatta make no distinction between males and females, both being included in gotraja. The latter, Balambhatta, assigns a specific place to the widow of a predeceased son, next after the paternal grandmother. Nandu Pandita also (Vaijyanti) prefers the sons' widow to the daughter; but at present we are not called upon to assign a place to the daughter-in-law, having merely to decide whether she is entitled to take property which her husband would have taken in preference to the male representatives of a remote branch (cognates). The author of the Viramitrodaya, referring to a text of Baudhayana, deduces from it that females as a class are not entitled to heritage. He accepts, however, the right of those expressly mentioned, but he expressly mentions the daughter-in-law as entitled to food and raiment only. At the same time he points out that the paternal grandmother is not expressly mentioned any more than the wives of other gotraja sapindas by Jogeswara.

Upon such consideration, therefore, as I am able to give to the subject, it appears to me that we have three positions established:—

[329] (1) That while the grandmother and great-grandmother, etc., only are expressly mentioned, the wives of other sapindas would also succeed.

(2) That the Mitakshara does not exhaustively enumerate the sapindas.

(3) That the son's widow is a gotraja sapinda.

But while effect is given to these propositions in the Bombay Presidency, it seems to be conclusively understood that up to the present day females, not expressly mentioned, have never been recognised (perhaps it may be said have seldom claimed to be recognized) as entitled to succeed in Benares and the western portion of the Lower Provinces. A case was recently before us in reference to other matters in which an examination of the facts will show that the right of a daughter-in-law to succeed was raised but was rejected. The pundit's Vyavastha was opposed to the claim of the daughter-in-law as against that of the daughter's son, on consideration of Mitakshara law (A. O. D. 187-80). In *Gauri Sahai v. Rukko* (I. L. R., 3 All., 45) it is expressly noted that none but females expressly named can inherit, and the widow of a paternal uncle (a gotraja sapinda) is declared not to be an heir.

In *Ranee Pudmavati v. Baboo Doolar Sing* (4 Moore's I. A., 259) the widow of a deceased brother was defeated by gotraja sapindas of her husband and his brother (great-grandfather's grandsons). Perhaps this case is not clear authority, except as showing that the widow of a brother who predeceased was not recognized in preference to other sapindas.

No case has been cited as directly supporting the plaintiff's claim, and under these circumstances, though decidedly inclined to view it with favour,

I think that her success "would have such an effect in disturbing existing titles that it is safer not to run counter to that which appears to be the current of authority." The more so as my learned colleague comes to a conclusion which is opposed to the inclination I have in the plaintiff's favour. I concur in the order that the appeal should stand dismissed with costs.

Appeal dismissed.

NOTES.

[RIGHT OF INHERITANCE OF WOMEN NOT EXPRESSLY NAMED IN THE TEXTS—

In the Mitakshara schools of **Northern India**, they are excluded altogether even though their sons would be entitled to the inheritance :—9 Cal. 315; 3 All. 45; 12 M. I. A. 81; 28 All. 187; 307 dissenting from 22 All. 338; 5 All. 311; 2 C. P. L. R. 178; 10 C. P. L. R. 95; (1901) P. R. 100; 16 Cal. 367; 9 Cal. 725.

So much so, that their presence does not prevent the Crown taking by escheat :—(1889) 16 Cal. 367.

The Madras School recognises the rights of inheritance of women whose relationship to the *propositus* is traceable through either parent :—18 Mad. 168; 8 M. H. C. 88; 21 Mad. 263.

But not of those whose relationship springs from *marriage* :—19 Mad. 35; 18 Mad. 168.

Thus the step-mother is no heir; and so are the wives of *gotrajas* :—18 Mad. 168.

And those heirs that are recognised, come in as *bandhus* :—5 Mad. 241; 29; 14 Mad. 149; 17 Mad. 182; 18 Mad. 193; 15 Mad. 421, and are postponed to males even though remote :—31 Mad. 321.

The Bombay School recognises the heirship of both classes of heirs; but in the case of the former class of heirs, it confers an absolute estate :—2 Bom. 388; 15 Bom. 206; 31 Bom. 453; 24 Bom. 192; 21 Bom. 739 and in the case of the latter class, it confers only a qualified estate :—16 Bom. 716; 35 Bom. 389.]

[11 C.L.R. 554]

[330] APPELLATE CIVIL

The 31st July, 1882.

PRESENT :

MR. JUSTICE MITTER, OFFG. CHIEF JUSTICE, MR. JUSTICE WHITE
AND MR. JUSTICE MACPHERSON.

Prasidha Narayan Koer.....Plaintiff

versus

Man Koch.....Defendant.*

Occupancy, Right of, in Assam—Act X of 1859—Ejectment, Suit for.

Per MITTER and WHITE, JJ. (MACPHERSON, J., dissenting).—Act X of 1859 does not apply to lands situated in the Assam Valley district.

In a suit brought to eject a tenant of certain land situated in Assam on the ground that he was a trespasser, where it was shewn that he had held the land direct from the Government for a considerable time, and that the land had been made over during his tenancy to the plaintiff in exchange for certain other lands made over to the Government, and where the tenant claimed to have acquired a right of occupancy under Act X of 1879, and not to be liable to ejectment in the manner sought for.

* Appeal from Appellate Decree, No. 825 of 1880, against the decree of W. E. Ward, Esq., Judge of the Assam Valley Districts, dated the 4th February 1880, affirming the decree of Baboo Guru Persid Das, Extra Assistant Commissioner, vested with the powers of a Munsif of Mungaldai, dated the 25th June 1879.

Held, per MITTER and WHITE, JJ., that as that Act did not apply to lands situated in Assam, no such right could be claimed, and the suit being properly framed, the plaintiff was entitled to the relief he asked for.

IN this suit the plaintiff sought to eject the defendant from certain land situated in mouzahs Durgagon and Barowtola, in the sub-division of Mungaldai, Darrang, in the province of Assam. The land in question was formerly Government kheraj land, but at the time of the survey operations in 1283 (1876), it was transferred to the plaintiff by the Government in exchange for an equal quantity of land belonging to his estate. The appeal originally came on for hearing before a Division Bench composed of WHITE and MACPHERSON, JJ., and the judgment of that Bench, which sufficiently states the facts, was as follows :—

White, J.—This is an appeal by the plaintiff against the decree of the Judge of Assam, affirming a decree of the Extra Assistant Commissioner of Mungaldai dismissing the plaintiff's suit.

The suit is to eject the defendant from 5*b*, 4*c*, 17½*d*, of rupit land, occupied by him in mouzah Mungaldai. The defendant [331] originally held the land under Government, executing annual pottahs for the same at varying rents, and sometimes holding less, and sometimes a larger quantity of land than the land in suit. In 1283 (1876) an exchange of lands took place between the Government and the plaintiff, on which occasion the land in suit was by Government made over to the plaintiff. The defendant's last annual Government pottah expired in 1875. The suit was brought in 1879, and the defendant has paid no rent in the interval.

The plaintiff alleges in his plaint that, after the exchange was effected, he repeatedly asked the defendant to make some settlement with him or quit the land, and that in 1284 (1877) the defendant refused to come to a settlement.

The defendant, on the other hand, alleges in his written statement that he had from a long time before the British Government came to the country been in possession of the land in dispute from generation to generation; that he had got a pottah from Government and a right of occupancy in the land; and that he has a right to hold the land in dispute under the plaintiff in the same way that he held it under Government.

The pleadings of both the parties leave it vague as to the rate of rent or description of rent, about which the parties are disputing; but it appears from the judgment that the defendant is willing to accept the plaintiff as his landlord, provided he exacts no higher rent than he (the defendant) paid to Government, before the exchange was made. The plaintiff insists that the defendant must come to a new settlement with him, which means submit to an increased rent or to some new description of rent, or on the other hand must quit possession. The plaintiff has applied to him to take one or the other course, but he will do neither.

The first Court has dismissed the suit because, in its opinion, having regard to the annual pottahs which the defendant used to receive from Government, and to the Assam settlement rules, the defendant stands as regards the liability to ejectment, at least in as high a position as, and in some respects in a better position than, a Bengal ryot having a right of occupancy.

The lower Appellate Court draws a distinction between a ryot who has held under an annual pottah from Government, and one [332] who has held under a ten years pottah, and puts a totally different construction upon the annual pottah and the Government rules, and arrives at a totally different

conclusion as to the rights enjoyed by the defendant, but agrees in dismissing the suit on a not very intelligible ground, having regard to the above conclusions. He says "the Government may," in the case of a tenant holding under an annual pottah, as the defendant did, "rackrent up to any limit it pleases, and in this way if it was so minded would compel the cultivator to relinquish his land. As is well known Government doubled the rates all round ten years ago, and it may double them again to-morrow."

We had an abstract prepared of the annual pottahs which had been granted by Government to the defendant and his predecessors prior to the exchange, and it fully bears out this statement of the Judge.

The Judge proceeds to say that "though the annual tenant in Assam has no legal property in the lands held by him, there is no doubt that for a long series of years he has been practically given to understand that it will recognize his right to have his pottah renewed every year, so long as he consents to pay the Government revenue demanded of him." This demand, as is evident from the previous passage, may be an increased demand, or even an exorbitant one according to the Judge. What would be the remedy if the defendant refused to pay the increased demand? Or if he refused to come to a new settlement at the increased rent? I can see no other than an action of ejectment. His annual pottah having expired, he is holding on without a pottah; and although he is entitled to have another annual pottah offered to him at the expiration of the former pottah, yet if the rent in the new pottah may be an increased one, his right of re-settlement amounts to nothing more than a right to have the renewed pottah offered to him in the first instance, and if he won't accept the renewed pottah because the rent is increased, he must make way for some person who will agree to pay the increased rent, and if he will not quit, the Government must sue to eject him.

The District Judge, however, agrees with the First Munsif in dismissing the suit on the ground that the plaintiff is not entitled to [333] treat defendant as a trespasser, and this conclusion he came to in consequence of some hazy agreement which is to be collected from the evidence of the Extra Assistant Commissioner, and which the Judge himself states was unfortunately not put into writing. This agreement is in the early part of the judgment stated in these words: "The plaintiff was given clearly to understand that the exchange would not be permitted unless he respected the rights of the Government tenants in the lands made over to him." Now this is merely a statement of the position in which the plaintiff would after the exchange stand to the tenants of Government according to law. The exchange would not affect their rights in any way. They would acquire no fresh rights by the exchange, but what rights they had before the exchange they would retain.

Towards the end of the judgment this supposed agreement assumes a rather different shape. It is stated thus: "The plaintiff agreed to respect that *guarantee* by receiving the same rent from defendant as the defendant would have been called upon to pay Government had no exchange been effected." This guarantee in a few lines above is described as "an implied guarantee from Government that their lands shall be re-settled with them every year subject to the condition of paying the Government revenue demanded. This sets the whole thing at large again, for Government may, as the Judge has found, increase the rent, and accordingly their demand, as it likes.

I can make nothing of this hazy agreement. It appears to me not to affect the question at all. The effect of the exchange was to put the plaintiff in the place of Government having the same rights as Government possessed, neither more nor less.

I see no reason to differ from the construction put by the Judge upon the form of the annual pottah and upon the settlement, and as the defendant will not take out an annual pottah at an annual rent, or at such a rent as the plaintiff may fix, and will not adopt the alternative of quitting possession as he has been requested to do, I think the present suit will lie, and I would reverse the decree of both Courts, and decree that the plaintiff recover from the defendant possession of the land in dispute.

It is argued by the *Government Pleader*, who appeared for the defendant, that the latter had a right of occupancy under Act [334] X of 1859. If this be so, I agree with the *Government Pleader* that the plaintiff could not succeed in this suit, but would be confined to bringing a suit for enhancement. Neither of the judgments of the Court below proceeded upon this point; but the *Government Pleader* contended that he is entitled to support the judgment appealed from, on any ground on which it can be supported. This appears to be so, and we have heard some argument on the question whether Act X of 1859 is in force in Assam. That Act, although in the title (which however is no part of the Act) mention is made of a limited part of India, has no clause in the body of the Act confining its operation. *Prima facie*, therefore, it applies over the whole of India—I mean that part of it for which the Legislature is empowered to legislate; but this extended operation may be confined, if it can be gathered from the context that its operation is intended to be limited, or if the circumstances of the locality and the incidents of the tenures prevailing there are so peculiar that a comparison of them with the clauses of the Act shows that it could not be intended to extend to such locality. As regards the circumstances and incidents of the occupiers of the land in Assam, we have not sufficient materials before us to enable us to form an opinion.

But upon a consideration of the various clauses of the Act, I incline to think that at the time when the Act was framed, its operation was confined to the Regulation Provinces of the Bengal Presidency of which Assam was not one. Another question then arises as to whether it has, since its date, been legally extended to Assam. I have been referred to a notification on the subject, but am not satisfied that the Act has been so extended, or if as a matter of fact it has been so, that it was legally extended.

We have been referred to a recent case decided by a Division Bench, in which it appears to have been the opinion of the two learned Judges composing that Bench that the Act was in force in Assam, but that decision was an *ex parte* one and the point was not argued (*Konaram Guonburah v. Dhatoram Thakoor* (I. L. R., 6 Cal., 196)). It also appears from an earlier case that [335] DWARKANATH MITTER, J., was of opinion that the Act had been extended to Assam (*Jullow Surma Patwaree v. Madhub Ram Atoi Boorha Bhukul* (16 W. R. 202)), but a long search has failed to unearth a notification (if any one exists) which supports that learned Judge's statements. The question, no doubt, is of considerable difficulty, and I should prefer not to decide it, but if I must decide it, then my decision is that the Act is not in force. My brother MACPHERSON is inclined to think that the Act is in force.

Under these circumstances this question will have to be re-argued before a third Judge or before another Bench. Subject to the result of that re-argument, and also of the determination of the further question whether, supposing Act X of 1859 is in force, the defendant has acquired a right of occupancy under that Act, my brother MACPHERSON agrees with me that the judgment of the lower Appellate Court should be reversed, and the plaintiff's suit decreed. Costs of this hearing reserved.

The appeal was accordingly subsequently re-argued before MITTER, J. (Offg. C. J.)

Mr. Piffard and Baboo Bykuntnath Dass for the Appellant.

The Senior Government Pleader (Baboo Annoda Persad Banerjee) for the Respondent.

The Judgment of the Court was as follows :—

Mitter, J.—I am of opinion that in the Assam Valley Districts, Act X of 1859 is not in force. That Act was passed by the Legislative Council of India which was constituted by the 16 and 17 Vic., Cap., 95. There is no clause in the body of the Act to show that its operation was limited only to a particular portion of British India. *Prima facie*, therefore, it applies to the whole of British India, unless it can be shown from the context that its operation was intended by the legislature to be limited to any particular portion of British India. But from the provisions of the Act itself it is quite clear that it does not apply to the whole of British India. For instance, the systems of land tenures and the settlements of Government revenue prevailing in the Presidencies of Bombay and Madras would make the provisions of this Act [336] wholly inapplicable to those Presidencies. We have, therefore, to determine to what portion of British India the Act in question was intended by the Legislature to apply.

The preamble of the Act says :—

“Whereas it is expedient to re-enact with certain modifications the provisions of the existing law relative to the rights of ryots, with respect to the delivery of pottahs and the occupancy of land to the prevention of illegal exaction and extortion in connection with demands of rent and to other questions connected with the same ; to extend the jurisdiction of Collectors and prescribe rules for the trial of such questions, as well as of suits for the recovery of the arrears of rent and of suits arising out of the distraint of the property for such arrears ; and to amend the law relating to distraint, it is enacted as follows.” Therefore, it is clear that the object of the Act was three-fold—first, to *re-enact*, with certain modifications, the existing laws regulating the rights of landlord and tenant regarding certain specified subjects ; secondly, to extend the jurisdiction of Collectors ; and, thirdly, to prescribe a law of procedure for the trial of the questions relating to those rights as well as for the trial of rent suits. Therefore, the provisions made in the Act for the carrying out of the first object can only apply to those districts in which the laws, which were re-enacted with certain modifications, were in force. Now these laws are the Regulations on the subjects in question which were repealed by the Act under our consideration. These regulations are specified in the repealing section of the Act., viz., section 1.

Referring to those Regulations, it is quite clear that they were not in force in the Assam Valley Districts. These districts were conquered in the year 1826. After their conquest, the upper portion was granted to certain Chiefs who were to govern them in accordance with the conditions of certain treaties concluded with them : see Aitchison's Treaties, Vol. 1, page 126. The Government of the lower portion was assumed by the E. I. Company :—The administration of justice in these provinces was entrusted to certain officers appointed by the Governor-General in Council. They were never brought within what were called the Regulation districts of the Presidency of Fort William. The whole of Upper Assam, for certain reasons. [337] to which it is not necessary to refer here, was gradually brought under the British rule, and the same system of administration of justice was introduced

there as was in force in Lower Assam. By a Government Resolution of 1834, it was directed that the Commissioner of Assam shall, from the 1st October next, be subject to the Courts of the Sudder Dewany and Nizamut Adawlut in all matters connected with the Civil and Criminal Administration, and to the Sudder Board of Revenue at the Presidency in revenue matters. The 4th paragraph of this Resolution contained the following direction: "The Assistants will continue to perform their duties at present entirely under the direction and control of the Commissioner." By the 5th paragraph it was directed that certain special rules, which had been sanctioned for the Sagur and Narbudda Districts, should be forwarded to Captain Jenkins, who was then the local head in charge of the administration of the District, to enable him to submit a draft of rules which he might consider best suited for the district of Assam. These rules were subsequently framed and sanctioned by the Governor-General in Council, and I shall refer to them hereafter.

It is clear from Regulation I of 1829, by which the office of Commissioner of Revenue was created, that it was not the intention of Government to extend to Assam the system of administration of justice prevailing in the Regulation Districts. It has been contended before me that by the Regulation in question a Commissioner of Assam was appointed with powers similar to the Commissioners in the Regulation Districts constituted by it. This contention is not correct, because the Commissioners of Revenue and Circuit, constituted by the Regulation in question, and vested with the powers recited in s. 4, were the Commissioners enumerated in s. 2. Assam is not one of the districts recited in this section. Section 9 says, that the Commissioners of Arracan and Assam shall possess and exercise within the districts of Bengal, which are by this Regulation attached to their respective divisions, the same powers as belonged to the Commissioners of Cuttuck, modified as above. By this provision the Commissioners of Arracan and Assam, who were not appointed under the provisions of Regulation I of 1829, and [338] whose powers were not defined by s. 4 of the Regulation, were declared to be *ex officio* Commissioners in certain Regulation Districts, *viz.*, Chittagong, Noakhally, Sherepore and Sylhet, exercising the power in these districts defined by s. 4. But so far as Arracan and Assam were concerned, they were not appointed under the provisions of Regulation I of 1829, and their powers were not defined by s. 4. This Regulation, therefore, instead of showing that Assam was brought in any respects within the Regulation Districts, shows just the contrary.

The next Act passed by the Governor-General in Council relating to Assam was Act II of 1835. This Act only embodied the provisions of the Government resolution already referred to. It declared "that the functionaries who are or may be appointed in the provinces of Assam * * * * * be henceforth placed under the control and superintendence in civil cases of the Court of the Sudder Dewany Adawlut, in criminal cases of the Court of the Nizamut Adawlut."

Then rules for the administration of Civil and Criminal justice in Assam were from time to time framed. The last set of rules on this subject were prepared and sanctioned in the year 1847. They form a complete Code providing for the trial of all kinds of suits. By the 9th rule, the assistant in charge of a district was empowered to try, in his capacity of Collector, suits for arrears of rent or undue exactions of rent. These rules and not any of the regulations mentioned in the repealing section of Act X of 1859, *i.e.*, s. 1, were in force in Assam in 1859. It is therefore clear that the provisions of Act X of 1859, which were intended to replace the Regulations repealed by s. 1, were intended to apply only to the districts in which those Regula-

tions were in force. Those provisions of Act X of 1859 which deal with the subject of relative rights of landlords and tenants cannot, therefore, apply to the Assam Valley Districts. These reasons are sufficient to warrant the conclusion that s. 6 of Act X of 1859 at least is not applicable to the districts in question.

It seems to me further that the provisions of Act X of 1859, which were intended to carry out the second and the third [339] objects mentioned in its preamble, also do not extend to the Assam Districts.

The second object was to extend the jurisdiction of Collectors. I have shown above that in 1859 there were no such officers as "Collectors" in existence in Assam. The assistants in charge of districts only *exercised* the powers of Collectors. If by the use of the word "Collectors" in Act X of 1859 the Legislature had intended to include these officers, we should have found in the Act an interpretation clause to that effect.

Then as regards the last object, it appears to me from s. 67 of Act of 1859, that the provisions relating to it were not intended to apply to Assam. Act X of 1859 does not contain any provision relating to the examination of witnesses, for procuring their attendance, etc. The section referred to above provided that the provisions of Regulations and Acts and all other rules for the time being in force relating to the subjects mentioned above in *cases before the Civil Court in the Presidency of Bengal*, shall, with a certain exception, apply to suits under Act X of 1859. The section does not refer to the Assam Rules on the subject. It is therefore clear to me that the procedure laid down in Act X of 1859 for the trials of suits under that Act, was not intended to apply to similar suits in Assam.

Furthermore, if it had been the intention to extend Act X of 1859 to Assam, we should have found in the repealing section a provision for the repeal of the Assam rules in force in 1859, relating to the trial of suits similar to those which were declared exclusively cognizable by the Collectors of land revenue under s. 23 of the Act. Then, again, by Act XIV of 1863, Act X of 1859 was amended so far as it related to the territories under the Government of the Lieutenant-Governor of the North-Western Provinces. The 19th section of this Act provides that it shall be lawful * * * for the Lieutenant-Governor of the North-Western Provinces to extend Act X of 1859 to any territories under his government in which the said Act was not then in force. This section does not give to the Lieutenant-Governor of Bengal any such power.

If Act X of 1859, when it was passed, was intended to extend to the whole of the territories under the Lieutenant-Governor [340] of the North-Western Provinces and Bengal, this provision would not have been necessary. It is clear to me, therefore, that it was intended when it was passed to apply only to what are called Regulation Districts.

Then the next question is, whether this Act has been, since 1859, extended to Assam. The only notification that I have been able to trace on this subject is one of the Bengal Government dated 28th May 1864. It is published in the *Calcutta Gazette* of that year, page 1133. It says: "For carrying out the provisions of Acts VIII and X of 1859, the officers employed in the Civil Administration of Assam and Chota-Nagpore Division are hereby vested with the following powers." Then certain officers are vested with the powers of Zillah Judge, of a Collector and of a Deputy Collector. This notification does not purport to extend the provisions of Act X of 1859 to Assam. It assumes that that Act is in force there. If it be assumed even that it was

intended to extend the Act to Assam, then the notification cannot be acted upon, because it was not in the power of the Lieutenant-Governor of Bengal to extend the Act by a simple notification. There is no provision to that effect in Act X of 1859, and in the subsequent Act of 1863, referred to above, no such power was given to the Lieutenant-Governor of Bengal.

For these reasons I am of opinion that Act X of 1859 is not in force in the Assam Valley Districts. As upon the other questions raised in this appeal, the learned Judges who heard this case first are agreed that if Act X of 1859 is not in force in the Assam Valley Districts, the judgment of lower Appellate Court should be reversed, and the plaintiff's suit decreed, the result is that a decree should be made in this Appeal in accordance with that opinion. Accordingly the judgment of the lower Appellate Court is reversed, and the plaintiff's suit is decreed with costs.

Appeal allowed.

NOTES.

[OCCUPANCY RIGHTS IN ASSAM—

See also 15 Cal., 100.]

=9 I. A. 152: 13 C. L. R. 185: 6 Ind. Jur. 602: 4 Sar. P. C. J. 387]

[341] PRIVY COUNCIL.

The 12th, 16th, and 17th May, and 23rd June, 1882.

PRESENT:

SIR B. PEACOCK, SIR M.E. SMITH, SIR R. P. COLLIER, AND SIR J. MELLOR.

E. D. Sinclair.....Plaintiff

versus

L. P. D. Broughton, Administrator-General of Bengal, administering the
Estate of Henry Tombs, deceased.....Defendant.

[On appeal from the Court of the Judicial Commissioner of Oudh and from the Court of the Commissioner of the Lucknow Division.]

*Liability of public servant for injury done by his act, illegal though bonâ fide—
Act XVIII of 1850—Protection of Judicial Officers—Cantonments Act (XXII of
1864), s. 11—Lunatic Asylums Act (XXXVI of 1858), s. 4.*

Act XVIII of 1850 is for the protection of Judicial Officers, acting judicially, and of officers acting under their orders.

An Officer Commanding in Cantonments, acting *bonâ fide* in the discharge of his public duty, and under the belief that a person was dangerous by reason of insanity, caused him to be arrested, in order that he might be examined by medical officers, and caused him to be detained in his house for that purpose, he not being a dangerous lunatic. The medical officers, while reporting him sane, recommended that he should be placed under the observation of the Civil Surgeon of the station, for which purpose the same officer caused his further detention. The Commanding Officer, who under Act XXII of 1864, s. 11, had control and direction of the police in the Cantonment, did not proceed, or intend to proceed, under s. 4 of Act XXXVI of 1858.

Held, that, although his belief might have justified the Commanding Officer, if he had proceeded under the provisions last mentioned, yet he not having done so, and not having any legal authority for what he had done, was not protected from liability in respect of the above acts.

APPEAL, *in formâ pauperis* and by special leave, from a decree of the Judicial Commissioner of Oudh (17th November 1874), which dismissed the plaintiff's suit, reversing on appeal a decree of the Commissioner of the

Lucknow division (2nd July 1874). The latter decree in part maintained and in part altered, a decree of the Civil Judge of Lucknow (12th May 1874), reducing the damages thereby awarded to the plaintiff.

[342] Appeal, also, against the Commissioner's decree in respect of such reduction of damages.

The principal question was whether protection was given to the Officer Commanding in a Cantonment, from liability in respect of acts done by him in the discharge of his duty, and *bond fide*, but not in due course of law, in restraint of the liberty of the plaintiff, appellant.

The plaintiff, who shortly before bringing this suit in February 1873, was employed as an Accountant in the Department of Public Works at Lucknow, sued General Tombs, Commanding the Lucknow Division, and therefore Commanding in the Lucknow Cantonments, for Rs. 25,000 for damages for wrongfully causing him to be confined on the 1st, 2nd, and 3rd November 1872 in his house at Lucknow. For the defence (which the Government of India undertook under ss. 69, 70 † and 71 of Act VIII of 1859) the defendant alleged in his written statement that he had acted *bond fide* for the public safety, believing the plaintiff to be dangerous by reason of insanity, actual or impending.

The defendant dying shortly after, his estate was represented by the Administrator-General of Bengal, who was made defendant on the record. The facts are stated in their Lordship's judgment.

The issues settled on the 24th February 1874 in the Court of the Civil Judge of Lucknow, Mr. F. Lincoln, were the following :—

- (1) Was there a false imprisonment? (2) If so, can the defendant justify it?
- (3) Was the defendant, as the Officer Commanding in Cantonments, competent to take up the duties of the police under s. 11 of Act XXII of 1864? ‡
- (4) Was the defendant authorized under Act XXXVI of 1858 § or otherwise, to make over the plaintiff to the Cantonment Magistrate?

[343] The rest of the issues related to the treatment of the plaintiff and to the damages.

The Civil Judge found that the confinement had taken place, and that no formal procedure had been observed; that the opinion of two medical officers, deputed by General Tombs to examine the plaintiff, was certified by them to the following effect :—

"The undersigned, after having carefully examined Mr. Sinclair, do not consider that they are justified in giving a decided opinion on the case until it

If Government undertake defence, Government Pleader to appear and move that a note of his appearance be entered in the Register.

* [Sec. 70 :—If the Government shall undertake the defence of the suit, the Government Pleader shall be furnished with authority to appear and answer to the plaint; and, upon motion made by him, the Court shall order a note to that effect to be entered in the Register.]

† Act XXII of 1864 (Cantonments) s. 11 enacts that "the administration of the Police, within the limits of any Cantonment in which there shall be a Cantonment Magistrate, shall be vested in the District Superintendent, subject to the general control and direction of the Commanding Officers of such Cantonments."

‡ Act XXXVI of 1858 (Lunatic Asylums), s. 4 enacts that "it shall be the duty of every Darogah or District Police Officer to apprehend and send to the Magistrate all persons found wandering at large within his district who are deemed to be lunatics, and all persons believed to be dangerous by reason of lunacy." The Magistrate is to examine, with the assistance of a medical officer, any person so apprehended, and may issue a certificate and order his reception in a lunatic asylum.

has been longer under their observation. They consider it necessary to recommend that Mr. Sinclair be kept under European guard until his case is decided on." "(Sd.) A. Guthrie, Surgeon, 8th R. A. H. Scott, M. D., Staff-Assistant Surgeon." He also found that the plaintiff was sent under a guard to the Cantonment Magistrate's Court.

In the opinion of the Judge neither of the acts above mentioned, nor any other law, gave authority for these proceedings. It was, he thought, however, clear that the defendant had not acted under any personal feeling against the plaintiff, nor had the latter suffered any violence. The damages were assessed at Rs. 3,000.

The Commissioner of the Lucknow Division, on appeal, upheld the decision, reducing the damages to Rs. 300, and disallowing costs on Rs. 2,700, the difference between the sums decreed in the Original and Appellate Courts.

The Judicial Commissioner of Oudh, on appeal, reversed the decrees of the lower Courts. His opinion was, that if by law a duty was imposed upon a person, the law protected him in the *bond fide* performance of it. On General Tombs, as the Officer Commanding in Cantonments, a duty had been imposed to act upon his belief that the plaintiff was dangerous by reason of insanity. Upon that belief he acted *bond fide*. The Judicial Commissioner was, therefore, of opinion that the defendant was not liable for a wrong that had been unintentionally done.

[344] On this appeal the appellant appeared in person.

Mr. R. V. Doyne and Mr. J. T. Woodroffe for the Respondent.

The material part of the appellant's argument was, that the restraint to which he had been subjected was not warranted by law. General Tombs, not having acted in a judicial capacity, was not protected by Act XVIII of 1850, and no law protected an executive officer under such circumstances. He also urged that the continuing to confine him was not a *bond fide* act.

For the respondent it was argued that the Indian Courts having found *bond fides* on the part of General Tombs, that question was no longer open, and that officer was brought either within the protection of the rule declared by this Committee in the case of *Spooner v. Juddow* (4 Moore's I. A., 353), or within the protection of Act XVIII of 1850. General Tombs, as the Officer Commanding in the Cantonment, had the general control and direction of the police administration within it, under Act XXII of 1864, s. 11, referring to Act V of 1861. He had to exercise a discretion upon the question, whether it was his duty to apprehend Mr. Sinclair, when the conduct exhibited by the latter, on the 1st November 1872, was brought to his notice. That section required the apprehension by the police of any person believed to be dangerous by reason of lunacy; and General Tombs, as the proper officer, had been put in motion upon grounds that were reasonable, and he had acted *bond fide* in the course of his public duty. This was enough to exonerate him. It was all that was necessary for his protection. Whether this exoneration could take place under Act XVIII of 1850—the act of discretion required on the part of the Police officer under Act XXXVI of 1858, s. 4 being, it was argued, of such a character that it might be called “quasi-judicial”—was next discussed; and it was contended that, if the operation of Act XVIII of 1850 should be held to be restricted to judicial officers, and to those who acted under their orders, still the defendant was protected. He was within the protection of the rule that “if parties *bond fide*, and not absurdly, believe that they are acting according to law, they [345] are entitled to the special protection which the legislature intended for

them, although they have done an illegal act." This was declared in the judgment in *Spooner v. Juddow* (4 Moore's I. A., 353), where it was said that there could be "no rule more firmly established." General Tombs had taken all proper steps to enable him to form a just belief, and he had acted upon it *bond fide*, thus bringing himself within the protection cast over subsequent error. Reference was then made to the passing of Act XVIII of 1850, "for the greater protection of Magistrates and others acting judicially," after the decision in *Calder v. Halket* (3 Moore's P. C., 28; s.c., 2 Moore's I. A., 293); and it was argued that when the law had imposed upon a public servant a duty requiring the exercise of a discretion, in the *bond fide* exercise whereof he erred, acting in an illegal manner and causing damage to another, such officer could not be held responsible in a suit by the person injured.

To secure for him this protection it was not necessary that the public servant should be acting as a Judge, *sedente curia*. In support of this proposition reference was made to the judgment in *Ferguson v. The Earl of Kinnoul* (9 Cl. and Fin., 251), where the liability of the body which in that case had violated the law, to the injury of the complainant, was expressly placed upon their not having had vested in them any discretion whatever to refrain from performing the ministerial duty, imposed upon them by law, for the omission whereof they were held liable in a suit. It was further argued that when public duties required the exercise of judgment, as to whether a certain course should be adopted by an executive officer, the forming such a judgment was for this purpose "acting judicially" within the scope of Act XVIII of 1850, which referred to magistrates, who, as a class, had many executive functions bordering on their judicial powers. Reference was made to *Hughes v. Buckland* (15 M. and W., 346); *Lucas v. Nockels* (4 Bing., 729; 10 Bing., 157); *Onsley v. Plowden* (1 Boulnois, 145). It was further contended that, though the confinement might [346] have been with a view to the obtaining a medical opinion as to Mr. Sinclair's state of mind, and not with a view to sending him to the magistrate according to the direction in s. 4, yet the intention of General Tombs did not deprive him of any protection to which he would otherwise have been entitled; for no practical difference in the custody of the plaintiff resulted. This was in consequence of the absence, shown at the hearing of the suit, of the magistrate of the district, to whom the plaintiff could not, even if General Tombs had purposed to send him, have been sent.

Lastly, it was argued that no doctrine of agency could link the conduct of General Tombs with the acts and omissions of the Brigade Major who had delayed the transmission of the medical officer's report to the former, and also treated the summons as a warrant. Reference was made to Addison on Torts, 665 (fifth edn.) and to *Nicholson v. Mounsey* (15 East., 384).

The Appellant was heard in reply.

On a subsequent day (23rd June), their Lordships' Judgment was delivered by

Sir B. Peacock.—This is an appeal brought *in forma pauperis* by the appellant Mr. Edward D. Sinclair, by special leave of Her Majesty in Council, from a judgment of the Judicial Commissioner of Oudh, dated the 19th November 1874, in a suit brought by the appellant in the Court of the Civil Judge of Lucknow against the late Major-General Sir Henry Tombs, and also from a judgment of the Commissioner of Lucknow in the same suit.

The suit was commenced as far back as the year 1873, and was for the recovery of damages laid at Rs. 25,000, alleged to have been sustained by the plaintiff in consequence of the defendant's having put him under an unlawful

arrest of European soldiers of Her Majesty's Royal Artillery, and having wrongfully confined him in his own premises for three successive days, *viz.*, from the 1st to the 3rd of November 1872, and having caused violence to be used against his person and property. The plaintiff also complained that the defendant, subsequently to the first step, *viz.*, on Sunday, the 3rd November 1872, forcibly delivered the plaintiff into the custody of the late Lieutenant Gubbins, the then Cantonment Magistrate.

[347] The defendant, who was the officer in command of the Military Cantonments in Lucknow, put in a written statement, and thereby alleged that at about 8 A.M. on the 1st November 1872 he was riding towards his house in the cantonments, when he noticed a flag flying from the thatched roof of a house in which plaintiff resided, and saw plaintiff walking about in a very strange and excited manner; that on being informed by Mrs. Gully (wife of Captain Gully, of the Royal Artillery), who resided in the house opposite that of the plaintiff, that she was alarmed at the conduct of the plaintiff, and on being asked by Mrs. Gully for protection against the plaintiff (Captain Gully being absent from the house), defendant caused due inquiry to be made regarding the plaintiff, and, on information received by him, he directed two medical officers, Doctors Guthrie and Scott, to examine the plaintiff as to his soundness of mind; and that the medical officers, on examination of the plaintiff, considered it necessary to recommend that he should be kept under an European guard until they could form a decided opinion as to his sanity. He further stated that, in the absence of the Cantonment Magistrate from the station on the 1st and the 2nd November 1872, defendant, as officer commanding the Cantonments of Lucknow, and consequently in general control of the Police employed in the Military Cantonments (see Act XXII of 1864, s. 11), considered that he was bound and justified, in the interests of public safety, to act on the recommendation of the two medical officers aforesaid, and believing the plaintiff to be dangerous, by reason of lunacy, actual or impending, placed over plaintiff a guard of unarmed European soldiers, to prevent him doing harm to himself and others. That the substitution of unarmed European soldiers for native policemen was in accordance with the usual practice, in case of European lunatics, when European policemen are not available.

That on the return of Lieutenant Gubbins, the Cantonment Magistrate, to the station, on the 3rd November 1872, the plaintiff was made over in due course to the said Magistrate (s. 4, Act XXXVI of 1858), to be dealt with according to law, and that defendant was in no way concerned, nor could he be held [348] responsible for any proceedings that might have taken place in the Court of the Cantonment Magistrate, or subsequently.

That defendant acted throughout in perfect good faith, and in the interests of public safety, and that no violence was used by the defendant's order, or at his request.

That the amount of damages claimed by the plaintiff was excessive, with reference both to the plaintiff's late position in life, and the nature of the alleged wrong.

The case was tried in the first instance by the Civil Judge of Lucknow, who gave judgment for the plaintiff, and assessed the damages at Rs. 3,000.

From that decree the defendant appealed to the Commissioner of Lucknow, who upheld the decision, but reduced the damages to Rs. 300, and ordered the plaintiff to pay the defendant's costs on Rs. 2,700, the difference between the Rs. 300 and the sum awarded by the Civil Judge.

It appears that, on the morning of the 1st of November 1872, the defendant, who was then the Commanding Officer of the Cantonment at Lucknow, having reason to believe that the plaintiff was a dangerous lunatic, caused him to be confined on his own premises under a guard of unarmed European soldiers of Her Majesty's Royal Artillery, and caused him to be soon afterwards visited and inspected against his will by Drs. Guthrie and Scott, in order to ascertain the state of his mind. Those gentlemen on the same day reported that, having carefully examined the plaintiff, they did not consider themselves justified in giving a decided opinion on the case until it had been longer under their observation, and that they considered it necessary to recommend that the plaintiff should be kept under a European guard until the case should be decided on. The defendant in his written statement admits that he felt himself bound, in the absence of the Cantonment Magistrate, to act upon the recommendation of the medical officers, though he there states his case as if the recommendation had preceded the confinement, which was not the fact. However, the plaintiff was kept under confinement, from the 1st to the 3rd of the month, and the medical officers were ordered to visit him during his confinement, and did so, against his will.

[349] The defendant signed on the report a memorandum as follows:—

"Mr. Sinclair is a civilian, not belonging to the cantonments, and it is hard on the troops to have to furnish a guard over him. I hope, therefore, Drs. Guthrie and Scott will not be long in making up their minds.

"I believe Mr. Sinclair's late chum, 'Mr. Reid,' could prove the insanity at once.

"Dr. Cannon is quite willing to receive him, and it is my opinion then that he should be observed before being sent to Bhowanipoor and not in cantonments.

"Make the substance of this known to Dr. Guthrie.

"Mr. Sinclair must be subsisted by the Cantonment Magistrate."

It is clear that the District Magistrate, or the officer exercising the powers of the District Magistrate, would have had jurisdiction in the case if the plaintiff had been taken before him under Act XXXVI of 1858, s. 4. It is clear, however, from the memorandum signed by the defendant, that he intended to keep the plaintiff under the European guard until the medical officers could decide on the case, a detention which he was not authorized to inflict.

The report of the medical officers, with the memorandum thereon signed by the defendant, was delivered to Captain Beadon, the Brigade Major, and on the following day, Saturday, the 2nd November, Drs. Guthrie and Scott forwarded a further report to the effect that they considered the plaintiff perfectly sane, but that they recommended him to be placed under the observation of the Civil Surgeon. This recommendation, it must be observed, was quite in accordance with the opinion of the defendant expressed in the memorandum on the first report of which he directed that the substance should be made known to Dr. Guthrie. The certificate is, unfortunately, not forthcoming, and has not been accounted for, but it appears from the evidence of Major Beadon, the Brigade Major, that he forwarded it on the 2nd to the Officiating Deputy Commissioner, with a docket, which was in the following terms:—

"No. 4,071. Lucknow Brigade Office, 2nd November 1872.

"Forwards medical certificate regarding Mr. Sinclair's state of mind, and to request that very early steps may be taken to remove him to the charge of Civil Surgeon.

[350] Mr. Sinclair is at present under restraint and in charge of a military guard.

"(Sd.) R. BEADON, Capt.,

"Brigade Major."

"To the Officiating Deputy Commissioner, Lucknow."

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In answer to that request Major Beadon received from Deputy Commissioner the following communication:—

"No. 4928, 2nd November 1872.

To the Brigade Major, Lucknow.

"Sir,

"In reply to your memorandum No. 4071, dated 2nd instant, I have the honour to state that the medical officers who have examined Mr. Sinclair, having reported him to be perfectly sane, I should not be justified in placing him under restraint, or under observation, against his will, of the Civil Surgeon. The law relating to lunatics is clear on this point, that a Magistrate has no power to act against any person (under Act XXXVI of 1858), unless that person has been declared by medical authority lunatic.

"2. I therefore regret that I cannot comply with your request to move Mr. Sinclair to the charge of the Civil Surgeon.

"4. The Cantonment Magistrate will be directed to give attention to Mr. Sinclair's proceedings, and, should occasion require, to bind him over to keep the peace, *and consign him to custody should sureties not be forthcoming.*

"I have, &c.,

R. H. DEMONTMORENCY,

"*Officiating Deputy Commissioner.*"

"No. 4929, 2nd November 1872."

"Copy of the foregoing forwarded to the Cantonment Magistrate, Lucknow, for compliance with reference to the last paragraph.

J. H. PHILLIPS, Head Assistant for

"R. H. DEMONTMORENCY,

"*Officiating Deputy Commissioner.*"

Major Beadon states his belief that he received that communication on Sunday, the 3rd of November, about 11 o'clock, but that, as he never did business on Sunday, he did not show the letter to the defendant on that day, but did so on the following Monday.

The plaintiff was not released from confinement either on the second report of the medical officers received by Major Beadon on the Saturday, or on the receipt of the letter from the Deputy [351] Commissioner, at about eleven o'clock on the Sunday. On that day, however, a summons was issued by the Cantonment Magistrate directed to the plaintiff, requiring him to appear at one o'clock on that day, to enter into his personal recognizance in Rs. 500, and two sureties in Rs. 250 each, to keep the peace for six months. That summons was delivered to and treated as warrant by Major Beadon, who forwarded it on the same day to the officer commanding the Royal Artillery, with a letter, of which the following is a copy:—

"Memorandum, No. Urgent.

"From the Brigade Major to the Officer Commanding Royal Artillery, Lucknow, 3rd November 1872.

"Has the honour to request that Mr. Sinclair, at present under a guard of the R. A., may be taken at once before the Cantonment Magistrate, in accordance with the enclosed warrant, when further orders will be given to the N. C. officer in charge as to his disposal.

"RICHARD BEADON, Capt.,

"*Brigade Major.*"

The plaintiff was accordingly detained in confinement in his own house until about two or three o'clock in the afternoon, when he was taken by the

European guard against his will before the Cantonment Magistrate, not to be dealt with as a dangerous lunatic, but in consequence of the summons, and was committed for want of bail. Subsequently the Colonel commanding the European Artillery addressed the following letter to the defendant :—

Lucknow, 3rd November 1872.

" Has the honour to report, for the information of the Major-General commanding, that Mr. Sinclair has been removed to the Magistrate's office, as herein directed, but considerable delay has taken place in doing this, owing to Mr. Sinclair refusing to be removed, and refusing to put on his clothes.

" The bungalow in which Mr. Sinclair resided is not in charge of any servant, and there are several articles of his property there. A gunner has been left to the care of these things as also two ponies, supposed to be Mr. Sinclair's, till further orders are received as to their disposal.

NEIL MACKAY, Col.,

" Commanding R.A. Oude Division."

It was contended by the defendant in his written statement that he was not liable for the detention of the plaintiff after he [352] was made over to the Cantonment Magistrate, and the first two Courts very properly adopted that view. It does not appear, however, upon whose information and complaint the summons was obtained, and their Lordships cannot help remarking upon the great irregularity of the forcible execution of it as if it were a warrant. The defendant, however, is not liable for any force used in compelling the plaintiff to go before the Magistrate.

Their Lordships must also point out that Colonel J. Reid, the Commissioner, in his judgment, has referred to several matters which do not appear in evidence. Their Lordships have, however, entirely rejected those statements from their consideration, and have not been in any manner influenced by them.

Sir Henry Tombs having died, the Administrator-General of Bengal, as administrator of his estate, appealed to the Judicial Commissioner of Oude, who, on the 17th November 1874, held that an officer commanding in cantonments is vested within cantonments with all the police powers which a Magistrate of a district may exercise within his district, and that as there was a duty imposed on the defendant, as officer commanding in cantonments, to take action in consequence of his *bona fide* belief that plaintiff was dangerous by reason of lunacy, actual or impending, and that as the action taken was in perfect good faith, and in performance of the duty thus imposed, the defendant was not liable at law for damages in consequence of any wrong that might have been unintentionally done to plaintiff.

It may be taken as a fact, upon the evidence and upon the findings both of the Civil Judge and of the Commissioner, that the plaintiff was not, at the time when the acts complained of were committed, a dangerous lunatic. At the same time, there can be no doubt that the defendant acted *bona fide* in the discharge of a public duty, and under the belief that the plaintiff was dangerous by reason of lunacy.

That belief might have justified the defendant, who as commanding officer of the cantonment had the control and direction of the police, in directing proceedings to be taken by the police under the 4th section of Act XXXVI of 1858, but it is clear that the defendant did not proceed, or intend to proceed, under that Act.

[353] The Commissioner in his judgment, referring to Acts XXII of 1864 and XXXVI of 1858, says :—

"It is not alleged that the defendant proceeded under either of the Acts above cited, or, indeed, under any particular law, but it is contended that he felt bound to take immediate steps himself, in the absence of the Cantonment Magistrate and the Magistrate of the district, and that he acted as a sensible and considerate man, and that subsequent inquiry into the legality of his proceedings shows that they were justifiable by the law."

The Legislature has been careful in providing for the protection of lunatics, and it would be extremely dangerous if the doctrine enunciated by the Judicial Commissioner could be held to be law. He draws no distinction between a mistake in fact and a mistake in law, if *bonâ fide*. He says: "The main point raised in the appeal to this Court is one of principle, namely, when a public officer, who is bound by his duty to take some action, fully intending in good faith to do what is right, makes a mistake and causes wrong, is such officer liable to be mulcted in damages by a Civil Court?" And he held that he is not. Again, he says: "Holding, then, that there was a duty imposed on the defendant, as the officer commanding in cantonments to take action, in consequence of his *bonâ fide* belief that the plaintiff was dangerous by reason of lunacy, actual or impending, and that whatever action was taken was taken in perfect good faith, and in performance of the duty thus imposed upon him, I am of opinion that the defendant was not liable at law for damages in consequence of any wrong that may have been unintentionally done to the plaintiff. I am of opinion, therefore, that a verdict should have been given for the defendant."

There is no law which authorizes the police or a Magistrate in the exercise of police duties, or an officer in command of a cantonment, in consequence of a *bonâ fide* belief that a person is dangerous by reason of actual lunacy, to put him into confinement in order that he may be visited and examined by medical officers, and to keep him in confinement until such officers can feel themselves justified in reporting whether the person is a dangerous lunatic or not; *a fortiori*, this cannot be done in the case of a *bonâ fide* belief of danger from impending lunacy. The defendant had no authority for causing the plaintiff to be put under restraint [354] for such a purpose, nor had he, after the report of the medical officers that the plaintiff was perfectly sane, any colour of authority for keeping him under restraint in order that he might be removed from the cantonment, and placed under the observation of the civil surgeon, even though recommended so to do by the medical officers.

Neither the police, nor a Magistrate in the exercise of police duties, could, under Act XXXVI of 1858, have had any colour for doing that which the defendant caused to be done.

The Appellant appeared in person, and argued his case with considerable ability.

The Respondent appeared by Counsel, who, amongst other arguments, contended that the defendant was protected by Act XVIII of 1850.

But there is no foundation for that contention. That Act was for the protection of judicial officers, acting judicially and officers acting under their orders. It is clear that the defendant was not a judicial officer, and that he did not act judicially. Mr. Woodroffe, one of the learned counsel for the defendant, cited many authorities, and amongst others, *Calder v. Halket* (3 Moore's P. C., 28; s. c., 2 Moore's I. A., 293); *Spooner v. Juddow* (4 Moore's I. A., 353); *Hughes v. Buckland* (15 M. and W., 346); and *Ferguson v. Lord Kinnoul* (9 Cl. and Fin., 251); but none of those authorities have any bearing upon the present case. He also referred to *Lucas v. Nockels* (4 Bing., 729; 10 Bing., 157); but there is a great distinction between that case and the present.

The plaintiff has complained before their Lordships that he was not allowed by the Civil Judge to give his own evidence in chief on his own behalf, and

that he was merely examined in the nature of cross-examination on behalf of the defendant. It does not appear that the Judge refused to allow the plaintiff to give evidence as a witness for himself; but, assuming that the plaintiff is correct in his statement, the fact would be merely a ground of appeal from the Civil Judge, and such appeal is expressly [355] excluded from the leave given by the order of Her Majesty in Council.

The plaintiff is entitled to a decree, and the only question remaining is as to the amount of damages to which he is entitled.

Their Lordships see no sufficient reason to alter the judgment of the Commissioner of Lucknow in that respect. They will, therefore, humbly advise Her Majesty to reverse the decree of the Judicial Commissioner, and also to reverse the judgment of the Commissioner of Lucknow as regards the order that the plaintiff shall pay the costs on Rs. 2,700, being the difference between the Rs. 3,000 awarded by the first Court, and the Rs. 300 awarded by the Commissioner, but to affirm the last-mentioned judgment in other respects. The respondent must pay the costs of this appeal.

Appeal allowed.

Solicitor for the Respondent: Mr. H. Treasure.

NOTES.

[See our Notes to *Calder v. Halket*, 2 M. L. A. 293 in the Indian Reports (1909) Edn. Vol. I.; also 12 All. 115; 30 Bom. 241; (1908) P. W. R. 59; 9 T. O. 535. The Indian Lunacy Act 1912, and the Indian Cantonments Act 1910 are the enactments now current.]

[9 Cal. 355 : 11 C. L. R. 430 : 7 Ind. Jur. 421]

APPELLATE CIVIL.

The 31st July, 1882.

PRESENT:

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

Manickya Moyee.....Plaintiff

versus

Boroda Prosad Mookerjee and another.....Defendants.*

Principal and Surety—Agreement to mortgage, assignment of—Bond of indemnity—Guarantee—Interest—Appeal—Respondent—Adding Parties—Civil Procedure Code, Act (XIV of 1882), s. 559—Limitation Act (Act XV of 1877).

Liability of parties discussed and form of decree given in a case where, by an agreement in writing, one of the defendants, in consideration of money lent to him by B, the other defendant, agreed to execute a mortgage to B, containing the usual covenants (in default the agreement to stand as a mortgage), and B assigned the agreement to the plaintiff, guaranteeing by bond of even date the payment of the principal and interest specified in the agreement.

The discretionary power of directing a person to be made a respondent, conferred on the Appellate Court by s. 559 of the Civil Procedure Code, is not limited by any provision in the Limitation Act (Act XV of 1877).

[356] THE facts of this case are set out in the judgment.

The lower Court fixed the following issues:—(1) Is the suit bad by reason of misjoinder? (2) Is the plaintiff entitled to have a lien declared on the properties in suit? (3) Is the plaintiff entitled to costs and the interest claimed? (4) What is the extent of Boroda Prosad's liability under the

* Appeal from Original Decree No. 16 of 1881, against the decree of Baboo Krishto Mohun Mookerjee, Second Subordinate Judge of the 24-Pergunnahs, dated the 2nd September 1880.

indemnity bond? The Munsif found the first three issues in favour of the plaintiff. On the fourth issue he said :—

"It is said that the defendant Boroda Prosad has not only guaranteed the payment of the principal and interest under the agreement to mortgage, but also covenanted, under the indemnity bond, to pay interest at the rate of 18 per cent., from the date of the agreement to mortgage to the date of realization. In the first place, I would observe that there are two things in the indemnity bond which render it ambiguous; and a portion of it is admittedly meaningless, under the rules of grammatical construction. It is said that the particle "thereof" has been interpolated for "hereof"; but there is no evidence to that effect. The words "date of payment" may be construed to mean "due date" or "date of realization." Under such circumstances I shall put such a construction on the document as under the nature of things would render it plausible and consistent. Boroda Prosad sold his interest in the agreement to mortgage. Rs. 38,000 and odd were due under the agreement. He gave up Rs. 3,000 and odd, and effected the transfer for Rs. 35,000. If it is contended that under the indemnity bond Boroda Prosad covenanted to pay interest at the rate of 18 per cent., I would say there was no consideration for such an agreement. Why should Boroda Prosad pay more than what was due under the agreement to mortgage? He assigned over his interest at a disadvantage, and it is not fair to make him liable for more than what was due under the original document. If he had made any such contract, it was *nudum pactum*. I am, therefore, not inclined to render him liable for more than what is due under the agreement to mortgage."

The plaintiff appealed to the High Court.

Mr. *Evans*, Baboo *Srinath Doss*, and Baboo *Doorga Mohun Doss*, for the Appellant.

The Advocate-General (Offg. Mr. *Phillips*), and Baboo *Rajendro Nath Bose*, for the Respondents.

The following **Judgment** of the Court (McDONELL and FIELD, JJ.), was delivered on the 25th of May by

Field, J.—In this case one Kali Dass Roy mortgaged certain property to Boroda Prosad Mookerjee by an instrument, dated [357] the 17th June 1878. This instrument was not a formal deed of mortgage; it was an agreement for mortgage only, but it was the intention of the parties that a formal mortgage deed should be subsequently executed. The agreement of the 17th June 1878 contained a provision that, until the formal mortgage deed should be executed containing all such covenants, provisions, stipulations, and agreements as are usually or properly introduced into mortgages of estates of a similar nature, the mortgage-property should remain charged with the amount of the loan, and the mortgage agreement (which was correctly stamped under Act XVIII of 1869) should be considered as a deed of mortgage. Under the agreement the money lent on mortgage, together with interest at 18 per cent., was to be paid *within one year* from the 17th June 1878, and the agreement further provided that this interest was to be payable in four quarterly instalments, and that if any instalment was not paid on the due date, compound interest was to be allowed thereupon. The money lent or the interest was not paid within the year, and Boroda Prosad Mookerjee, on the 28th June 1879, transferred his interest in the mortgage to Manickya Moyee Chowdhraim, the plaintiff in the present suit. It is not necessary to refer further to the contents of the deed of transfer for the purposes of the present case.

Boroda Prosad Mookerjee, further, on the same date, executed an instrument of guarantee. This is in the common form of a bond, by which Boroda Prosad Mookerjee is held bound in the sum of Rs. 50,000 to be paid to Srimoti Manickya Moyee Chowdhraim; such bond to be void if the amount due upon the mortgage, together with the stipulated interest, be paid by or recovered

from the mortgagor. This instrument recites the mortgage agreement executed by Kali Dass Roy in favour of Boroda Prosad Mookerjee, and the transfer of Boroda Prosad Mookerjee's interest thereby created to the plaintiff Manickya Moyee Chowdhraïn. Then comes the condition of the obligation, and after this we have the following passage which is material to the questions which we have to decide in the present case :—

[338] " Provided alway, and it is hereby agreed and declared by and between the said Boroda Prosad Mookerjee and Srimoti Manickya Moyee Chowdhraïn that, if the said Kali Dass Roy, or his heirs, executors, administrators, representatives or assigns does not or do not pay to the said Srimoti Manickya Moyee Chowdhraïn, or her heirs, executors, administrators, representatives, or assigns amicably and without the institution of any suit, the whole of the said principal sum of Rs. 32,000, and the simple and compound interest thereon according to the terms of the said indenture of mortgage at the rate of eighteen per cent., per annum from the said 17th day of June 1878 to the *date of payment* within one year from the date THEREOF the said Srimoti Manickya Moyee Chowdhraïn or her heirs, executors, administrators, representatives, and assigns shall bring a suit or suits in the proper tribunal to enforce payment of the monies secured by the said indenture of agreement for mortgage ; but if she or they fail to do so, then the said Boroda Prosad Mookerjee, or his heirs, executors, administrators, and representatives shall not be liable to the said Srimoti Manickya Moyee Chowdhraïn or her heirs, executors, administrators, representatives or assigns for payment of any interest that may grow or become due on the said indenture of agreement for mortgage from the date on which under this proviso the said suit or suits ought to be brought, and the date on which the said suit or suits shall be actually brought ; and that if under any decree that may be passed against the said Kali Dass Roy, or his heirs, executors, administrators, representatives or assigns in favour of the said Srimoti Manickya Moyee Chowdhraïn, or her heirs, executors, administrators, representatives, or assigns on the said indenture of agreement for mortgage, *simple and compound interest be not allowed at the rate of eighteen per cent. per annum, from the said 17th day of June 1878 to the date of payment*, the said Boroda Prosad Mookerjee, or his heirs, executors, administrators, and representatives, shall nevertheless be liable to pay to the said Srimoti Manickya Moyee Chowdhraïn, or her heirs, executors, administrators, representatives and assigns *the difference between the amount which will be allowed by such decree for interest and the full amount of simple and compound interest according to the terms of the said indenture of agreement for mortgage*, from the said 17th day of June 1878 to the date of payment, minus the interest for the period between the date on which under this proviso the said suit or suits ought to be brought, and the date on which the said suit or suits shall be actually brought. And lastly it is hereby expressly understood that upon this bond or obligation the said Srimoti Manickya Moyee Chowdhraïn, her heirs, executors, administrators, representatives, and assigns shall be competent to recover from the said Boroda Prosad Mookerjee, his heirs, executors, administrators, and representatives, only the amount of the difference between what shall be recovered by the said Srimoti Manickya Moyee Chowdhraïn, or her heirs, executors, administrators, representatives, and assigns on the strength of the said indenture of agreement for mortgage and transfer of mortgage from the said Kali Das Roy, or his heirs, executors, administrators, representatives or assigns, and the said sum of Rs. 32,000, and *simple and compound* [359] *interest thereon according to the terms of the said indenture of agreement for mortgage at the rate of eighteen per cent., per annum from the said 17th day of June 1878 to the date of payment*, subject to the agreement in the hereinbefore proviso contained."

It is contended before us that the word "thereof" in the commencement of this passage is a mistake for "hereof." This contention supposes that the word "hereof" suggested for substitution, is together with the six preceding words to be read with the verb "pay," thus "do not pay within one year from the date hereof;" but it appears to us that it is not necessary to substitute "hereof" for "thereof," because a sufficient sense is to be obtained from the passage as it stands if the word "thereof" be taken and construed with "interest thereon according to, etc.," in other words, be read as defining or describing the interest.

Having regard to the words "any interest that may grow or become due on the said agreement for mortgage from the date on which, etc.," and what immediately follows these words, we think that interest after and besides the interest for the year specified in the mortgage agreement was within the intention of the parties to the guarantee bond.

Then comes the essential passage, "if under any decree that may be passed against the said Kali Dass Roy simple and compound interest be not allowed at the rate of eighteen per cent., per annum from the said 17th day of June 1878 to the date of payment, the said Boroda Prosad Mookerjee shall nevertheless be liable to pay to the said Srimoti Manickya Moyee Chowdhraïn the difference between the amount which will be allowed by such decree for interest and the full amount of simple and compound interest according to the terms of the said indenture of agreement for mortgage from the said 17th day of June 1878 to the date of payment minus the interest, etc." It is contended before us that the words "date of payment," are to be construed to mean, not the due date of payment inserted in the mortgage agreement, namely, within one year from the 17th of June 1878, but the date on which the money may be or shall be realised, and it is further contended that inasmuch as it was stipulated between the original parties that the agreement for mortgage was to have the same effect as a formal mortgage deed containing the usual covenants, the original mortgagee is entitled to interest at eighteen per cent., and [360] also compound interest calculated in the manner specified in the mortgage agreement; entitled, that is, in respect of the time (after the year allowed for payment by the mortgage agreement) during which the debt was not paid, because, if a formal mortgage deed had been executed, covenants securing the payment of such interest and such compound interest would have been inserted therein.

Now, so far as regards compound interest, we are not able to agree with this contention; but it does appear to us that if a formal mortgage deed had been executed between the original parties, it would have been a usual and ordinary covenant to insert in such a deed that interest shall be paid on the principal sum, for any time during which such sum remained unpaid after the expiry of the year fixed for payment, at the rate of eighteen per cent., specified in the agreement; and it therefore appears to us that the original mortgagee was *primâ facie* entitled to recover interest at this rate until such principal sum were realized from the mortgagor.

We think that what was guaranteed by the guarantee bond was that interest would be recoverable upon the true construction or interpretation of the mortgage agreement.

But it is contended that inasmuch as the Subordinate Judge has decided that interest after the year is not recoverable at the rate of eighteen per cent., from the mortgagor Kali Dass Roy, the plaintiff is bound by that decision, and is precluded from recovering such interest from her assignor. It has also been pressed upon us that Kali Dass Roy ought to have been made a party to this appeal, and that the present defendant is entitled to say that unless and untill

Kali Dass Roy is a party to this appeal, it is unjust and inequitable to make him (the present defendant) liable for the further amount of interest, from liability for which Kali Dass Roy has been discharged by the decree of the Court below, because that decree was made in a suit to which the original parties to the mortgage, as well as the assignee of the mortgagee, have all been parties.

Two questions thus arise : (1) If upon the true construction of the mortgage agreement we think the mortgagor liable to pay interest at eighteen per cent. after the year allowed for payment, can the assignee of the mortgagee recover this interest from his [361] assignor upon the guarantee, when such assignee has failed to recover such interest from the mortgagor ? (2) Can the assignee recover such interest in this appeal, notwithstanding that he has not made the mortgagor a party to his appeal ?

We think that, as to the *first* question, if the assignee had sued the mortgagor in a separate suit to which the mortgagee (assignor) was not a party, and had failed to recover the after interest, the guarantee bond would entitle the assignee to recover such interest from the assignor in a second suit subsequently brought on the guarantee against the assignor alone ; but it is not so clear to us that he is equally entitled to recover in a suit to which all three are parties. The second question we do not propose to decide, as we think that the proper course will be to let the hearing of this case stand over, and to direct that Kali Dass Roy be made a party to the appeal. So far as regards Kali Dass, the time for appealing as against him has expired ; but we think that this is a case in which we may reasonably exercise the discretion vested in us by s. 5* of the Limitation Act ; and it may be quite possible that, apart from that section, we have power to direct that Kali Dass Roy be made a party to the appeal, inasmuch as the mortgagee, respondent, has in a way a right to relief over against him, and it is proper that all questions in dispute should be settled so as to prevent as far as possible further litigation.

It has been stated to us by the learned counsel for the appellant that Kali Dass Roy was not made a party to this appeal because Boroda Prosad Mookerjee made common cause with him in resisting the plaintiff's claim ; and the plaintiff cannot in consequence be supposed to show him much consideration, while at the same time she believes that upon the true construction of the contract of guarantee she is entitled to recover the after interest at eighteen per cent., in any event from him.

This is a question upon which we pronounce no opinion at the present stage of the proceedings. If this really were so, it may be a matter for consideration when we come to deal with the question of costs. All we say at present is that having regard to the fact that Kali Dass Roy, together with the mortgagee and the assignee of the mortgagee, were parties to the present proceedings [362] in the Court below, we think that the case should be so finally disposed of as to do complete justice between all parties.

The appellant will take steps within a fortnight from this date to serve notice upon Kali Dass Roy, and the usual time for his appearance will be allowed.

Kali Dass Roy having been made a party respondent to the appeal appeared by Baboo *Rash Behary Ghose*, who addressed the Court on his behalf.

Proviso where Court is closed when period expires.

Any appeal or application Proviso as to appeals and applications for review.

*[Sec. 5 : -If the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, presented or made on the day that the Court re-opens :
for a review of judgment may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not presenting the appeal or making the application within such period.]

The following **Judgment** was delivered on the 31st July 1882, by

Field, J.—Kali Dass has now been made a party to the appeal, and we have heard Baboo *Rash Behary* on his behalf. The learned pleader has contended that Kali Dass has been improperly made a party to this appeal. His argument is based upon the rule of limitation applicable to the institution of appeals, and he contends that as the period for filing an appeal against his client has expired, it is not now competent to the Court to make him a respondent to the appeal. We think that s. 559 of the Code of Civil Procedure gives us full power to make him a respondent, and that the discretion conferred by that section is not limited by any provisions to be found in the Limitation Act. We may observe in the first place that s. 32 of the Code, which provides for adding parties in the Court of First Instance, contains an express reference to s. 22* of the Limitation Act. No such express reference is contained in s. 559, and the language of s. 22 of the Limitation Act deals with *plaintiff* and *defendant*. There is no general clause, which provides that *plaintiff* shall include *appellant*, and *defendant*, *respondent*. Then again what is done under s. 559 is done not upon the application of the parties but by the Court *suo motu*. If a rule of limitation were applicable to s. 559, it would be in the power of the appellant to exclude the discretion of the Court by filing his appeal on the last day allowed by the Limitation Act for that purpose. We think, therefore, having regard to this consideration, that it was not the object of the Legislature to limit the operation of s. 559 by any rule of limitation, and we think that we had full power to direct that Kali Dass be made a respondent in this appeal. We entertain no doubt that Kali Dass is liable for interest at 18 per cent. Until the date of realization, and we shall direct a decree to be [363] made to the following effect: Interest at 18 per cent. will be allowed up to the date of the decree of this Court. That interest will be realized in the first instance from Kali Dass; and the original mortgagee, that is the assignor of the plaintiff, will be liable upon the guarantee bond only if the interest cannot be realized by the usual execution proceedings from Kali Dass. Having regard to all the circumstances of the case and the omission of Kali Dass as respondent, when the appeal was originally filed, we shall give no costs upon the additional interest now decreed. The total sum allowed by the decree will carry interest at 6 per cent. from the date of the decree of this Court to the date of realization.

Appeal allowed.

NOTES.

[ADDING RESPONDENT AFTER THE EXPIRY OF THE PERIOD OF LIMITATION FOR APPEAL—

See C. P. C. 1908, O. 41, r. 20. The two limits on the power are (1) the party to be added must have been a party to the suit (2) and he must be interested in the appeal:—33 Cal. 329; 38 Cal. 918; 26 Cal. 114; 8 C. W. N. 496; 14 All. 154; 13 All. 78; 15 Mad. 362; 18 Bom. 520; 31 Mad. 442; 12 C. L. J. 137; 5 I. C. 654.

As regards adding in second appeal persons who were not before the first Appellate Court, see 19 Mad. 151, *contra* 15 All. 5. The order can be made only at the hearing:—(1912) 40 Cal. 323; 17 C. L. J. 183.]

Effect of substituting or adding new plaintiff or defendant.

Proviso where original plaintiff dies.

Provided also, that, when a defendant dies, and the suit is continued against his legal representative, it shall, as regards him, be deemed to have been instituted when it was instituted against the deceased defendant.]

* [Sec. 22:—When, after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party.

Provided that, when a plaintiff dies, and the suit is continued by his legal representative, it shall, as regards him, be deemed to have been instituted when it was instituted by the deceased plaintiff:

Provided also, that, when a defendant dies, and the suit is continued against his legal representative, it shall, as regards him, be deemed to have been instituted when it was instituted against the deceased defendant.]

[9 Cal. 363- 12 C.L.R. 490]
APPELLATE CIVIL.

The 9th August, 1882.

PRESENT :

MR. JUSTICE MITTER, OFFG. CHIEF JUSTICE AND MR. JUSTICE MACLEAN.

Joy Coomar and another.....Defendants

versus

Bundhoo Lall.....Plaintiff.*

*Evidence—Local investigation—Judgment on facts observed by
Judge but not proved.*

In a suit respecting boundaries, the Munsif, before settling the issues in the case, visited the locality, and in his judgment relied upon certain facts which had come under his observation during his visit. These facts were not proved by any evidence, and the Munsif did not make any report as to them. The District Judge reversed the Munsif's decision on the oral evidence given in the case, holding that he could not take notice of the facts observed by the Munsif himself, and on which he had based his judgment.

Held, that though the result of the enquiry instituted by the Munsif was not evidence according to the definition in the Evidence Act, it was a matter before the Court which might have been taken into consideration.

Held, also, that the Munsif should have put the result of his investigation upon paper.

Mr. Branson and Munshi Mahomed Yusuf for Appellants.

Baboo Mohesh Chunder Choudhry and Mr. Sandel for the Respondent.

[364] THE facts of this case sufficiently appear from the **Judgment** of the Court (MITTER and MACLEAN, JJ.) which was delivered by

Mitter, J.— We are of opinion that in this case the judgment of the lower Appellate Court cannot stand.

The question between the parties was whether the plaintiff was entitled to have the alang or singha, marked B. C. in the Munsif's map, removed, the plaintiff's allegation being that it was placed there in the month of August 1879 by the defendants, who are the proprietors of mouzah Rathni.

The plaintiff alleges that the land upon which the alang has been put up belongs to him, being part of a jagir of eight bighas within mouzah Titaria.

The defendants do not deny that the alang or singha B. C. is upon a piece of land appertaining to mouzah Titaria, but they allege that this piece of land does not appertain to the plaintiff's jagir of eight bighas, but to the khalisa land of mouzah Titaria; that it is really a part of an alang or singha of an har called ahar uparata, and that it has been in existence for more than twenty years.

The Munsif came to the conclusion that the alang or singha B. C. was constructed upon land not belonging to the plaintiff's jagir, but to the khalisa land of mouzah Titaria, and that the alang or singha had been in existence for more than twenty years as a protection to the band of a portion of ahar uparata. He accordingly dismissed the plaintiff's suit.

* Appeal from Appellate Decree No. 287 of 1882 in Rule No. 569 of 1882, against the decree of J. Tweedie, Esq., Officiating Judge of Cya, dated the 16th November 1881, reversing the decree of Baboo Mohendro Lal Ghose, Second Munsif of that district, dated the 27th June 1881.

It appears that the Munsif visited the locality, and in his judgment he relies upon certain facts which he says came under his observation when he was on the spot. This local investigation was held by the Munsif before the issues in the case were settled. Some of these facts, which are not proved by any evidence, but which came, according to the Munsif's judgment, under his personal observation while he was on the spot, appear to us to have a material bearing upon the questions at issue between the parties.

The District Judge on appeal has reversed the decisions of the Munsif. He has come to the conclusion that the land upon which the disputed along B. C. is situated appertains to the [365] plaintiff's jagir. He is also of opinion that the defendants have failed to prove that this along or singha B. C. has been in existence for more than twenty years. He bases his decision mainly upon the oral evidence on the record.

As regards the result of the investigation held by the Munsif, the District Judge seems to have excluded it entirely from his consideration. It is not very clear from his judgment whether he means to hold that, before the result of that investigation could be taken into consideration, it was necessary that the Munsif should be examined as a witness in the case. However that may be, it is clear from his decision upon this point that he has entirely excluded the result of the Munsif's investigation from his consideration. In his opinion it was not a material which he was legally competent to take into consideration in arriving at a conclusion in this case.

We are of opinion that his decision upon this point is not correct. There are many decisions of this Court in which results of investigations, made by the Judges personally, have been made the basis of judicial conclusions. In some of these cases it has been pointed out that it is the best material upon which a decision can rest. Looking at the language of s. 392 of the Code of Civil Procedure it is clear that the result of a local investigation, made by the presiding judicial officer, is a material which may be taken into consideration in arriving at a conclusion upon disputed questions of fact. Section 392 says: "In any suit or proceeding in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, and the same cannot be conveniently conducted by the Judge in person, the Court may issue a commission to such person as it thinks fit." It is clear from this that the delegation of the duty of elucidating any matters in dispute by local investigation is to be made only when the presiding Judge cannot conveniently conduct the enquiry himself.

The District Judge also appears to have been of opinion that the result of the enquiry, conducted by the Munsif in this case, could not be considered by him because it was not evidence according to the definition of that word in the Evidence Act. He is perhaps right in this view. The definition of the word [366] "evidence," as given in the Evidence Act, means and includes (1) all statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under enquiry; such statements are called oral evidence; (2) all documents produced for the inspection of the Court: such documents are called documentary evidence.

The result of a local enquiry by a presiding judicial officer does not come under either of these two heads; but the District Judge has not taken into consideration the definition of the word "proved" which comes immediately after. It is to this effect: "A fact is said to be proved when after considering the matters before it the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

It would appear, therefore, that the Legislature intentionally refrained from using the word "evidence" in this definition, but used instead the words, "matters before it." For instance, a fact may be orally admitted in Court. The admission would not come within the definition of the word evidence as given in this Act, but still it is a matter which the Court before whom the admission was made would have to take into consideration in order to determine whether the particular fact was proved or not.

But though we are of opinion that the District Judge was in error in not taking into consideration the result of the Munsif's local investigation, we entirely agree with him in his remark that the Munsif ought to have put upon paper the result of his investigation when it was completed. It is very desirable that judicial officers conducting local investigations should place upon record the results of their investigations as soon as they are completed, so that the parties may have an opportunity of seeing what the facts are which the judicial officers consider to be established by the local investigations.

But in this case we find that none of the facts upon which the Munsif relied as coming under his personal observation while the local investigations were being conducted, or objected to in the petition of appeal filed by the defendants in the Court below as being incorrect. In referring to this circumstance we do not by [367] any means wish it to be understood that we consider that those facts which the Munsif says came under his personal observation are to be taken as absolutely correct. All that we say is that the District Judge should not have excluded them from his consideration. Whether there are good grounds for accepting the result of the local investigation as correct, or rejecting it as incorrect, are matters with which we have nothing to do. It is for the District Judge to decide these questions.

For these reasons the rule will be made absolute; the order of this Court made under s. 551 of the Code of Civil Procedure will be set aside; and this appeal will be decreed, the decree of the lower Appellate Court being reversed; and the case remanded to that Court for re-trial.

The costs will abide the result.

Appeal allowed.

NOTES.

[LOCAL INVESTIGATION--EVIDENCE--

See also 16 C. W. N. 426; 37 Cal. 340; 14 C. W. N. 422; 33 Cal. 133; 1 C. W. N. 682; 20 Cal. 857; (1910) 8 I. C. 939; 4 S. L. R. 180.

The "matters before" the Court must be matters properly before it:—14 C. W. N. 1114, *see per* Carnduff, J. The re-enactment of the transaction, the subject-matter of the suit, was animadverted upon by the Privy Council in (1907) 34 I. A. 115; 31 Bom. 381.

The Judge cannot import into a case his own knowledge and belief:—11 M. I. A. 213; 3 I. A. 286.]

* [Sec. 551:—The Appellate Court may, if it thinks fit after fixing a time for hearing the

Power to confirm decision of lower Court without sending it notice.

appellant or his pleader, and hearing him accordingly if he appears at such time, confirm the decision of the Court against whose decree the appeal is made without sending notice of the appeal to such Court and without serving notice on the respondent or his pleader; but in such case the confirmation shall be notified to the same Court.]

[9 Cal. 367 : 12 C.L.R. 19]
APPELLATE CIVIL.*The 18th August, 1882.*

PRESENT :

MR. JUSTICE WILSON AND MR. JUSTICE FIELD.

Krishna Gobind Dhur and others.....Plaintiffs

versus

Hari Churn Dhur and others.....Defendants.*

*Landlord and Tenant---Suit for possession---Cause of action---Limitation---
Act XV of 1877, sch. ii, cls. 139, 144.*

The plaintiff stated that in the year 1862 he purchased a talook in which some of the defendants then held an ijara for a term of years expiring in 1868. The talook had previously been a khas mehal in the possession of the Government, and was bought by the plaintiff at an auction sale held by the Collector. The plaintiff also stated that the ijaradar defendants, in collusion with the other defendants, had continued in possession of the lands held in ijara after the term of the ijara had expired, and had refused to give up possession thereof to the plaintiff. The Judge of the lower Appellate Court found that the defendants (other than the ijaradars) had been in possession previously to the sale in 1862, and he also found that there was no evidence to support the charge of collusion with the ijaradar defendants. He therefore dismissed the suit (which was brought in 1880) on the ground of limitation.

Held, on second appeal, that the plaintiff's cause of action arose on the expiration of the ijara, and that the suit, whether governed by Articles [368] 139† or 144 of the Limitation Act, Act XV of 1877, was not barred on the ground of limitation. *Woomesh Chunder Goopto v. Raj Narain Roy* (10 W. R., 15) cited.

THIS was a suit for the recovery of possession of land brought by some of the joint owners thereof. The other joint owners were made *pro forma* defendants. The plaintiff stated that the plaintiffs and their co-sharers had bought the talook, in which the lands in question were situated, on the 4th of June 1862; the talook had been a khas mehal of Government, and they bought at an auction-sale held by the Collector. Before the date of the auction sale certain relatives of the principal defendants became ijaradars of the lands in dispute for a term of years which expired with the year 1274 (11th April 1868). The plaintiff stated that at the end of the term the ijaradars did not give up the lands, but allowed the principal defendants "to hold possession of the land along with them under an adverse right." The Munsif found in favour of the plaintiffs, and decreed the claim.

On appeal, the Judge said : "The Munsif has found that the case is not barred by limitation; but I hold that this finding is erroneous, because the Munsif has considered the case as similar to one brought by a reversioner for

*Appeal from Appellate Decree, No. 765 of 1881, against the decree of Baboo Ram C'oomar Paul Chowdhry, Subordinate Judge of Sylhet, dated the 10th February 1881, reversing the decree of Baboo Upendro Chunder Ghose, Munsif of Nabeegunge, dated the 24th September 1880.

† [Art. 139 :—

Description of suit	Period of limitation	Time from which period begins to run
By a landlord to recover possession from a tenant	Twelve years...	When the tenancy is determined.]

setting aside a sale made by a Hindu widow, and he says that, as the term of the ijara ran up to the year 1274, the plaintiffs could not bring a suit before. But in my judgment the analogy drawn by the Munsif does not apply. The reason is that the possession of a purchaser from a Hindu widow, or the possession of anybody with the consent of the widow, is not a possession adverse to the right of the reversioner. Had the plaintiffs in the present case proved their statement that the contending defendants held possession of the land in collusion with the ijaradars, then the analogy drawn by the Munsif would have applied to this case; but on reference to the evidence adduced in this case, I do not find any proof to that effect. On the other hand, it has been proved by the evidence of the witnesses examined by the defendants, as well as by the thakbust papers that, for a period of more than twenty years, the contending defendants and their predecessors were in possession of the land in question." The [369] Subordinate Judge then reversed the Munsif's decree, and dismissed the suit with costs. The plaintiffs appealed to the High Court.

Baboo Aukhil Chunder Sen for the Appellants. •

The **Judgment** of the Court (WILSON and FIELD, JJ.), was delivered by

Wilson, J.—We think that this appeal must be allowed. It appears to us that the lower Appellate Court has mistaken the application of the law of limitation to the case. The judgment of that Court says: The plaintiffs, therefore, are bound to prove that the ijaradars were in possession of the disputed land to the end of the term of their ijara, and if it comes out that the ijaradars did hold possession up to the end of the term of the ijara, then the cause of action of the plaintiffs may be held to have arisen just as the ijara terminated, otherwise the plaintiffs were bound to bring this suit within twelve years from the time at which the ijaradars were dispossessed from the land, or from the time at which their (the ijaradars) predecessors had been dispossessed, in case the defendants were never in possession.

That appears to us to be a misapprehension of the law. The facts are very short. The land was purchased by the plaintiffs, and at the time when they acquired their title it was subject to an ijara to certain persons. During the currency of the ijara, the ijaradars were dispossessed. When did limitation begin to run against the plaintiffs? Did it run from the dispossession of the ijaradars, or from the termination of the ijara? It appears to us that it clearly runs from the determination of the ijara. Prior to that date they might possibly have a right to bring a suit for declaration of their title, and the Court would have power, probably in its discretion, to give them a declaratory decree; but they certainly had no power to sue for possession. Now by what rule in the Limitation Act is their right to sue governed? It may fall either under Article 140 of the second schedule, or under Article 144. It will be convenient first to refer to Article 139. That deals with a case where the suit is by a landlord to recover possession from a tenant, and there the time runs from the determination of the tenancy. That is the only section dealing expressly with the case of a landlord as such. The next article says that in a suit by a *remainder man*, a reversioner (other than a landlord) or a devisee, for possession of immoveable property, the point from which time runs is, "when his estate falls into possession." Probably in this article, the expression "other than a landlord," means "other than a landlord as such suing his tenant." If that be so, then that article would apparently govern this case, and the time would run from the termination of the ijara. If the case does not fall within that article, then it must fall within Article 144, as being a suit "for possession of immoveable property or any interest therein not hereby otherwise specifically provided for." Then the period of limitation

begins to run from the time when the possession of the defendant becomes adverse to the plaintiff. "Plaintiff," by the interpretation clause, includes any person through whom the plaintiff claims; but the plaintiffs do not claim through the ijaradars. Therefore, possession adverse to the ijaradars is not possession adverse to the present plaintiffs. This conclusion is entirely in accordance with the construction put upon our earlier Limitation Act, in the case to which we have been referred, *Woomesh Chunder Goopto v. Raj Narain Roy* (10 W. R., 15). We think, therefore, that the decree of the lower Appellate Court should be reversed, and the decree of the Munsif in plaintiff's favour affirmed.

The Appellant will have his costs in this Court and in the lower Appellate Court.

Appeal allowed.

NOTES.

[I. LIMITATION AGAINST THE LANDLORD—

Limitation as regards third persons—

As regards the right of the landlord to bring a suit against the trespasser during the subsistence of the lease, see also 10 Cal. 577; 13 Cal. 101; 18 Bom. 51; 19 Bom. 138; 10 Cal. 1076; 21 Mad. 288.

In these cases, the landlord is not barred and time does not run against him until the expiration of the term, even if the tenant himself be barred:—*Walter v. Yalden* (1902) 2 K. B. 304; and in such cases the tenant, being barred, and having no possession himself, cannot by his surrender confer a right of possession.

Suppose a determination of the tenancy by surrender accompanied by a renewal; limitation runs or not against the landlord according as the person in actual possession is the lessee (including those deriving title from him) or a trespasser. In the former case, as there is no moment when the lessor has a right of entry, time does not run against him, *Corpus Christi College v. Rogers* (1879) 49 L. J. Q. B. 4 C. A.; *Ecclesiastical Commissioners v. Tremer* (1893) 1 Ch. 166 (sub-lessee). In the latter case time runs against him, in favour of the third person, the new lease being carved out of the possession vested in the lessor, *Ecclesiastical Commissioners v. Rowe* (1880) 5 A. C. 736.

2. Limitation as regards the tenant—

The subject of the tenant's incapacity to prescribe adversely to his landlord was exhaustively dealt with by Bhashyam Ayyangar, J., in his judgment in (1892) 25 Mad. 507; see also 29 Cal. 518, P.C.

Upon the determination of the tenancy, limitation runs against the landlord:—(1903) 26 Mad. 535. As regards tenant holding over after expiry of the term of the lease, see that case and 24 Bom. 504; 1 A.L.J. 201; 31 Mad. 163. There may, however, be adverse possession by the tenant of land other than those demised by the lease (16 C.W.N. 634,) but it will have to be yielded up on the determination of the tenancy.

If limitation had commenced to run against the landlord before the commencement of the lease, the fact of the lease is no bar to its running against both the landlord and the tenant—5 All. 1; 17 Cal. 137; 26 Mad. 410. Similar principles are applicable to the case of mortgagor and mortgagee:—4 Bom. L.R. 721; 27 All. 395. Adverse possession may run against the real owner when, though by mistake, he himself holds the land as tenant of a third party, and his real title will be extinguished on the expiry of 12 years:—29 Cal. 518 P.C. Principles, similar to those in this case, were laid down in 13 Cal. 101; 10 C. W. N. 343; 29 All. 593; 4 A. L. J. 726; (1907) A. W. N. 1855; 27 Bom. 43; 4 Bom. L. R. 721. The case of 26 Cal. 460 is an erroneous decision, as pointed out in 29 All. 593; and it would appear that the case of 1 C. W. N. 246 is likewise erroneous, since the material factor in adverse possession is not the right to rent nor the tenant's dealing with the land or attorning to another, but the right of the landlord to possession. The landlord having parted with it to the tenant, does not regain it until determination of the tenancy, and so, until then, his right to possession is not barred.]

The 9th October, 1882.

PRESENT :

MR. JUSTICE FIELD AND MR. JUSTICE NORRIS

Manu Miya

versus

The Empress.*

Joinder of charges Offences of the same kind committed in respect of different persons—Criminal Procedure Code (Act X of 1872), ss. 452, 453, and 455.

Where an accused was charged under one charge including four counts, viz.,¹

- (1) House-breaking by night with intent to commit theft in the house of A ;
- (2) Theft from the same house ;
- (3) House-breaking by night with a like intent in the house of B ;
- (4) Theft from that house ;

And where he pleaded guilty to the first and third charges,

Held, that the case was within the terms of s. 453, and that the words " offences of the same kind " are not to be limited by the explanation to that section, but include a case like this, where a man has within a year committed two offences of house-breaking.

Held, also, that the words " offences of the same kind " are not limited to offences against the same person.

Per FIELD, J. : The explanation to s. 453 must be understood as extending and not as limiting the meaning of that section.

Per NORRIS, J.—Care should be taken that accused persons are not prejudiced by charges being joined, and the Court should at all times be anxious to lend a willing ear to any application upon their behalf by separation of charges and for separate trials upon separate charges.

Empress v. Murari (I. L. R., 4 All., 147) dissented from.

THE facts of this case appear sufficiently from the judgment of Mr. Justice NORRIS.

No one appeared for either side.

The following **Judgments** were delivered by the Court (FIELD and NORRIS, JJ.):—

Norris, J.—In this case there were four heads of charge or counts against the prisoner, viz., *first*, house-breaking by night [372] with intent to commit theft in the house of one Baroda Prosad Das ; *second*, theft from the same house ; *third*, house-breaking by night with intent to commit theft in the house of one Tarini Churn Butta ; and, *fourth*, theft from the same house.

At the trial before the Sessions Judge the prisoner pleaded guilty to the first and third heads of charge, and was sentenced upon the first to three years rigorous imprisonment, and upon the third to three years rigorous imprisonment, to commence at the expiry of the sentence passed under the first head of charge.

It does not appear that any plea was recorded upon the second and fourth heads of charge ; the Judge merely says : " No sentences are given under the

* Criminal Appeal, No. 454 of 1882 against the order of H. Muspratt, Esq., Sessions Judge of Sylhet, dated the 21st June 1882.

second and fourth heads of charge as they are included in the first and third heads."

The Magistrate committed the prisoner upon one charge only, including therein the four heads of charge to which I have referred; and the Sessions Judge tried him upon that one charge as sent up by the Magistrate.

We do not think that the courses followed by the Magistrate and Sessions Judge are illegal. Section 452 of the Code of Criminal Procedure says: "There must be a separate charge for every distinct offence of which any person is accused, and every such charge must be tried separately, except in the cases hereinafter excepted." Section 453 says: "When a person is accused of more offences than one of the same kind, committed within one year of each other, he may be charged and tried at the same time for any number of them not exceeding three." Then follows the explanation: "Offences are said to be of the same kind under this section if they fall within the provisions of section four hundred and fifty-five." Section 455* says: "If a single act or set of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused person may be charged with having committed any such offence; and any number of such charges may be tried at once, or he may be charged in the alternative with having committed some one of the said offences."

Now if we are to hold that the words "offences of the same kind" in s. 453 refer to, and include only "offences that fall [373] within the provisions of s. 455," then undoubtedly there has been an illegality; there has been an "error or defect either in the charge or in the proceedings on the trial," which would call for our interference if we were of opinion that such error or defect had prejudiced the prisoner in his defence; but as the prisoner pleaded guilty, he cannot be said to have been thus prejudiced. But we are of opinion that we cannot so hold. To do so would be equivalent to striking s. 453 out of the Code altogether. We are of opinion that the words "offences of the same kind" in s. 453 are not to be limited by the explanation to that section, but include such a case as this where a man has within a year committed two offences of house-breaking. The "offences" mentioned in s. 455 are not in fact "offences of the same kind," but offences of different kinds arising out of "a single act, or set of acts." Moreover, these offences of different kinds arising out of "a single act or set of acts" must, in the contemplation of the section, have been committed at one and the same time, whereas s. 553, by the use of the words "within one year of each other," clearly points to offences committed on distinct occasions, separated, it may be, by 364 days. Upon the words of the Act, therefore, we are of opinion that there has been no illegality.

We now proceed to consider another point, *viz.*, whether the "offences of the same kind," mentioned in s. 453, must be held to mean offences against one and the same person. We are of opinion that they must not be so limited. There is nothing in the words of the section itself so limiting them, and we are not at liberty to introduce words of limitation unless it is absolutely necessary to do so. We are aware that in this holding we are refusing to follow the decision of the High Court at Allahabad in the case of *Empress v. Murari*

* [Sec. 455 :—If a single act or set of acts is of such a nature that it is doubtful which of
Where it is doubtful several offences the facts which can be proved will constitute,
what offence has been the accused person may be charged with having committed any
committed. such offence; and any number of such charges may be tried at
once, or he may be charged in the alternative with having committed some one of the
said offences.]

(I. L. R., 4 All., 147), but with the greatest respect for the learned Judges who decided that case, one of whom, STRAIGHT, J., has a most deservedly high reputation as a criminal lawyer, we do not think it is correct. As I said before, there are no words in the section limiting its operation as the Allahabad High Court would limit it. This of itself would, in our opinion, be sufficient ground for supporting our present ruling, but [374] we think it well to refer to the practice of the Criminal Courts in England as furnishing authority in support of our view. According to the Common Law of England, there is nothing to prevent a prisoner being charged on different counts of the same indictment on the several different felonies. In Hale's Pleas of the Crown, Vol. II, p. 173, it is laid down that "if there be one offender and several capital offences committed by him, they may be all contained in one indictment as burglary and larceny: larcenies committed of several things, though at several times, and from several persons, may be joined in one indictment"; and see *Reg. v. Heywood* (I. L. and C., 451). In the case of *Castro v. The Queen* (L. R., 6 App. Ca., 229) Lord Blackburn, at p. 243, makes the following observation: "The course taken with regard to one indictment was this: The Queen having sent her Commission to the Grand Jury or any other Commission to a proper tribunals, the tribunals so authorized presented all the offences that came to their knowledge; if it was brought sufficiently to their knowledge that a man had committed ten murders, fifty burglaries, and a score of larcenies, they would find, not one finding as to them all, but they would find in separate counts that he had committed each of those charged offences; and if there were many other persons (as generally there are) it would also be found that those other persons had committed the offences proved against them also, and of this presentment one record was made up. Upon that process could be issued against a man so charged, to bring him upon his trial before a petty jury, to try whether he was guilty of those offences so charged or not.

"Now, at Common Law, there was no objection whatever, in point of law, to bringing a man who was charged with several offences if those charges were all felonies, or were all misdemeanours, before one petty jury, and making him answer for the whole at one time. The challenges and the incidents of trial are not the same in felony and misdemeanour, and, therefore, felony and misdemeanour could not be tried together; but any number of felonies and any number of misdemeanours might. The contrary was asserted by the learned Counsel, but though repeatedly challenged to do so, he did not cite any authority in support of his contention. There was no legal objection to doing this; it was frequently not fair to do it, because it might embarrass a man in the trial if he was accused of several things at once, and frequently the mere fact of accusing him of several things was supposed to tend to increase the probability of his being found guilty, as it amounted to giving evidence of bad character against him. Whenever it would be unfair to a man to bring him to trial for several things at once, an application might be made, to the discretion of the presiding Judge, to say, 'try me only for one offence, or try me only for two offences; if one was the real thing, let me be tried for one, and one only'; and whenever it was right that that should be done, the Judge would permit it. For these mixed motives it was well established by a long series of decisions, (I confess I doubt whether they were right at first, but certainly they have been both well established now, and sanctioned by Statute—that is quite clear) that where the several charges were of the nature of felony, the joining of two felonies, in one count was so, necessarily I may say, unfair to the prisoner that the Judge ought, upon an application being made to him, to put the prosecutor to his election, and send them to two trials. It never was decided, even in:

felony, that if that application for the election was not made, the joining of several felonies, that is to say, the taking several felonies which had been found together, and trying those several felonies before one petty jury, was wrong in point of law; on the contrary, it was repeatedly held that it was right enough, although, if the proper application had been made at the proper time in a case of felony, the party prosecuting would have been put to his election or made to take one felony only, and not both at the same time. But in cases of misdemeanour, it was by no means a matter of course that that should be done. I think that if the Judge, upon an application made to him, had been satisfied that to try the man for several misdemeanours together would work injustice to the prisoner, he had a perfect right to say 'I will not work this injustice by trying them together, let us diminish them in number, and try a reasonable number and no more. [376] I do not know whether that was ever done in a case of misdemeanour, but I feel very little doubt that it may have been.'

The Legislature has enacted in two cases that three charges of felony may be charged in one indictment. 24 & 25 Victoria, cap. 96, enacts that "it shall be lawful to insert several counts in the same indictment against the same person for any number of distinct acts of stealing, not exceeding three, which may have been committed by him against the same person within the space of six months from the first to the last of such acts, and to proceed, thereon, for all or any of them;" and s. 71 of the same Act contains similar provisions with regard to three distinct acts of embezzlement.

Such is the law and practice in England with regard to felonies. In cases of misdemeanour there is no limit to the number of counts charging distinct offences that may be inserted in one indictment. In prosecution of what are called "long firm swindles" it is not unusual to insert ten or fifteen counts, each charging a separate offence against different persons. Within my own experience there was a case tried before Mr. Justice HAWKINS at the last May Sessions of the Central Criminal Court, where the indictment contained some 120 counts, and at least 25 or 30 of these charged separate offences against different persons. The offences in this case, house-breaking by night, or as called in England burglary, were, according to English law, felonies; and, no doubt, had the prisoner been tried in England, two separate indictments would have been preferred against him; but here, happily, we know nothing of the antiquated distinction between felony and misdemeanour, and, therefore, if our view of the law is correct, the question in this case is reduced to one of practice, and upon this point we are of opinion that the practice prevailing in England with regard to misdemeanour, is the one that should be followed here. But the Judges should take care that prisoners are not prejudiced by that course being taken, and they should, at all times, be anxious to lend a willing ear to any application for separation of charges and for separate trials upon separate charges. The prisoner in this case having been convicted on his own plea, there is no appeal under s. 273* [377] of the Criminal Procedure Code, except as to the extent or legality of the sentence as I have already

* [Sec. 273:—There shall be no appeal in cases in which a Court of Session, or the Magistrate of a District or other Magistrate of the 1st class, passes a sentence of imprisonment not exceeding one month only, or of fine not exceeding fifty rupees only, or of whipping only.

There shall be no appeal from a sentence of imprisonment passed by such Court or Magistrate in default of payment of fine when no substantive sentence of imprisonment has been passed.

When an accused person has been convicted on his own plea, whether on a trial with assessors or by jury, there is no appeal, except as to the extent or legality of the sentence.]

pointed out. We are of opinion that there is no illegality, and having regard to the offences to which he pleaded guilty, we are of opinion that the sentences are not at all too severe.

This appeal will, therefore, be dismissed.

Field, J. - I am of the same opinion. I think that the explanation to s. 453 of the Code of Criminal Procedure must be understood as extending not as limiting the meaning of the section itself. As pointed out by my brother NORRIS, there are in the section no words which limit the three offences for which an accused person may be charged and tried at the same time to offences against the same person; and I think the explanation cannot operate to impose any such limitation or restriction upon the general language of the section.

Appeal dismissed.

NOTES.

[JOINDER OF CHARGES]

See also (1890) 15 Bom. 191 (502); (1887) Ratanlal, 331; 25 Mad. 61 P. C.; 13 C. W. N. 418; 507; 9 C. L. J. 119.]

[9 Cal. 377 : 11 C.L.R. 499]

APPELLATE CIVIL.

The 11th July, 1882.

PRESENT :

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

Nobin Chunder Roy.....One of the defendants
versus

Rup Lall Das and another.....Plaintiffs.*

*Contribution, Suit for—Government revenue—Payment
by one co-sharer for another.*

Where a co-sharer of a portion of a talook is compelled to pay a quota of the Government revenue due on account of a share, not his own, in order to save the portion of the talook from being sold, he is entitled to a charge upon such share for the money so paid, and such share should be charged even when it has passed subsequently into the hands of a third party.

Enayet Hossain v. Muddun Monee Shahoon (14 B. L. R., 155; S.C., 22 W. R., 411). followed.

IN this suit the plaintiffs sought to have it declared that a sum of money paid by them in respect of Government revenue for a seven-anna share in a certain talook should be declared a charge [378] on the defendants' share in the talook, it having been paid on their account to prevent a sale taking place.

In the suit, as originally framed, there were seven defendants, and the first Court gave a decree as against only the first defendant, but on appeal this decree was varied and the amount decreed in favour of the plaintiffs was,

* Appeal from Appellate Decree, No. 441 of 1881 against the decree of Baboo Krishna Chunder Chatterjee, First Subordinate Judge of Backergunge, dated the 27th December 1880, modifying the decree of Baboo Doorga Churn Sen, Third Munsif at Barisal, dated the 7th July 1880.

declared to be a charge on the 11 gundas $3\frac{1}{4}$ cowries share of the defendant No. 1, which had subsequently passed into the possession of defendant No. 4.

Defendant No. 4 now preferred a special appeal to the High Court.

The facts are, for the purposes of this report, sufficiently stated in the judgment of the Court.

Baboo *Jogesh Chunder Roy* and Baboo *Busunt Coomur Bose* for the Appellant.

Baboo *Lal Mohun Das* for the Respondents.

The **Judgment** of the Court (McDONELL and FIELD, JJ.) was as follows :—

Field, J.—This is a case somewhat complicated by details, but the point which has to be decided is a very simple one when eliminated from these details. It appears beyond all doubt, and in fact it has now been admitted before us, that the plaintiffs and defendants 1, 2, 3, 4, 6, and 7 were joint proprietors of a seven-anna share in a talook, and for this seven-anna share a separate account had been opened, under the provisions of Act XI of 1859, in the Collectorate. By some mistake upon an arrear of revenue falling due, the whole talook was advertized for sale, but this mistake was afterwards corrected and what was about to be sold for the unpaid balance of revenue was only the seven-anna share just mentioned. The plaintiffs, in order to prevent the sale, paid Rs. 87-6-10, which was the amount of the unpaid balance of revenue, and they have brought this suit to recover this amount from the defendants other than defendant 5, who are, as has already been pointed out, the plaintiff's co-sharers in the seven-anna share. The defendant No. 4 had before the transaction which has given rise to this case purchased a nine-anna share out of 5 annas 15 gundas treated as 16 annas, [379] that is, 5 annas 15 gundas cut of the seven annas share. It has been found as a fact by the lower Courts that defendant No. 4 had paid his quota of revenue in respect of the nine-sixteenths of 5 annas 15 gundas so purchased by him, and of which he was the proprietor when the seven-anna share fell into arrears. The present appeal is concerned with another share consisting of 11 gundas $3\frac{1}{4}$ cowries, that is, a share of the seven annas share. Now, in respect of this 11 gundas $3\frac{1}{4}$ cowries share the defendant No. 4 was a mortgagee under a mortgage granted by defendant No. 1, and after the payment by the plaintiffs of the balance of revenue, the defendant No. 4 became the purchaser at an execution sale of this 11 gundas $3\frac{1}{4}$ cowries share. The Judge in the Court below, applying the principle laid down in the case of *Enayet Hossain v. Muddun Monce Shahoan* (14 B. L. R., 155; s.c. 22 W. R., 411), has directed that the revenue paid by the plaintiffs be a charge upon this 11 gundas $3\frac{1}{4}$ cowries share. It is now contended before us that the principle of that case ought not to be applied to the present case, because in that case the whole estate was about to be sold, and in the case before us it was merely a share, *i.e.* the seven annas share which was about to be sold. It appears to us that this really makes no difference. The principle on which that case proceeded was, that inasmuch as by the payment of the Government revenue the estate was saved and protected from sale, the person who afterwards became the owner of the estate, and was benefited by this protection, could not justly say that the money paid to effect that protection ought not to be a charge on the thing protected, and we think that that principle is just as applicable to a share of an estate as it is to the whole of an estate. An argument has been raised upon s. 54 of the Sale Act, but we do not see that *that* has any application to the case now before us. The defendant No. 4 having

purchased has become the assignee by law of defendant No. 1, and inasmuch as the amount of revenue paid to protect the seven annas share from sale would justly be made a charge upon the 11 gundas $3\frac{1}{4}$ cowries share in the hands of defendant No. 1, it is equitable that it should be a charge upon the same share in the hands of the [330] assignee by law of the same defendant No. 1. We think, therefore, there are no grounds for this appeal, which will be dismissed with costs. We may observe that no question has been raised by either party as to there not being a personal decree against defendant No. 1, and the amount being leviable upon the share only in case it cannot be levied from him personally. This judgment will admittedly govern appeals Nos. 466 and 467 of 1881.

McDonell, J. I am unable to distinguish this case from that of *Enayet Hossain v. Muddun Monce Shahoan* (14 B. L. R., 155; s.c., 22 W. R., 411), and following that ruling I concur in dismissing these appeals.

Appeal dismissed.

NOTES.

[PAYMENT OF GOVERNMENT REVENUE—CHARGE—

In (1887) 11 Cal. 809 F. B. it was declared that there was no charge, overruling this case. The case of 11 Cal. 809 has been followed by the Calcutta High Court in 22 Cal. 800; by the Bombay High Court in 26 Bom. 437 dissenting from 11 Bom. 313; by the Allahabad High Court in 14 All. 273; by the C. P. in 8 C. P. L. R. 42; but not by the Madras High Court in 11 Mad. 452; 15 Mad. 258; 26 Mad. 686; 29 Mad. 37.]

[9 Cal. 380 : 12 C. L. R. 58]

APPELLATE CIVIL.

The 10th July, 1882.

PRESENT :

MR. JUSTICE WILSON AND MR. JUSTICE O'KINEALY.

Bholanath Roy.....Judgment-debtor

versus

Nurendro Nath Roy.....Decree-holder."

Landlord and Tenant—Rent decree—Execution of decree—Limitation—
Beng. Act VIII of 1869, s. 58.

Where an application for the transfer of a rent decree for execution has been made and granted by the Court which passed the decree within three years from the date of the decree, but no application for execution is made to the Court to which the decree has been transferred within three years from the date of the decree, the execution of the decree will be barred by limitation, under the provisions of Beng. Act VIII of 1869, s. 58.

THIS was an application for execution of a decree for rent. The facts are thus stated by the Court of First Instance: "The decree in question is a rent

* Appeal from Appellate Order No. 94 of 1882, against the order of C.A. Kelly, Esq., Judge of Pubna, dated the 20th January 1882, reversing the order of Baboo Lokhenath Nundi, Munsif of Nawabgunge, dated the 13th September 1881.

decree, and for a sum less than Rs. 500, and the application under s. 230 of Act X of 1877 has been made to this Court, after expiration of three years from the date of the decree; but the application under s. 223 of the said Act for the transfer of the decree was made to the Munsif's Court, Putnitollah, in which these decrees were passed within three years from the date of the decree. The judgment-debtor objects to the execution on the [381] plea that limitation bars. The point to be decided is whether the execution of the decree is barred by limitation." The Munsif, while holding in conformity with *Heera Lall Seal v. Poran Maiteah* (6 W. R., (Act X), 84), and *Rhidoy Krishna (Ihose v. Kailas Chandra Bose* (4 B. L. R., F. B., 82: s.c., 13 W. R. (F. B.), 3), that s. 58 was not to be construed literally, yet held that an application under s. 223 of Act X of 1877 could not be considered an application to execute the decree; and as the application under s. 230 for execution of the decree had not been made within three years from the date of the decree, he held the execution of the decree was barred by limitation. On appeal the Judge said :

"In this case I think the Munsif's judgment may be set aside. There is nothing in s. 230, Act X of 1877, that prohibits the presentation of an application for execution to the Court which passed the decree, although another application is put in afterwards before the Court to which the decree has been sent for execution. In this case it appears that an application was put in for transfer before the Munsif of Putnitollah within time; that the decree was sent for execution to the Munsif of Nawabgunge in this district, reaching the Munsif, it appears, on or about the 5th of May 1881; and that application for execution, with talubana for notice, was put in on the 10th of May 1881, the Munsif having directed by order of the 5th of May that a notice should be put up at the catcherry for the decree-holder to appear, and directing that the case be put up on the 1st of June. It appears that notice subsequently issued, and that objection was made by the judgment-debtor. It is stated by the pleaders for the decree-holder that the application, which they contend was an application for execution, was in tabular form, though I do not consider it proper that any document showing this should be admitted on the record at this time. It appears, however, that the prayer in this application may be considered as an application for execution so far as allowing execution to proceed goes. On this view I reverse the order of the Munsif and decree the appeal with costs."

The judgment-debtor appealed to the High Court on the grounds that the Court of appeal was wrong (1) in holding execution was not barred by s. 58, Beng. Act VIII of 1869; and (2) in holding that an application under s. 223 for transfer of a decree to another Court is an application for execution within the meaning of s. 230 of the Code of Civil Procedure; and that the said application under s. 223 saved the application for execution from being barred.

[382] Baboo Bama Churn Banerjee for the Appellant.

Baboo Joy Gobind Shome for the Respondent.

The **Judgment** of the Court (WILSON and O'KINEALY, JJ.) was delivered by

Wilson, J.— In this case the question turns wholly upon the construction of s. 58 of the Rent Act, which says that "no process of execution of any description whatsoever shall be issued on a judgment in any suit for any of the causes of action mentioned in ss. 27, 28, 29 or 30 of this Act, after the lapse of three years from the date of such judgment, unless the judgment be for a sum exceeding five hundred rupees." In the present case the judgment or decree is for a sum less than Rs. 500, and the question raised is whether the right to execute is barred.

Now what appears to have happened is this : that within three years from the date of the decree an application was made for the transfer of a certified copy of the decree from the Court by which the decree was made, to the Court of the Munsif of Nawabgunge. A certified copy was transmitted. After the lapse of three years from the date of the decree, an application was made for execution to the Munsif of Nawabgunge. He held that the application was made too late. The District Judge reversed that decision. We think that the Munsif was right, and the District Judge wrong. There are several decisions modifying the severity of the result of the absolutely literal construction of the terms of s. 58, as that section says that "no process of execution of any description whatsoever shall be issued." Acting upon the ordinary rule of construction that the delay on the part of the Court is not to prejudice any man's rights, that section has been construed to mean that no process of execution shall issue unless it is properly applied for within three years. We have no right to relax the meaning of that section any further. We are asked to put such a construction upon it as to make it mean that no process shall issue unless some step, with a view to making an application, has been taken within three years. We do not think we are at liberty to put any such construction. The appeal will be allowed with costs.

Appeal allowed.

[- 11 C.L.R. 577]

[383] APPELLATE CIVIL.

The 23rd August, 1882.

PRESENT :

MR. JUSTICE WILSON AND MR. JUSTICE FIELD.

Bhugwan Chunder Roy Chowdri and others..... Plaintiffs
versus

Manick Bibee.....Defendants.*

*Act X of 1859, s. 23—Revenue Court, jurisdiction of—Surety
for payment of rent—Binding decree.*

In a suit for arrears of rent in a Revenue Court under Act X of 1859, the lessors joined as defendants the lessee, and another person whom they alleged to be a surety for the payment of the rent. An *ex parte* decree was made in favour of the plaintiffs, but it did not expressly make the alleged surety liable for the money awarded. In execution of the decree certain of the alleged surety's land was sold, and the decree-holders were the purchasers at the sale.

An application under Beng. Act VII of 1876 for the registration of their names as proprietors of the land purchased having been rejected, the decree-holders brought the present suit to establish their title to, and to recover possession of, the land.

Held, that the plaintiff's title was bad on the ground that the decree did not purport to bind the surety for the payment of the money awarded, and on the ground that a Revenue Court is not competent to entertain a suit against a person who has become surety for payment of rent.

THE plaintiffs, alleging that they had been in possession of the land in dispute previous to an order dated the 30th June 1879 of the Collector in a proceeding under Beng. Act VII of 1876, rejecting their application to be

* Appeal from Original Decree, No. 223 of 1881, against the decree of Baboo Uma Churn Kastogiri, Subordinate Judge of Tipperah, dated the 26th of June 1881.

registered as proprietors, instituted this suit on the 26th June 1880 to establish their title to, and to recover possession of, the land. The facts material to this report appear from the judgment of the High Court.

The suit having been dismissed by the lower Court, the plaintiffs appealed.

Bahoo Kally Mohun Doss, and Bahoo Sharada Churn Mitter for the Appellants

Bahoo Hurry Mohun Chuckerbutty for the Respondent.

The **Judgment** of the Court (WILSON and FIELD, JJ.), was delivered by.

Wilson, J.— We think that this appeal should be dismissed.

[384] The suit is one to recover certain land, and the case made is this : That the plaintiffs, or rather those from whom the plaintiffs claim, granted an ijara in December 1867 to the son-in-law of the present defendant, one Fuzur Ali ; that Fuzur Ali executed a kabuliati in accordance with the ijara ; that the present defendant executed at the same time through her mokhtar a bond for the purpose of securing payment of rent ; that subsequently in a suit brought in the year 1868, in the Court of the Deputy Collector of Moonsheegunge in the district of Dacca, under Act X of 1859, against both Fuzur Ali and the defendant to recover arrears of rent, a decree was recovered ; that after the Act had ceased to be law, and after Act III of 1870 had been passed, the decree (which would seem to have been transferred in accordance with the last mentioned Act by the Deputy Collector to the Subordinate Judge's Court at Dacca) was remitted for execution from the Court of the Subordinate Judge at Dacca to the Court of Tipperah, and that there in execution of the decree the right, title, and interest of the present defendant in the land sued for was sold and purchased by the plaintiffs. This is the title on which they now sue.

It is obvious that, this title being founded upon a decree followed by execution, it must be shown, in order to make out a good title, *first*, that the decree was one purporting to bind the present defendant for the payment of money ; *secondly*, that it was a decree made by a Court of competent jurisdiction.

The decree was made in a suit in which the son-in-law and the present defendant were both made defendants. The son-in law, Fuzur Ali, is described as the principal defendant, and the other as merely a *pro formâ* defendant. The decree states, first, that the claim is for recovery of arrears of rent under Act X of 1859 ; it then goes on to recite the ijara, and it says :

"The defendant No. 1, on the strength of a deed of security executed by defendant No. 2, took a Tahoot settlement of jowar" so and so, which it describes in detail, and then it says : "The present suit was instituted on the 31st August 1869 for recovery [383] of the balance Rs. 1,213-1-10-3, inclusive of interest, from the defendant," the word used being not in the plural.

"According to the reasons given in the judgment passed to-day in English" (which judgment was not put in evidence) "it is ordered that a decree be passed in favour of the plaintiffs together with costs, fee, and interest."

That decree throughout points out that one defendant is the principal debtor, and the other is a surety. It speaks of the money as due by the one, and it says that a decree is given without saying against whom. It says nothing about the principal debtor being, or possibly hereafter becoming, unable to pay the money decreed against him. It contains no such provision as the law directs in case of decrees against principal and surety requiring the

money awarded to be levied from the principal in the first instance, and it does not anywhere expressly say that any amount of money is awarded against the surety.

It is quite consistent with the terms of the decree that the surety may have been made a party to it only to have a decision binding upon her as to the indebtedness of the principal debtor in case of subsequent proceedings against the surety. It is for the plaintiff to make out his title, and show clearly that the decree is a decree for money against the present defendant, and he has failed to do so. All the subsequent proceedings must, therefore, fall to the ground.

On the second question it appears to us also that the title of the plaintiff fails. That is the question of jurisdiction.

The decree relied upon was a decree given by the Deputy Collector, and it could be given by that officer only under s. 23, Act X of 1859. Now, that is an Act which, according to its preamble was intended to re-enact, with certain modifications, the provisions of the existing law relative to the rights of ryots with respect to the delivery of pottahs and the occupancy of land, to the prevention of illegal exaction and extortion in connection with demands of rent, and to other questions connected with the same, to extend the jurisdiction of Collectors, and to prescribe rules for the trial of such questions, as well as of suits for the recovery of arrears of rent, and of suits arising out of the distraint of property for such arrears, and to amend the law relating [386] to distraint. That is to say, the preamble describes the law as a law relating to matters which arise between landlord and tenant as such. Then s. 23 describes what suits are to be brought in the Collector's Court. The 4th clause says: "All suits for arrears of rent due on account of land, either kheraj or lakhiraj or on account of any rights of pasturage, forest rights, fisheries, or the like."

The Act does in some parts deal with rights of persons different from landlord and tenant, and where it does, it does so expressly. The very next section, (s. 24) in dealing with suits by zamindars against their collecting agents, expressly allows the sureties of such agents to be brought into such suit. Now taking the Act by itself, it appears to us to be free from reasonable doubt that sub-section 4 of s. 23 applies only to suits for rent by a landlord against his tenant as such, and not to suits against sureties or other persons not tenants. The authorities are very strong to the same effect. The most important of these is the Full Bench case, *Prosonno Coomar Paul Chowdry v. Koylash Chunder Paul Chowdry* (B. L. R., Sup. Vol., 759; s. c., 8 W. R., 428). That case appears to us to be a clear and unqualified decision to the effect that the jurisdiction of the Revenue Courts under the sub-section in question was limited to cases between landlord and tenant as such, and did not extend to claims against any person other than a tenant. That has been followed in a series of cases: for instance, in *Kishen Buttee Misra v. Hickey* (11 W. R., 406), and in *Ram Tann Acharji v. Komal Lochan Roy* (3 B. L. R., Ap. 37; s. c., 11 W. R., 407). In a more recent case, *Bipinbehari Chowdry v. Ramchandra Roy* (5 B. L. R., 234) there was some difference of opinion between the learned Judges before whom the case came as to the precise bearing of the rule of law upon the particular case before them, but all agreed that the only questions that the Revenue Courts could try were those between landlord and tenant as such. It is true that there are cases in which the jurisdiction has been upheld where the person sued has not been the person in whose name [387] the holding was taken, because the doctrine of benami has been recognized, and a suit might lie against the real tenant who had taken his holding

in the name of a benamidar. An example of this will be found in *Heeraloll Bukshee v. Rajkishore Mozoomdar* (W. R. Sp. No., 58).

Two cases, however, were relied upon on the other side. Those are *Bhoobun Mohun v. Bhubo Soonduree Debia Chowdrain* (8 W. R., 452), and an earlier case, *Koomeroonissa Begum v. Khyroonissa Begum* (S. D. A. Jan. to June, 1862, p. 297). These are said to be authorities for holding that a surety might be sued in a Revenue Court together with the principal for whom he had become surety.

The earlier of those cases appears to us to be by no means an authority for that proposition. The plaintiff in that case appears to have alleged the so-called surety to have been the actual tenant, and in actual occupation of the demised premises, and, therefore, liable to pay the rent. The defence set up suretyship. The facts brought before the Court do not appear from the report, and we are left wholly in the dark as to what the materials upon which the Court acted really were. All that we know is, that the Court sent the case back to be re-tried.

Then in *Bhoobun Mohun v. Soonduree Debia Chowdrain* (8 W. R. 452) the decision taken by itself does appear to be inconsistent with the series of cases to which we have referred. But there again there is no report of the facts of the case, or of the arguments, and nothing to enable us to say what kind of case the Court was really dealing with. When we observe that this case was decided within a few months after the Full Bench decision in *Prosunno Coomar Paul Chowdhry v. Koylash Chunder Paul Chowdhry* (B. L. R. Sup. Vol., 759; s.c., 8 W. R., 428), and that one of the learned Judges, before whom the case came, was himself a member of the Full Bench, it is impossible to suppose that the Court can have intended to decide something in apparent conflict with the decision of the Full Bench without stating its reasons for holding it not to be in conflict. We are bound, therefore, to assume that [388] there must have been facts in that case of such a nature as to put the matter on a different footing from the other cases.

These considerations are sufficient to dispose of the present case, and the appeal will, therefore, be dismissed with costs.

Appeal dismissed.

[- 9 Cal. 388]

APPELLATE CIVIL.

The 31st July, 1882.

PRESENT :

MR. JUSTICE TOTTENHAM AND MR. JUSTICE BOSE.

Bally Dobey.....Plaintiff

versus

Ganei Deo and another.....Defendants.*

Execution of decree—Attachment—Shikmi ghatwali tenure.

A shikmi ghatwali tenure, held under the superior ghatwal, is not liable to be sold in execution, nor are its proceeds liable to attachment for satisfaction of the debt due from its holder.

* Appeal from Appellate Decree, No. 2457 of 1880 against the decree of W. Oldham, Esq., Deputy Commissioner of Damka, dated the 29th September 1880, modifying the decree of C. W. Wilmat, Esq., Sub-Judge of Deoghur, dated 12th May 1880.

Mr. Evans, Baboo Mohesh Chunder Chowdhry and Baboo Mohini Mohun Roy for the Appellant.

Mr. Branson, Baboo Sree Nath Dass, Baboo Doorga Mohun Dass and Baboo Kuroona Sindhu Mookerjee for the Respondents.

THE facts of this case sufficiently appear from the **Judgment** of the Court (TOTTENHAM and BOSE, JJ.), which was delivered by

Tottenham, J.—We are of opinion that the lower Courts' judgment is correct. The question involved in the suit is whether a shikmi ghatwali tenure, held under the superior ghatwal, is liable to be sold in execution, or its proceeds liable to attachment for satisfaction of the debt due from its holder. The lower Court has held that it is not liable for such debts, and we entirely concur in that opinion. The shikmi tenure partakes of the nature of the superior ghatwali tenure, and as the latter has been repeatedly held by this Court to be not liable for such debts, the former will be necessarily so. The inferior tenure cannot have larger incidents attached to it than the superior.

We accordingly dismiss the appeal with costs.

Appeal dismissed.

NOTES.

[GHATWALI TENURE—

The surplus collections during life may be attached, (1836) 23 Cal. 873, but not those after death, 6 W. R. 129; 7 W. R. 178. Ghatwali tenures in Kharackpure are liable :—10 Cal. 677; 15 Cal. 471]

[12 C. L. R. 494]

[389] APPELLATE CIVIL.

The 4th August, 1882.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE NORRIS.

Sheo Proshad and another.....Defendants

versus

Jung Bahadoor and another.....Plaintiffs.*

Hindu Law—Mitakshara—Alienation by father—Joint family—Sale in execution of money decree against father of Mitakshara family.

The mere fact of a decree being passed against the father only of a joint family governed by the Mitakshara law will not lead necessarily to the conclusion that what was sold in execution of that decree is only the father's interest in the joint family property. Notwithstanding the decree being against the father only under certain circumstances, there may be a valid sale of a joint property belonging to the family in execution thereof.

In execution of two money decrees against A alone, the right, title and interest of A in certain joint family property was sold, and the entire share of the joint family was taken possession of by the auction-purchasers.

In a suit by the minor son and the wife of A who with A, constituted a joint family governed by the Mitakshara law to recover possession of their shares in the property sold, Held that, although the plaintiffs were not parties to the decrees, in execution of which the sales took place, the mere fact of A being sued alone was not sufficient to justify the finding that only his right, title and interest passed under the sales; and that as the facts of the case showed that the decrees were passed with reference to transactions which clearly concerned the joint family, the whole of the share of the joint family in the properties sold passed to

*Appeal from Original Decree, No. 97 of 1881, against the decree of Baboo Mohendro Nath Bose, First Subordinate Judge of Tirhoot, dated the 28th March 1881.

the auction-purchaser, the plaintiff having failed to show that the debts, which were the foundation of the decrees in execution of which the sales were held, were contracted for immoral purposes.

Umbica Prosad Tewary v. Ram Sahay Lall (I. L. R., 8 Cal., 898), and *Ponnappa Pillai v. Pappuayyengar* (I. L. R., 4 Mad., 1), followed.

Ramphul Singh v. Deg Narain Singh (I. L. R., 8 Cal., 517) dissented from.

THIS was a suit in which the plaintiffs, who were the minor son and wife of one Kali Sahai, sought to recover possession of a two-third share out of seven annas in certain mouzahs which had formerly belonged to Kali Sahai, but had been taken possession of by the plaintiffs, who alleged that they had purchased them at sales in execution of two decrees against Kali Sahai.

[390] The plaintiffs claimed to be entitled as members of a joint family, and alleged that one of the mouzahs in question, *viz.*, Dowlatabad, had not been sold. The lower Court was of opinion that Dowlatabad had not passed under the sales, and with regard to the other mouzahs, held that the case was governed by the ruling in the case of *Deendyal Lall v. Jugdeep Narain Singh* (I. L. R., 3 Cal., 198), and that consequently the defendants who contested the claim had only purchased the right, title and interest of Kali Sahai in the properties, and that the plaintiffs were entitled to a decree for possession of the share claimed.

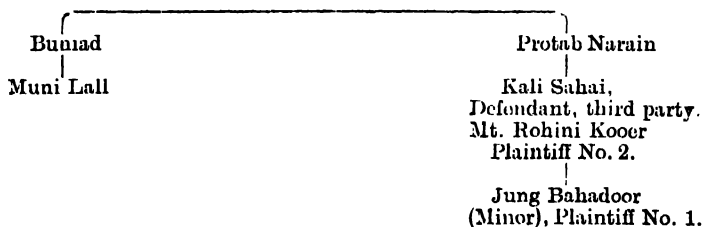
The facts of the case are sufficiently stated in the judgment of the High Court, to which Court the defendants appealed against that decree.

Mr. Branson and Baboo Pran Nath Pundit for the Appellants.

Mr. R. E. Twidale for the Respondents.

The Judgment of the Court (MITTER and NORRIS, JJ.) was delivered by

Mitter, J.—The following genealogical table of the family will be of help in stating the facts of this case:—



From the above tree it will appear that the plaintiffs are the minor son and wife of Kali Sahai, who has been made a *pro forma* defendant. The appellants before us were the defendants who defended the suit in the lower Court. At the time of the institution of the suit, they were in possession of seven annas of Jufferabad Ashi, Aurungabad, Jehanabad, and Dowlatabad, *dakils* of which plaintiffs claim to recover possession of a 4 annas 8 pie share.

It appears that these mouzahs constitute an estate, the towji [391] number of which is 1,300, and the Government revenue of which is Rs. 27-13-11. Eight annas of these mouzahs were held and owned by Kali Sahai, who, on the 28th February 1873, sold a one-anna share in each of these mouzahs to a third party. On the 15th September 1874, in execution of two decrees against Kali Sahai, it is alleged by the plaintiffs that the first three mouzahs were sold, but that the auction-purchasers under their purchase took possession of the whole seven-annas share of these mouzahs, including Dowlatabad, on the 12th Bysack 1282 (April 24th, 1875). The plaintiffs'

case is that under these auction-sales only the interest of Kali Sahai in the first three mouzahs passed ; therefore, they claim to recover possession of two-thirds of seven annas of these mouzahs, i.e., a 4 annas 8 pie share on partition thereof, between Kali Sahai on the one hand and the plaintiffs on the other.

It will be convenient here to state the transactions which led up to the auction-sales mentioned above. Muni Lal and Pertab Narain, father of Kali Sahai, borrowed from one Khajeh Mohamed Rs. 1,200, and executed a bond in favour of the creditor on the 30th June 1858, hypothecating certain properties other than those in suit. This bond was renewed on the 28th April 1862 by Muni Lal, who executed it for himself, and as guardian of Kali Sahai, who was then a minor, his father Pertab Narain having died in the meantime. There was a second renewal of this debt by Muni Lal for self and as guardian of Kali Sahai on the 29th January 1866. Khajeh Mohamed, after the death of Muni Lal, brought a suit against his widow, Deoti Koor and Kali Sahai, for the recovery of the money due under the last-mentioned bond. On the 18th August 1870 he obtained a decree. It appears that on the 15th February 1872, Kali Sahai borrowed from Jugger Nath Singh and Janki Sahai Rs. 5,000, to pay off the debt due from him to the decree-holder Khajeh Mohamed. The creditors, on the 8th February 1873, obtained a decree against Kali Sahai for the money due under this bond. Certain properties, other than those in dispute, having been hypothecated in the bond executed in favour of Jugger Nath Singh and Janki Sahai, the decree of the 8th February 1873 declared that the money decreed should continue to be a charge upon the [392] properties hypothecated. In execution of this decree, the right, title, and interest of Kali Sahai in mouzah Jufferabad, towji No. 1300, and bearing a sudder jumma of Rs. 27-13-11, were brought to sale on the 15th September 1874, and purchased by Peary Lal and Girdharee Mahto for Rs. 4,300. The appellants before us are purchasers from Peary Lal and Girdharee.

On the same 15th September 1874, in execution of another decree, dated the 18th April 1874, against Kali Sahai, his right, title, and interest in seven annas of mouzahs Aurungabad and Jehanabad, were sold and purchased by the same auction-purchasers. Aurungabad was purchased for Rs. 775, and Jehanabad for Rs. 1,750. The history of this decree is as follows : After the death of Muni Lal there was a dispute between Kali Sahai and Deoti Koor his widow, regarding Muni Lal's property. Kali Sahai claimed the whole of it on the ground that the family was joint. The dispute between these parties was settled by a compromise filed by them in a regular appeal pending in this Court between them in 1870. By this compromise, Muni Lal's properties were divided between Kali Sahai and Mussamut Deoti Koor in certain proportions, Kali Sahai having taken over all the debts due from the estate of Muni Lal. One Ram Dhoni Sahai was a creditor of this estate, and it was for Ram Dhoni's debt that the decree of the 18th April 1874 was passed against Kali Sahai. It has been already stated that in execution of this decree Kali Sahai's right, title and interest in seven annas of mouzahs Aurungabad and Jehanabad were brought to sale on the 15th September 1874, and purchased by Peary Lal and Girdharee Mahto. The appellants before us are the purchasers from these auction-purchasers in this instance also. They contend that in execution of the first-mentioned decree, the whole seven annas share of the estate No. 1300, including all the *dakhili* mouzahs, was sold, and that the auction-purchasers took possession under their purchase in April 1875 of the whole seven annas share of the estate.

The lower Court held that in the first auction-sale only mouzah Jufferabad was sold, and the *dakhili* mouzals Aurungabad and Jehanabad were sold in execution of the other decree. Mouzah Dowlatabad was not sold at all. Then as regards the interest that was sold, it was of opinion that, as the plaintiffs [393] were not parties to the decrees, the interest of the father alone in these properties was sold.

We agree with the lower Court that Dowlatabad was not sold. If under the first auction-purchase the purchasers had acquired a seven annas share of the whole estate, they would not have bid for the *dakhili* mouzals of Aurungabad and Jehanabad which were brought to sale on the same date. It was said in the course of the argument before us that the purchasers in the first sale bid for the *dakhili* mouzas in the second sale, because they wanted to avoid litigation, which might have ensued if they had allowed third parties to purchase the *dakhili* mouzas. But it appears to us that, if they had really purchased in the first auction-sale all the *dakhili* mouzas, they would have at least made an attempt to prevent a second sale of two of them. On this point we agree with the lower Court in the conclusion to which it has come.

With reference to the question as to what was sold, we are of opinion that the decision of the lower Court is not correct. That Court was of opinion that, because the plaintiffs were not parties to the decrees, in execution of which the sales in question took place, therefore, according to the principle laid down by the Judicial Committee of the Privy Council in *Deendyal Lal v. Jugdeep Narain Singh* (I. L. R., 3 Cal., 198), only the interest of the father passed. It has been shown that the circumstance of the father being sued alone will not necessarily bring the case within the ruling in *Deendyal Lal v. Jugdeep Narain Singh*. See *Umbica Prosad Tewary v. Ram Sahay Lal* (I. L. R., 8 Cal., 898). The same view was taken by a Full Bench of the Madras High Court in the case of *Ponappa Pillai v. Pappuwayyanganar* (I. L. R., 4 Mad., 1).

In a recent case decided by their Lordships of the Judicial Committee of the Privy Council (*Muttayan Chetti v. Sangili Vira Pandia Chinnatambiar* (I. L. R., 6 Mad., 1), in which the judgment was delivered on the 10th May last) the Full Bench decision of the Madras High Court has been approved as laying down the law correctly. A contrary view seems to have been taken by a Division Bench of [394] this Court (PRINSEP and FIELD, JJ.) in *Ramphul Singh v. Deg Narain Singh* (I. L. R., 8 Cal., 517). This decision is dated the 1st August 1881, but Mr. Justice PRINSEP in another case, the judgment of which has not yet been reported, took the same view as was taken in *Umbica Prosad Tewary's case*. This judgment was delivered on the 16th June last. Under these circumstances, and specially as the Madras Full Bench decision has been approved by the latest judgment of the Judicial Committee of the Privy Council on this point, we do not think that we are bound to refer this question to a Full Bench on the ground of there being a conflict in the decisions of this Court. The preponderance of authorities, therefore, is in favour of the proposition that the mere fact of a decree being passed against the father only will not lead necessarily to the conclusion that what was sold in execution of that decree is only the father's interest in a joint family property. Notwithstanding the decree being against the father only, under certain circumstances there may be a valid sale of a joint property belonging to the father and the son in execution thereof.

What we have to determine in this case is whether the whole seven annas share belonging to Kali Sahai and his son was sold or only the father's interest. If the former, can the sale stand?

Although the plaintiff No. 1 was not of age at the time of the sales, yet it is quite clear upon the evidence that both his father and mother, who are interested in protecting his interest, were under the belief that the whole seven annas share was sold. The auction-purchasers were allowed without any opposition or protest on their part to take possession of the whole seven annas share. The decree in execution of which the first sale took place, was passed with reference to a transaction which clearly concerned the joint family. The bond, which was the basis of that decree, was the final outcome of a loan which had been originally contracted by Pertab Narain, Kali Sahai's father. Having regard to these circumstances, we are of opinion that the whole seven annas share in Mouzas Jufferabad, Aurungabad and Jehanabad passed by the auction-sales.

The next question is whether these sales are binding upon the [395] minor son, Jung Bahadoor. According to the principle laid down in *Suraj Bansi Koer v. Sheo Prosad Singh* (I. R., 6 I. A., 88; s.c., I. L. R., 5 Cal., 148), the plaintiffs can set aside the sales if they can prove that the debts, which were the foundations of the decrees in execution of which they were held, were contracted by the father for immoral purposes. This the plaintiffs in this case have failed to prove. Their suit, therefore, as regards Jufferabad, Aurungabad and Jehanabad, will fail. We, therefore, modify the decree of the lower Court to this extent, *viz.*, that we dismiss the plaintiff's suit as regards these mouzas, but we affirm the decree so far as the Mouza Dowlatabad is concerned. As the major portion of the plaintiff's claim has failed, they must pay the defendant's costs in both Courts.

Appeal allowed and decree modified.

[HINDU LAW—EXECUTION-SALE UNDER DECREE AGAINST FATHER—

See the Notes to 3 Cal. 198; 13 Cal. 21 in the Law Reports Reprints.

See also 7 Bom. 438; 8 Bom. 481; 9 Mad. 343; 424; 3 Bom. I.R. 322.]

[9 Cal. 396—12 C.L.R. 314—7 Ind. Jur. 414]

APPELLATE CIVIL.

The 27th July, 1882.

PRESENT :

MR. JUSTICE WILSON AND MR. JUSTICE FIELD.

Ramjoy Surma.....Defendant

versus

Joy Nath Surma.....Plaintiff.*

Contribution, Suit for—Money paid in satisfaction of joint decree—Small Cause Court, Jurisdiction of.

A suit for contribution for money paid by one judgment-debtor in satisfaction of a joint decree against him and others cannot be entertained by a Court of Small Causes.

Rambux Chittanjeo v. Mudhoosoodun Paul Chowdhry (B. L. R., Sup. Vol., 675 ; 7 W. R., 377), *Shaboo Majee v. Noorai Mollah* (B. L. R. Sup. Vol., 691) followed ; *Nath Prasad v. Baijnath* (I. L. R. 3 All., 66) dissented from.

IN this case the plaintiff alleged that he and the defendant jointly had borrowed a sum of money from one Ram Kanai Das, who on the 9th of September 1876, obtained a joint decree for the amount, with costs, against the plaintiff and the defendant. In 1877, the decree-holder took out execution against the plaintiff alone, and recovered from him Rs. 250. The decree-holder applied [396] for further execution, but while his application was pending he came to a compromise and sold the decree to the plaintiff for Rs. 90. The plaintiff claimed to recover in the present suit Rs. 170 from the defendant, being half of the total amount paid by him under the decree of the 9th of September 1876. The suit was dismissed by the Court of First Instance, but this decision was reversed on appeal. The defendant appealed to the High Court.

Baboo Joy Gobind Shome for the Appellant.

Baboo Juggut Chunder Banerjee, for the Respondent, objected that no second appeal lay, as the suit being one for contribution and the amount claimed being under Rs. 500, it was of a nature cognizable in a Court of Small Causes.

The Judgment of the Court (WILSON and FIELD, JJ.) was delivered by

Wilson, J.—This is a second appeal from a decision of the Subordinate Judge of Sylhet modifying a decree of the Munsif of Nubeegunge. A preliminary objection was raised that under s. 586 of the Procedure Code this appeal does not lie, on the ground that the claim is under Rs. 500, and the cause of action of such a nature that a Small Cause Court had jurisdiction over it.

The claim is for contribution. The case found is that the plaintiff and the defendant, being jointly liable on a bond, were jointly sued, and a decree was made against them jointly. The plaintiff was compelled to satisfy that decree and in this suit seeks to recover his share from the defendant. In *Rambux Chittanjeo v. Mudhoosoodun Paul Chowdhry* (B. L. R., Sup., Vol., 675 ; 7 W. R., 377), the general rule was laid down by a Full Bench that a suit for contribution does not lie in a Small Cause Court under s. 6 of the Mofussil Small

* Appeal from Appellate Decree, No. 1993 of 1880, against the decree of Baboo Ram Coomar Paul, Subordinate Judge of Sylhet, dated the 10th July 1880, modifying the decree of Baboo Upendro Chunder Ghose, Munsif of Nubeegunge, dated the 31st March 1880.

Cause Courts Act (XI of 1865), in the absence of a contract to contribute. In *Shaboo Majee v. Noorai Mollah* (B. L. R., Sup., Vol., 691), the plaintiff and defendant had been jointly sued upon a joint bond, and a joint decree obtained against them, plaintiff having had to pay the amount sued for contribution. It was held by a Full Bench that he could not sue in a Small Cause Court. This case is on all fours with the present, and we are bound to follow it, unless some- [397] thing has since occurred by which the law has been altered. It was argued before us that ss. 43,* 69 and 70† of the Contract Act (IX of 1872) have made a change in the law on this point, and that such a suit as the present has become one for "money due on bond or other contract, or for damages." We are unable to accede to this view. The sections referred to appear to us to do no more than state in written form what was the law before the Contract Act, and the consequences of a given rule of law must be the same whether it be written or remain unwritten.

A somewhat different view has been taken in a partially analogous case by the Allahabad High Court in *Nathprasad v. Baignath* (I. L. R., 3 All., 66) : but that view has not been followed in this Court. *Nobin Krishna Chukravati v. Ram Kumar Chakravati* (I. L. R., 7 Cal., 605) and Special Appeal No. 2350 of 1879 unreported. The appeal must therefore be heard on its merits.

The appeal will be dismissed with costs.

Appeal dismissed.

Any one of joint promisors may be compelled to perform.

Each promisor may compel contribution.

Sharing of loss by default in contribution.

Explanation.—Nothing in this section shall prevent a surety from recovering from his principal payments made by the surety on behalf of the principal, or entitle the principal to recover anything from the surety on account of payments made by the principal.

* [Sec. 43 :—When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise.

† [Sec. 70 :—Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.]

Obligation of person enjoying benefit of non-gratuitous Act.

Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.

If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

[9 Cal. 397]
APPELLATE CRIMINAL.

The 12th October, 1882.

PRESENT :

MR. JUSTICE FIELD AND MR. JUSTICE NORRIS.

In the matter of the Petition of Charoo Chunder Mullick and others.

Charoo Chunder Mullick
versus
The Empress.*

High Court's Criminal Procedure Act (X of 1875), ss. 14 and 147—Commitment, application to quash—24 and 25 Vict., c. 104, ss. 13 and 15.

The words "or other proceeding" in s. 147 of Act X of 1875, do not include a commitment, and an application to have a commitment quashed can be entertained under the provisions of that section.

Applications under s. 14 of that Act should be disposed of by the High Court in the exercise of its Ordinary Original Criminal Jurisdiction.

IN this case three persons, named Bunwari Lall, Charoo Chunder Mullick, and Chintamoney Doss, were charged before Mr. B. L. [398] Gupta, one of the Presidency Magistrates, with certain offences under the Penal Code and Act XIV of 1866 (The Post Office Act).

The first accused Bunwari Lall, who was a Post Office peon, was charged under s. 406 of the Penal Code, with criminal breach of trust in respect of a number of voting papers entrusted to him to deliver to the address of one Kedar Nauth Dutt. He was also charged under s. 409 of the same Act with criminal breach of trust as a public servant in his capacity of Post Office delivery peon in respect of the same voting papers; and he was further charged with having committed an offence punishable under s. 47† of Act XIV of 1866 (The Post Office Act).

The other two accused, Charoo Chunder Mullick and Chintamoney Doss, were charged with having aided and abetted the first accused in committing the offences charged under ss. 406 and 409 of the Penal Code, and also with having abetted the offence charged under s. 47 of Act XIV of 1866; and thereby having committed an offence punishable under s. 52 of that Act; and they were further charged with having fraudulently retained or wilfully kept or

* Criminal Motion against the order of B. L. Gupta, Esq., Presidency Magistrate of Calcutta, dated the 9th October 1882.

† [Sec. 47:—Every person employed to convey or deliver any mail bag or box, or any letter or other article sent by post, who shall be guilty, while so employed, of drunkenness, carelessness or other misconduct, whereby the safety of any such bag, box, or letter or other article shall be endangered; or who shall loiter or make delay in the conveyance or delivery of any such bag, box, letter or other article; or who

shall not use proper care and diligence safely to convey or deliver any such bag, letter, or other article, shall be liable to a fine not exceeding fifty rupees, and any person employed to deliver a letter or other article sent by the post, who shall not duly deliver the same, shall, within a reasonable time not exceeding twenty-four hours, report the fact at the Post Office where he received such letter or other article, and return the same, and if any such person shall wilfully make a false report, he shall be liable to a fine not exceeding fifty rupees.]

obtained a voting paper, and thereby committed an offence punishable under s. 45^a of Act XIV of 1866, while Bunwari Lall was also charged with having abetted the commission of that offence.

The case was heard and inquired into by Mr. B. L. Gupta, who committed all of them to the High Court for trial.

Thereupon the accused petitioned the High Court, and applied that the record might be sent for, and the order of commitment quashed and their discharge directed, on the ground that the said commitment was illegal, because the evidence given in the investigation before the Magistrate was not sufficient to justify the charges; and, even supposing it to be true, it was not sufficient in law to form a ground for the commitment, and consequently that the Magistrate should have either dismissed the charges or discharged the accused, and should not have committed them or any of them to stand their trial before the High Court.

Upon this application the record was sent for, and the case came on to be argued before a bench consisting of Mr. Justice FIELD and Mr. Justice NORRIS.

[399] Mr. Branson and Mr. M. Ghose appeared for Charoo Chunder Mullick.

Mr. L. M. Ghose, for Chintamoney Doss.

Mr. M. P. Gasper, appeared on behalf of the Crown.

The **Judgment** of the Court (FIELD and NORRIS, JJ.) was delivered by

Field, J.—In this matter an application has been made asking us to call up the proceedings connected with the commitment of three persons, Baboo Charoo Chunder Mullick, Chintamoney Doss, and Bunwari Lall, with a view to such commitment being quashed, on the ground, *first*, that as regards one of these persons, Baboo Charoo Chunder Mullick, there is no evidence which can in any view of the case incriminate him; and, *secondly*, that as regards all three accused, even if the truth of the facts deposed to by the witnesses examined before the Magistrate be assumed, those facts do not constitute any offence punishable by the Criminal law.

The application at first purported to be made under s. 147 of the High Courts' Criminal Procedure Act X of 1875, but it comes before us to-day as an application under either this section or s. 14 of the same Act.

The first question with which we now propose to deal is whether an application of this nature, an application that is to quash a commitment made by a Presidency Magistrate, can be entertained, and an order quashing such commitment made under the provisions of s. 147.

This section is as follows: "Whenever it appears to the High Court of Judicature at Fort William, Madras, or Bombay, that the direction hereinafter mentioned will promote the ends of justice, it may direct the transfer to itself of any particular case from any Criminal Court situate within the local limits of its ordinary original Criminal jurisdiction, and the High Court shall have

* [Sec. 45 :—Every person who shall fraudulently retain, or wilfully secrete, or make away with, or keep or detain, or, being required to deliver up by an Officer of the Post Office shall neglect or refuse to deliver up a post letter or other article which ought to have been delivered to other person, or mail bag, box, or packet, containing a letter or any other article which shall have been sent by the post, shall be

Penalty for retaining letters, etc., delivered by mistake.

punished, on conviction before a Criminal Court, with imprisonment of either description as defined in the Indian Penal Code, for a term not exceeding two years, and shall also be liable to fine.]

power to determine the case so transferred, and to quash or affirm any conviction or other proceeding which may have been had therein, but so that the same be not quashed for want of form, but on the merits only."

The proceeding which we are asked to quash on the present [400] occasion is not a conviction but a commitment; and what we have to decide is whether a commitment is a proceeding within the meaning of the words "or other proceeding." We have considered this question since the application was first made to us the day before yesterday, and we are both of opinion that a commitment is not a proceeding within the meaning of these words. According to the usual construction, the words "or other proceeding" must be taken to mean other proceeding of the same nature, *ejusdem generis*, with a conviction. Now a conviction is a definitive decision of a Judge or Magistrate having jurisdiction to deal definitively with the matter before him, whereas a commitment is merely a preliminary proceeding by which a Magistrate, not himself having jurisdiction to deal definitively with the matter before him, sends that matter to be definitively disposed of by another tribunal. That this is a distinction well understood and indeed made by the Indian Legislature itself will appear from section 10 of the Penal Code and illustrations (b) and (d) to that section. It appears to us, therefore, that a commitment is not a proceeding *ejusdem generis* with a conviction. It was asked in the course of argument what proceedings can the Legislature be supposed to have intended by the words "or other proceeding," if these words do not include a commitment? The answer to this question is not difficult. There are numerous cases in which a Presidency Magistrate has jurisdiction to make a definitive order other than a conviction. For example, he can make an order punishing for contempt of Court (ss. 205* to 207, Chapter XV of the Presidency Magistrate's Act, IV of 1877). He can make an order requiring security to keep the peace (ss. 208 to 211 of Chapter XVI of the same Act). He can make an order requiring security for good behaviour (ss. 212 to 214 of the same Chapter). He can make an order putting a person in possession of immoveable property (s. 233 of the same Act). He can make an order for maintenance (ss. 234, 235†, Chapter XVIII of the same Act). He can make an order giving compensation for a groundless charge or complaint (s. 242 of the same Act). All these orders are in their nature definitive, that is, unless brought before a superior tribunal for revision and thereupon revised, they are and remain final. It appears to us that in using words "or other [401] proceeding" in s. 147 of the High Court Criminal Procedure Act, the Legislature contemplated proceedings and orders such as those which I have just mentioned.

* [Sec. 205 :—When any such offence as is described in sections 175, 178, 179, 180, or 228 of the Indian Penal Code, is committed in the view or presence of a

Procedure in certain cases of contempt.

Presidency Magistrate, he may cause the offender to be detained in custody; and, at any time before the Magistrate leaves his Court on the same day, he may take cognizance of the offence, and sentence the offender to punishment by fine not exceeding two hundred rupees, and, in default of payment, by imprisonment in the Civil Jail for a period not exceeding one month, unless such fine be sooner paid.

In every such case, the Magistrate shall record the acts constituting the offence, with the statement (if any) made by the offender as well as the finding and sentence.

If the offence is under section 228 of the Indian Penal Code, the record must show the nature and stage of the judicial proceeding in which the Magistrate interrupted or insulted was sitting, and the nature of the insult or interruption.]

† [Sec. 235 :—On the application of any person receiving, or ordered to pay, a monthly allowance under the provisions of section 234, and on proof of

Alteration in allowance. a change in the circumstances of such person, his wife or child, the Magistrate may make such alteration in the allowance ordered as he thinks fit, provided the monthly rate of fifty rupees be not exceeded.]

But there are other considerations which have influenced us in arriving at a conclusion in this matter. When a proceeding is transferred to the High Court under s. 147, the High Court has power to "determine the case so transferred and to quash or affirm any conviction or other proceeding which may have been had therein but so that the same be not quashed for want of form but *on the merits only*."

In other words the High Court, in order to the exercise of the jurisdiction hereby conferred, must proceed to consider all the evidence in the case, must come to a finding upon questions of fact, for otherwise it could not quash or affirm on the merits. In so dealing with a case, which in the ordinary course would be tried by a jury, with whom rests the decision upon questions of fact, the High Court would be superseding the jury, by whom in the usual course the case would be tried. We think it extremely improbable that the Legislature contemplated any such result as this.

Then, again, if a commitment may be quashed upon the merits under s. 147, and an application to this effect may be made by or on behalf of any accused person who has been committed, it will, in practice, be made only in those doubtful cases in which there is reason to hope that the application to have the commitment quashed will prove successful. If that hope should be found to be a mistaken one, the result would be that a prisoner, committed upon evidence sufficiently weak to make the result of a trial doubtful, would come to his trial prejudiced by the opinion of a Division Bench of two Judges pronounced against him to the effect that the commitment ought not to be quashed. It may be said that the accused person could avoid this result by abstaining from making an application under s. 147, to have his commitment quashed; and that, as he can foresee this effect of an unsuccessful application, he cannot justly complain of a result brought about by his own action. Giving to this argument all the consideration which it deserves, we cannot think that the Legislature [402] intended that a Bench of two Judges should pronounce their opinion publicly upon the merits of a case, which must afterwards come before a jury.

Then again when a Magistrate has committed a case, he becomes *functus officio*, and it may be said with some show of reason that there is no case before him which can be *transferred* to the High Court.

For all these reasons it appears to us that the words "or other proceeding" in s. 147 of the High Court's Criminal Procedure Act X of 1875, do not include a commitment; and that no application to have a commitment quashed can be entertained under the provisions of that section.

But there is another section in the Act under which it may be possible that the petitioners may obtain that which they seek. I say "may be possible" because upon this point speaking for myself, I desire to express no opinion, and this for the reasons which I shall presently state. The section to which I refer is s. 14, which provides that "when any charge or portion of a charge, recorded as aforesaid, appears to a Judge of the High Court at any time before the commencement of the trial of the person charged to be clearly unsustainable, such Judge may make on the charge an entry to that effect. Such entry shall have the effect of staying proceedings upon the charge or portion of the charge," etc. Now the jurisdiction conferred by this section is a jurisdiction which may be exercised by a Judge, that is one Judge of the High Court.

Having regard to that which has been determined by the learned Chief Justice under s. 14 of the High Court Act, 24 and 25 Vic., cap. 104, we are

agreed, and speaking for myself I am very strongly of opinion that, if this matter is to be heard by a single Judge, it should be heard by my brother NORRIS and that I ought not to sit to hear it.

The Chief Justice has determined, under the section just quoted, that Mr. Justice NORRIS and myself "may form a Division Bench, and hear and determine any appeal, motion or other matter, in any civil or criminal case which may be brought before the High Court in its Appellate Jurisdiction, or which they shall order to be brought before them." Now, clearly a matter under s. 14 [403] of the High Courts' Criminal Procedure Act is not a matter brought before the High Court in its Appellate Jurisdiction. I take it that the words, "or which they shall order to be brought before them" have reference only to the same Appellate Jurisdiction.

Then the Chief Justice has further determined that on and after the 18th September 1882, and until further order, the ordinary Original Civil and Criminal Jurisdiction of the High Court, shall be exercised by the Honourable Mr. Justice CUNNINGHAM, the Honourable Mr. Justice NORRIS, and the Honourable Mr. Justice PIGOT sitting separately.

And the Officiating Chief Justice has determined on the 10th August 1882 that until further order the ordinary Original Criminal Jurisdiction of the Court shall be exercised by the Honourable Mr. Justice NORRIS. It is quite clear from this that I am not, and that my brother NORRIS is, a Judge, as to whom it has been determined by the Chief Justice under the provisions of s. 14 of 24 and 25 Victoria, cap. 104, that he shall sit alone for the exercise of the ordinary Original Criminal Jurisdiction of the Court; and this being so, it appears to me proper, that as this matter is one falling within that jurisdiction, it should be disposed of by Mr. Justice NORRIS.

I have further thought it right to consider whether this matter shall be heard by myself and my brother NORRIS sitting together; in other words whether I shall continue to sit with my learned brother for the hearing and determination of the matter, as a matter to be disposed of under s. 14 of the High Courts' Criminal Procedure Act, and I have decided not to do so. So long as we had not determined whether or not the matter could be dealt with under s. 147, I have continued to sit, because it has been the recent practice of this Court that matters under this section should be dealt with by the Division Bench for the time being exercising the Appellate Criminal Jurisdiction of the Court. During my experience several cases have been so disposed of. I may refer by way of example to the case of *The Empress v. Thompson* (I. L. R., 6 Cal., 523); *Wood v. The Corporation of the Town of Calcutta* (I. L. R., 7 Cal., 322); and *In re Poorna Churn Pal* (I. L. R., 7 Cal., 447). The [404] former practice was to bring applications under the section before a single Judge sitting on the Original Side of the Court. See for example the cases of *The Empress v. Gasper* (I. L. R., 2 Cal., 278), and the *Corporation of the Town of Calcutta v. Bheecunram Napit* (I. L. R., 2 Cal., 290). Whatever doubt there may be as to whether applications under s. 147 of Act X of 1875 should be heard by the Division Bench exercising the Appellate Criminal Jurisdiction of the Court, I think there can be no doubt that applications under s. 14 of the same Act must be disposed of in the exercise of the Court's Original Criminal Jurisdiction.

Section 36 of the Letters Patent of 1865 provides that any function which by these Letters Patent is directed to be performed by the High Court in the exercise of its Original or Appellate Jurisdiction, may be performed by any

Judge or by any Division Court thereof appointed or constituted for such purpose under the provisions of the thirteenth section of the 24 and 25 Vict., cap. 104. This section is as follows: Subject to any laws or regulations which "may be made by the Governor-General in Council, the High Court may, by its own rules, provide for the exercise by one or more Judges, or by Division Courts constituted by two or more Judges of the said High Court of the Original and Appellate Jurisdiction, vested in such Court in such manner as may appear to such Court to be convenient for the due administration of justice."

So far as I am aware no rule has been made under this section since the date of the Letters Patent of 1865; but there was a rule made previously, and while the Letters Patent of 1862 were in force, *viz.*, "A Court for the exercise of the ordinary Original Criminal Jurisdiction of this Court may be held before one Judge, and two or more Courts may sit at one time, in each of which there shall be one Judge,"—(see Rule 58, Belchambers, p. 87). As there is here an express provision, Rule 51 does not apply, which provides that all powers and functions vested in the Court by the Letters Patent, *which are not otherwise expressly provided for by the Rules of Court*, may be exercised by a single Judge, or by a Division Court consisting of two or more Judges.

[403]. The operation of the rule above first quoted (No. 58) is saved by the second section of the Letters Patent of 1865, which provides that all rules and orders in force immediately before the publication of these Letters Patent, shall continue in force, except so far as the same are hereby altered until the same are altered by competent authority.

It would appear to follow that, while there is a single Judge there is no Division Court appointed or constituted under s. 13 of the 24 and 25 Vic., cap. 104, to exercise the Original Criminal Jurisdiction of the Court, and that, therefore, this jurisdiction should not be exercised in this or any case by a Division Court consisting of two Judges.

It may be that this result would be altered by reading the words "subject to any laws or regulations which may be made by the Governor-General in Council" in s. 13, 24 and 25 Vic., cap. 104, with sub-section 2, section 2 of the General Clauses Act I of 1868: "Words in the singular shall include the plural," and that "a Judge" in s. 14 of Act X of 1875 may thus be held to include two or more Judges. But as this may be arguable, and as my brother NORRIS is undoubtedly competent to act alone, I think it will be better that he alone should proceed to deal with the case, more especially as, if there should be a difference of opinion, my opinion as that of the Senior Judge would prevail, and there would be this result that a Judge, whose competency to exercise jurisdiction may be arguable, would overrule a Judge as to whose competency there can be no doubt.

[=11 C. L. R. 565]
[406] APPELLATE CIVIL.

The 5th September, 1882.

PRESENT:

MR. JUSTICE WILSON AND MR. JUSTICE FIELD.

Ram Dhun Dhur..... Plaintiff

versus

Mohesh Chunder Chowdhry and others.... Defendants.*

Direction in will for payment of debts—Decree against heirs for debt due by ancestor—Charge on property—Apportionment of mortgage debt amongst several properties mortgaged.

A testator by his will directed payment of all his debts, and subject thereto devised his property to his heirs. After one of the testator's creditors had obtained a decree against the heirs in their representative capacity, which by its terms was to be satisfied out of the assets left by the testator, one of the heirs mortgaged his share in twelve properties left by the testator. Subsequent to the mortgage one of the mortgaged properties was sold in execution of the creditor's decree.

The mortgagee afterwards brought a suit against the mortgagor and obtained a decree on his mortgage.

Held, that as neither the direction in the will for payment of debts nor the decree in the creditor's suit created a charge on the property of the testator, the property sold in execution of the creditor's decree had been sold subject to the mortgage, and the mortgagee was entitled to execute his decree against that property.

Bazayet Hossein v. Dooli Chund (I. L. R., 4 Cal., 402) distinguished.

It appearing that the mortgagee deliberately abstained from executing his decree against eleven properties which still remained in the possession of the mortgagor, but proceeded against the one property which had passed out of the mortgagor's possession, the mortgage debt was directed to be apportioned between the twelve properties, and the mortgagee was not to be allowed to take out execution against the property which had passed out of the mortgagor's possession, except for the amount which should be apportioned to such property, without satisfying the Court that he had made every possible effort to execute the remainder of his decree against the other eleven properties.

BRINDABUN by his will directed the payment of his debts, and subject thereto devised his property to his heirs; he mentioned [407] certain debts specifically including one to Ram Jibun and went on to say that payment should be made of all his debts present and future.

The heirs of Brindabun were his four sons, one by name Pitamber.

On the 28th February 1876 Ram Jibun obtained a decree against Pitamber and his brothers in their representative capacity as heirs of Brindabun, which by its terms was to be satisfied out of the assets left by Brindabun. On the 29th June 1876 Pitamber mortgaged to the plaintiff his four-anna share in twelve properties left by his father. On the 15th August 1877 one of the pro-

* Appeal from Appellate Decree, No. 1385 of 1881, against the decree of Baboo Grish Chunder Chowdhry, Subordinate Judge of Chittagong, dated the 8th June 1881, affirming the decree of Baboo Anund Chunder Mullick, First Munsif of Ramjan, dated the 30th of March 1880.

erties included in the mortgage was sold in execution of the decree which had been obtained by Ram Jibun, and Mohesh Chunder Chowdhry became the purchaser at the sale. On the 16th November 1877 the plaintiff obtained a decree against Pitamber for the amount due on the mortgage.

Several creditors, both of Brindabun and of Pitamber, who had obtained decrees, applied for a rateable distribution of the surplus proceeds of sale, and the plaintiff claimed a right to the whole of Pitamber's share of the surplus, but his application was on the 28th February 1878 rejected on the ground of his not having applied in time, and the surplus proceeds were distributed amongst the creditors who had applied.

On the 14th July 1878 the plaintiff attached the twelve-mortgaged properties in execution of his decree, but on a claim by Mohesh Chunder Chowdhry the property which he had purchased was on the 24th February 1879 released from attachment.

The plaintiff took no proceedings to bring the remaining properties to sale, but on the 20th June 1879 instituted this suit against (1) Mohesh Chunder Chowdhry ; (2) the creditors amongst whom the surplus sale proceeds had been distributed ; and (3) Pitamber ; claiming to have the order of the 24th February 1879 set aside, and for a declaration that the property which had been sold was liable to satisfy a decree, and in the alternative for a declaration that he was entitled to Pitamber's four-anna share in the surplus proceeds of sale as against the creditors who had shared in the distribution of them.

Mohesh Chunder Chowdhry and the creditors contended amongst [408] other things, that the mortgage was fraudulent, and that the plaintiff was acting in collusion with Pitamber in order to defeat creditors. The creditor defendants further set up limitation as a bar to the claim against them.

Pitamber did not defend the suit. The first Court found the plaintiff's claim against the creditors to be barred by limitation under Art. 13* Schedule II of Act XV of 1877, the suit not having been instituted within one year of the order of the 28th February 1878 rejecting the plaintiff's application to share in the surplus sale-proceeds.

The first Court further found the mortgage to be fraudulent, and accordingly dismissed the suit.

On appeal the Subordinate Judge agreed with the Munsif's finding on the claim against the creditors, but held that fraud as regards the mortgage had not been satisfactorily established. He held, however, that the direction in Brindabun's will had the effect of making his debts a charge on the properties left by him, and that the devisees taking the properties subject to the charge could not alienate them so as to defeat the rights of creditors whose debts constituted the charge. He also held that the creditor's decree was virtually

[Art. 13 :—

Description of suit.	Period of limitation.	Time from which period begins to run.
To alter or set aside a decision or order of a Civil Court in any proceeding other than a suit.	One year.	... The date of the final decision or order in the case by a Court competent to determine it finally.]

a decree against the testator's properties, and that the mortgage being subsequent to the decree, the mortgagee took subject to a charge created by the decree. He accordingly dismissed the appeal.

The plaintiff appealed to the High Court.

Baboo Sreenath Dass add Baboo Aukhil Chundar Sen for the Appellant.

Baboo Sreenath Banerjee and Baboo Bama Churn Banerjee for the Respondents.

The Judgment of the Court (WILSON and FIELD, JJ.) was delivered by

Wilson, J.—We think that the order of the lower Appellate Court must be varied in this case. The suit is for two distinct things. In the first place, it is a suit in which the second defendants are principally interested, with the view of giving the plaintiff a share of the sale-proceeds of certain property. With regard to this [409] claim it is enough to say that we see no ground whatever for differing from the view taken by the Court below ; but then there is a matter of greater difficulty, namely, the suit as against the first defendant. The object of that is to enforce the mortgage-decree which the plaintiff has obtained against the former owner of the property, viz., Pilamber, against the property which has now passed into the hands of the first defendant, who has purchased it at an auction sale in execution of a money decree. *Prima facie* the plaintiff is entitled to that, because the sale in execution of the money decree was the sale of the right, title and interest of the mortgagor, and there was nothing to show that the sale was not what the law ordinarily contemplates in such a case, that is to say, a sale subject to the mortgage lien. But two reasons have been given for holding that the mortgage lien was superseded by the rights of the person at whose suit the execution sale took place. The first is that the decree which was against the representatives of the original owner of the property in question declares that the property of the original owner is liable. But the decree is in the ordinary form of a decree made in a suit against the representative of a deceased person. It is a decree which is known to English lawyers as *De bonis testatoris*, a decree which by its terms is to be satisfied out of the assets left by the deceased person. It appears to us that it has no other effect than as a mere money decree, and has not the effect of creating a charge upon the property. This case differs from the case of *Bazayet Hossein v. Dooli Chund* (I. L. R., 4 Cal., 402), where the decree in question was a decree which distinctly bound the property.

The second ground urged for holding that the judgment-creditor's debt had priority over the mortgage, was by reason of the will of the testator. In that he undoubtedly directs payment of his debts, and he directs that subject to the payment of those debts, the property should be taken by his heirs, and he mentions certain debts specifically including the debt of the judgment-creditor. But he goes on to say that payment is to be made of all his debts, present and future. That, therefore, is simply a general direction to pay all his debts out of his estate, and that, upon the authorities, clearly creates no charge. It directs nothing more [410] than what the law requires every executor, or heir, or other representatives to do, that is, to pay the debts of the testator out of his assets. It appears to us, therefore, that the plaintiff is entitled to execute his decree against the property in question. Of course it would have been otherwise if the finding of the Munsif had stood to the effect that the transaction was fraudulent ; but we feel ourselves bound, in spite of the suspicious circumstances of the case, by the finding of the lower Appellate Court on this question which is one of fact. The plaintiff is, therefore, entitled to execute

his decree against the property. On the other hand we find that, although the mortgage includes twelve pieces of property, and the plaintiff's decree covers those twelve pieces of property, he deliberately abstains from executing his decree against eleven properties, which still remain in the possession of the mortgagor, and comes into Court with this suit, in which he tries first to proceed against the execution-creditor, and failing that, against the purchaser from his debtor, the object being apparently to make everybody but his debtor pay the debt due to him. It appears to us that he cannot be allowed to do that. All the parties interested are before the Court. Pitamber is a party, plaintiff is a party, and the first defendant is a party. On the inquiry that we propose to direct all these persons should be heard. There will be an inquiry in the first instance how the mortgage debt should be apportioned between the twelve properties, and what portion of it should be charged upon the property which the plaintiff now seeks to charge. The plaintiff will not be allowed to take out execution against this property, except for the amount which upon such inquiry should be properly charged upon it, without satisfying the Court that he has made every possible effort to execute the remainder of his decree against the other eleven properties.

In this way the decree of the lower Appellate Court will be varied, and the case will be remitted to the Court of First Instance for the purposes of the inquiry above directed.

Under the circumstances of the case we think it undesirable to make any order for the costs of this appeal. The appellant has succeeded in part and he has failed in material parts of his case, [411] and his conduct in the case is not such as to entitle him to any indulgence.

The second defendants are entitled to their costs of this appeal, which as regards them is dismissed.

Decree varied.

NOTES.

[MORTGAGEE'S RIGHT TO PROCEED AGAINST ANY PART OF THE MORTGAGED PROPERTY—

With reference to this and similar cases, Dr. Rash Behari Ghosh in his *Mortgages* Vol. I (1911) p. 364 observes, "These cases can be supported only on the ground that the purchasers bought without notice of the mortgage and paid not for the equity of redemption, but for an absolute interest in the property; as there can be no question that ordinarily where the purchaser under an execution acquires merely the equity of redemption in a part of the mortgaged property, he cannot compel the mortgagee to proceed first against the portion of the property which has not been sold; for a purchaser who buys under an execution cannot set up the defence of a *bona fide* purchase for value without notice of the incumbrance. But a purchaser claiming under a conveyance executed by the mortgagor occupies a very different position, as the vendor *prima facie* conveys to the purchaser not simply the equity of redemption, but 'the property itself free from any liability to contribute to the mortgage-debt.'"

The cases of 29 Mad. 217 and 6 O.C. 197 advert to this distinction. See also 2 C.L.J. 139-10 C.W.N. 38; 13 Bom. 45; 8 I. C. 1208.]

The 27th July, 1882.

PRESENT :

MR. JUSTICE TOTTENHAM AND MR. JUSTICE BOSE.

Modho Kooery and others.....Defendants

versus

Tekait Ram Chunder Singh.....Plaintiff.*

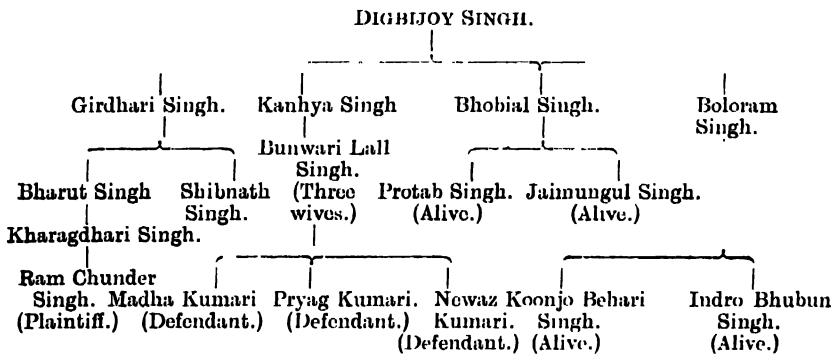
Ghatwal—Adverse possession—Limitation in suit by landlord against tenant of a permanent tenure—Limitation Act XV of 1877, Sch, 2, Art. 139.

Where a permanent tenure has been granted by a ghatwal, if the successor of such ghatwal, being one of the ghatwals, to whom Regulation XXIX of 1814 applies, wishes to resume that tenure, he must bring his suit within twelve years after succeeding to the ghatwali estate.

The possession of the tenant is adverse to him from the time of the decease of his immediate predecessor.

Article 139, Sch. 2 of Act XV of 1877, regarding suits by landlords to recover possession from tenants giving twelve years' time from the determination of the tenancy, does not apply to cases in which the plaintiff seeks to recover a tenure permanent in its nature and not determinable by notice.

THIS was a suit to recover direct possession in ghatwali right of turuf Lalgurh as part of the Pathrole ghatwali, held by Ram Chunder Singh. The following genealogical table shows the state of the family : —



[412] Digbijoy Singh was the plaintiff's great grand-father, and was ghatwal of Pathrole, one of the ghatwali mehals of Sarut Deoghur, known as a ghatwali of Birbhum, falling under the provisions of Regulation XXIX of 1814. The three defendants in the suit were the widows of Bunwari Lall Singh, who was a grandson of Digbijoy through Kanhya Singh, his second-son.

On Digbijoy's death he was succeeded by his eldest son Gridhari Singh as ghatwal of Pathrole, and he in his turn was succeeded by Bharut Singh and Kharagdhari Singh, who each in their turn hold the estate until their death. Kharagdhari Singh died in Joyt 1272 (May 1864), and the plaintiff being at

* Appeal from Original Decree, No. 51 of 1881 against the decree of C. W. Wilmot, Esq., Subordinate Judge of the Sonthal Pergunnahs, dated the 26th November 1880.

that time nine years of age, his estate was placed under the Court of Wards, and remained under its management until Bhadro 1280 (August-September 1873). Bunwari Singh died in Assar 1280 (June-July 1873) and the Lalgurh Estate on his death also passed into the custody of the Court of Wards who defended this suit on behalf of the three widows.

The plaintiff contended that the possession of turuf Lalgurh and its villages by the Court of Wards was illegal, as it was a portion of his estate. The defendants alleged that Dighijoy Singh granted the turuf to his son Kanhya Lall Singh in mokurruri for khorposh or maintenance at a fixed yearly rent of Rs. 103-7-6, and doshi salami Rs. 2 more; and the plaintiff, while admitting that during his minority the Court of Wards received rent at that rate, alleged that even if such a mokurruri lease had been granted by Dighijoy, it was not a valid grant, and could not be maintained in law, as no ghatwal had power to alienate any part of his estate.

On the 19th November 1875 the plaintiff sent an application or notice to the Deputy Commissioner for the Court of Wards, asking for the release of the Lalgurh Estate. This was acknowledged, and after certain steps had been taken, the plaintiff was, on the 7th September 1876, referred to the Civil Court. The plaintiff accordingly, after having memorialised the Bengal Government, and being directed on the 8th June 1878 to bring a regular suit if so advised, filed this suit on the 25th June 1879.

Part of Mouzah Modhupore, belonging to turuf Lalgurh, having been taken up for the construction of the East Indian Railway, [413] the Court of Wards, on behalf of the plaintiff, who was then a minor, brought a suit in the Civil Court of Zillah Birbhum, to obtain compensation for the said land. In this case Bunwari Lall Singh, the husband of the present defendants, pleaded that Dighijoy Sing had granted the mokurruri to his son Kanhya Lall Singh. Bunwari Lall died while the suit was pending, but the Subordinate Judge, on the 23rd October 1873, awarded a portion of the compensation to the plaintiff and a portion to Bunwari Lall's widow. On attaining his majority the plaintiff filed an appeal in the High Court against that decree, and it was decided on the 15th March 1875. In that appeal the High Court held that the three widows had no right to hold possession of turuf Lalgurh, and that Dighijoy Singh had no power to grant the mokurruri alleged, and that it was not binding on the plaintiff. The whole of the compensation awarded was accordingly made over to the plaintiff.

In the present suit the plaintiff alleged that his cause of action arose on the 19th November 1875, the date on which the notice was given, and prayed for possession of turuf Lalgurh and for mesne profits from 1282 (1875-76) to the date of the delivery of possession.

The Deputy Commissioner, on behalf of the three defendants under the Court of Wards, set up the mokurruri khorposh lease, and pleaded that it had been created before the permanent settlement, and had ever since been enjoyed as a permanent hereditary tenure by the defendants and their predecessor in uninterrupted descent at a rent which had never been changed; that as the tenure was created before Regulation XXIX of 1814 was enacted, that Regulation did not apply to it; that the plaint showed that the cause of action had arisen more than twelve years ago; and that the plaintiff having attained his majority more than three years previously the suit was barred by limitation; and, further, that the plaintiff had received rent from them and acknowledged the tenure, and consequently ratified the grant of the land made by his ancestor. The Subordinate Judge decreed the suit in favour of the plaintiff,

holding that he was not barred by limitation; that the grant by Digbijoy Singh, whatever it might have been, was not binding on the plaintiff; and that it had not been proved that the plaintiff had [414] ratified this grant. He, however, held that the defendants could not be considered as trespassers, and that the plaintiff was not entitled to the mesne profits he claimed. The decree was dated the 26th November 1880, and directed that it should take effect as from the 1st Bysack 1288 (12th April 1881). Against this decree the defendants now appealed to the High Court, and the plaintiff also filed a cross appeal against that portion of the decree which disallowed the mesne profits, and postponed the date from which it should take effect, and also against the ruling that the question of the defendants' title was not *res judicata*.

The Assistant Legal Remembrancer (Mr. Kilby) and the Senior Government Pleader (Baboo Annoda Pershad Banerjee) for the Appellants.

Baboo Sreenath Dass, Baboo Mohiny Mohun Roy and Baboo Koroona Sindhoo Mukerjee for the Respondent.

The **Judgment** of the Court (TOTTENHAM and BOSE, JJ.) was delivered by **Tottenham, J.**—The subject of this suit is a property called turuf Lalgurh, etc., which forms a portion of the ghatwali of Pathrole, and this is one of the Birbhum ghatwalis, though it is situated within the Sonthal Pergunnahs.

The plaintiff Ram Chunder Singh is the ghatwal; and the defendants, appellants in this appeal, are the three widows of Bunwari Lall Singh. The object of the suit is to recover from the defendants possession of the property in suit, with a declaration by the Court that the mokurruri khorposh lease alleged to have been granted by Digbijoy Singh to Kanhya Lall Singh, the father of Bunwari Lall, is not binding upon the plaintiff, and that it is invalid in law. The plaintiff further prays for mesne profits from 1282 to 1285 (1875-76 to 1879).

Digbijoy Singh was, in his day, ghatwal of Pathrole, and was the great-grandfather of the plaintiff. The estate of the defendants is under the management of the Court of Wards, and their defence has been conducted by it. It is alleged that the property was granted to Kanhya Lall (who was second son of Digbijoy) as a shikmi mokurruri khorposh tenure, at a rental fixed in perpetuity; that it was created before the permanent [415] settlement; and that it has ever since its creation been possessed as a permanent hereditary tenure by the defendants and their predecessors in uninterrupted descent at a rent which never has been changed.

The plaintiff is fifth in descent from the grantor, but the first defendant's husband was the son of the original grantee. The uninterrupted possession is not disputed, nor is it contended that any of the plaintiff's predecessors ever sought to resume the grant. Plaintiff, when his father died in 1865, was a child of nine years, and his estate was managed by the Court of Wards. During his minority, which terminated in 1873, the Court of Wards recognized Bunwari Lall as holding a valid title; and this suit was not instituted until 1879, nearly six years after the plaintiff's majority.

The suit was tried before the Subordinate Judge of Deogurh, who held that the grant was in its nature one for maintenance and not saddled with any condition as to Police duties; that, whatever, its nature, it was not binding upon the plaintiff; that the plaintiff had not ratified it by any act of his; and that the suit was not barred by limitation. He accordingly gave a decree in favour of the plaintiff for possession, to take effect from the 1st day of the Bengali year 1288 (12th April 1881). He disallowed the claim for mesne profits.

The defendants, having appealed against this decree, the plaintiff has filed a cross appeal as to the mesne profits, and against the lower Court's ruling that the question of the defendants' title is not *res judicata* in favour of the plaintiff by reason of the decree of this Court, dated the 15th of March 1875, in a suit regarding certain compensation money paid on account of land taken up for the East Indian Railway, where it was determined that Bunwari Lall had no valid right in the lands pertaining to their ghatwali.

The main contention which we have to consider in the appeal of the defendants' is that the suit is barred by limitation, and on the merits it has been urged that the grant to Kanhya Lall was, on various considerations, a valid one, binding upon the successor of the grantor. Obviously we must first deal with the question of limitation. The learned Counsel for the appellants submitted [416] that, inasmuch as the grant had been in force for more than 60 years before the suit was brought, it was protected by s. 3 of Regulation II of 1805; but we think that that Regulation having been repealed, its provisions cannot avail the defendants unless it be shown that, while it was still in force, the defendants had already acquired an indefeasible title by 60 years enjoyment of the property under the grant made by Dighijoy Singh. But the Regulation had already become obsolete when it was repealed by Act VIII of 1868; and, although it was alleged that the grant was made before the permanent settlement, we have no evidence in its favour earlier than a receipt for rent of the year 1211 B.S. (1804—5 A. D.). It has not been shown to us that a good title, by 60 years' possession, had become perfected while the Regulation was still operative; and it apparently ceased to be operative when Act XIV of 1859 came into force in 1862.

But the limitation is pleaded on another ground, *viz.*, that conceding that the plaintiff, as ghatwal, was not bound by the act of his remote ancestor and predecessor, or by the ratification of that act by his more immediate predecessors, still he would be bound to sue to enforce his right to set it aside within twelve years of the accrual of that right, or within twelve years from the date when the possession of the defendants became adverse to him; and for this contention we find authority in *Babaji v. Nana* (I. L. R., 1 Bom., 535) and in *Petamber Baboo v. Nilmony Singh Deo* (I. L. R., 3 Cal., 793). The plaintiff's father and immediate predecessor as ghatwal died in 1865, so that the possession of the defendants then became adverse to the plaintiff, and, notwithstanding his minority, which terminated in 1873, limitation then commenced to run, but the suit was not brought until fourteen years afterwards. When the plaintiff reached his majority there were still four years remaining within which he might have brought the suit; but he allowed a further period of two years to elapse, and it lies upon him to show that his suit is not barred by limitation. For the plaintiff it was contended that the suit is not barred because it is one by a landlord to recover possession from a tenant, for which the law allows a period of twelve years running from the date when the tenancy is determined. And it is alleged that the tenancy [417] was determined only in 1875, when the plaintiff refused to accept the rent tendered by the Court of Wards on behalf of the defendants. Plaintiff claims a period of twelve years from 1875; and his suit was brought within four. The lower Court has held that, if the defendants be considered merely as tenants, no question of limitation arises; but that if the title set up by the defendants as mokurruridars gives them a right to plead limitation against the plaintiff, the limitation will run only from the date when plaintiff had notice of the claim to such title, and upon the evidence the Court held that the first

notice of it to the plaintiff was in 1875, when the suit for the compensation money above mentioned was brought. Thus it was held that the suit was not barred by limitation.

We think it is clear that the article in the Schedule No. 2 of the Act, which provides for a suit by a landlord to recover possession from a tenant, and gives twelve years from the determination of the tenancy, refers to suits in respect of tenancies in which the leases have expired, and so have terminated, or in respect of tenancies at will terminable by due notice. It does not refer to a suit by which the plaintiff seeks to recover from the holder of a title permanent in its nature.

It is certain that the defendants are in possession of the property in suit by virtue of a title which, if valid, is of a permanent character, not determinable by notice from the plaintiff. If it is not valid, the defendants can only be got rid of by a suit in which they are entitled to plead, and to show that they are protected by the rules of limitation. Then if the plaintiff be considered to be a reversioner, the period of limitation runs from the date when his estate fell into possession, *viz.*, the date of his father's death in 1865, and in this view we should be compelled to say that his suit is too late. It was argued that, as he was formally appointed to be ghatwal only in 1873, after he came of age, the twelve years should be counted from that date; but we are of opinion that this contention is untenable, for he was practically invested with the ghatwali when his father died, and the estate was taken on his behalf under the management of the Court of Wards. The *pervana* of appointment of ghatwal in 1873 was a mere formal imposition upon him of the duties and responsibilities of [418] the office which during his minority he was incompetent to undertake.

And if the suit be treated as one to which no article of the Schedule specially applies, then it is one which must be brought within twelve years from the time when the possession of the defendants became adverse to the plaintiff; and in such case, too, it is clear that the possession has been adverse from the moment of the plaintiff's succession in the room of his father.

As regards notice to the plaintiff of an adverse claim on the part of the defendants, we think that it is not a case in which any special notice was required. It is not a case as between a zamindar and a ryot who, having been dealt with as an ordinary ryot, sets up a mokurruri claim. Here the plaintiff is a ghatwal, and, *ipso facto*, claims the right of khas possession of the whole of the ghatwali property. It is not pretended that the defendants or their predecessors were ever considered to be ordinary ryots, or to hold under any title less than that of a mokurruri khorposh grant. We hold, therefore, that there is no valid ground for the contention that limitation did not begin to run against the plaintiff in 1865, when his father, the last ghatwal, died; and we must hold that the suit is barred by limitation, and should have been dismissed on that ground by the lower Court.

This finding makes it unnecessary to inquire further into the validity of the grant made by Digbijoy Lall. We may observe, however, that it could not be affected by Regulation XXIX of 1814, as it was made before that Regulation was passed. Our decision on the question of limitation renders it unnecessary also to dispose of the plaintiff's plea of *res judicata*.

We reverse the decree of the lower Court, and dismiss the suit with costs of both Court.

Appeal allowed.

NOTES.

[On the point of limitation, this case was reversed by the Privy Council in (1885) 12 Cal. 484, who held that there was no point of time when the possession became adverse. Cf. 27 Cal. 156 (grantee holding for his life). See also 13 Mad. 277; 19 Mad. 243; 22 Bom 893.]

The 4th August, 1882.

PRESENT:

MR. JUSTICE MITTER, OFFG. CHIEF JUSTICE, AND

MR. JUSTICE NORRIS.

Ajoodhya Persad.....Plaintiff

versus

Collector of Durbhungah.....One of the Defendants.*

*Partition between owners of separate shares in permanently settled estate—
Effect of, as against Government.*

In the year 1226 F. (1819) a fourteen-anna eight-gunda share of a certain mouzah was permanently settled. The remaining one-anna twelve-gunda share was permanently settled in 1861. This share was sold for arrears of Government revenue in 1873, and purchased by the plaintiff, who subsequently applied to the Collector for partition under the Butwara Act. The Collector refused to partition, upon the ground that the Act was not applicable to the partition of a mouzah held jointly by the proprietors of two separate estates. The plaintiff then brought the present suit, to which he made the Collector a party, to obtain a declaration that he was entitled to have his share separated from the fourteen-anna eight-gunda share by metes and bounds, and also for a decree directing a partition of the whole mouzah into two parts.

Held, that so far as the plaintiff on the one hand, and the owners of the fourteen-anna eight-gunda share on the other, were concerned, the mouzah could be partitioned, but that such partition would not be binding upon the Government unless by consent.

Baboo Saligram Singh for the Appellant.

Baboo Annoda Churn Banerjee for the Respondent.

THE facts of this case sufficiently appear from the **Judgment** of the Court (MITTER, Offg. C.J., and NORRIS, J.), which was delivered by

Mitter, Offg. C.J.—It appears that a fourteen-anna eight-gunda share of a mouzah named Mohamedpur was settled permanently in the year 1226 Fasli (1819). The number of this share of the mouzah in the Collector's Towji is 223. The defendants, second and third parties, are now the owners of this estate. The remaining one-anna twelve-gunda share of the mouzah in question was permanently settled in the year 1861 with Fakir Misser and [420] others. The number of this latter estate in the Collector's Towji is 4,945. In the year 1873, the estate No. 4945 was sold by auction for arrears of Government revenue, and was purchased by the plaintiff.

On the 28th of July 1879 the plaintiff brought this suit for obtaining a declaration that he is entitled to have the one-anna twelve-gunda share of this mouzah separated from the fourteen-anna eight-gunda share by metes and bounds, and also for a decree directing a partition of the whole mouzah into

* Appeal from Appellate Decree, No. 1269 of 1881, against the decree of H. W. Garden, Esq., District Judge of Tirhoot, dated the 2nd of May 1881, reversing a decree of Baboo Koylash Chunder Mookerjee, Second Sub-Judge of Mozufferpore, dated the 30th of March 1880.

two parts, so that the lands of his estate may be defined as separate and distinct from the estate No. 223, belonging to the second and third party defendants. It appears that before this suit was brought, the plaintiff had made an application to the Collector for the partition of the lands of Mouzah Mohamedpur under the Butwara Act; but the Collector refused the application on the ground that the said Act was not applicable to the partition of a mouzah which is held jointly by the proprietors of two separate estates.

The Collector of Durbhungah has also been made a party in this case.

The suit was defended by the Collector on behalf of Government, and by the second party defendant.

The defendant, second party, stated in his written statement that the lands of the plaintiff's estate were separate from the lands of the estate No. 223.

The Collector rested his defence simply upon the ground that the lands of the two estates could not be partitioned under the provisions of the Butwara Law, viz., Beng. Act VIII of 1876.

The Court of First Instance made a decree in favour of the plaintiff, directing that the one-anna twelve-gunda share, belonging to the plaintiff, should be separated from the lands of the estate No. 223. The decree also contained a provision to the effect that the Collector of Durbhungah should be requested to carry out the partition, and that if he refused to do so, the partition should be effected by the Civil Court Ameen in execution of that decree.

Against that decree the Collector of Durbhungah, on behalf of the Government of Bengal, appealed, and the District Judge has dismissed the suit, both against the Government as well as the [421] owners of the estate No. 223, upon the ground that the lands of Mouzah Mohamedpur cannot be partitioned under the provisions of Beng. Act VIII of 1876.

Against the decision of the District Judge, this appeal has been preferred by the plaintiff, and the Collector of Durbhungah, representing the Government of Bengal, is the only respondent who has appeared to oppose the appeal.

We are of opinion that, so far as the plaintiff, the owner of the estate No. 4945, on the one hand, and the defendants, second and third parties, on the other hand, are concerned, there should be a decree for the partition of Mouzah Mohamedpur. It has been found that this mouzah is held by the owners of these two estates in the proportion of one-anna twelve-gundas, and fourteen-annas eight-gundas respectively. It is an ordinary incident of a property held jointly by two or more persons, that there should be a partition by metes and bounds, whenever one or more of the owners desire it. When all the joint owners of a property do not agree in holding it jointly, constant strifes and quarrels are likely to arise. It would be against good morals to compel joint owners to hold property jointly against their will. Therefore, so far as the plaintiff, on the one hand, and the defendants, second and third parties, on the other, are concerned, the District Judge was not right in dismissing the suit for a partition.

The only question upon which we entertain some doubt is, whether the partition should be so effected as to be binding upon the Government. Whatever may be the rights of joint owners *inter se*, as to the right of partition, we fail to see any tangible ground for laying down that such a right also exists in favour of one of two grantees of a joint estate as against the grantor.

Under the terms of the grant, the grantees have a right to enjoy the property in the estate in which it is granted. They cannot, against the will

of the grantor, enforce a partition as against him. It seems to us, therefore, that unless the Government of Bengal, represented by the Collector of Durbhunga in this case, be willing to have a partition of this mouzah effected, the only decree that can be passed in the case is a decree for [422] partition to be binding between the plaintiff and the second and third party defendants.

Having regard to the facts stated in the plaint and established most clearly by the evidence, it seems to us that it will be for the interest of the Government to consent to a partition being made of the mouzah. The estate No. 4945 was, as already stated, permanently settled in the year 1861, and it was within twelve years of that time brought to sale for arrears of Government revenue. It is alleged in the plaint, and proved by the plaintiff, that owing to the lands of this estate being joint with the lands of the estate No. 223, he has not been able to collect even such an amount of rent as would be sufficient to discharge the Government dues. In this state of things it seems to us desirable that a partition should be effected of this mouzah. A partition which may be binding not only upon the present owners of the two estates, but also upon the Government and future auction-purchasers for arrears of Government revenue.

But in our opinion we cannot decree this suit, and direct a partition of the mouzah to be made, so that it may bind the Government, unless the Government withdraw their opposition to the suit and consent to the partition. It is true that we can award a decree in favour of the plaintiff for a partition of the mouzah which will be binding upon the defendants, second and third parties. But it is desirable, if there is any chance of the plaintiff obtaining the sanction of the Government, that the decree for partition should be made with the consent of the Government, so that it may be binding, in future, upon all the parties to this suit.

The plaintiff, as already stated, made an application to the Collector under the Butwara Act, and the Collector refused to effect the partition, because the Act, in his opinion, was not applicable to the facts of this case. We entirely agree in that view of the law; and probably, therefore, the Collector would not be competent, without the sanction of the higher executive authorities, to give his consent, on behalf of Government, to a partition of this mouzah, so as to bind this Government. We, therefore, allow the plaintiff six months' time from this date to take proper [423] steps for obtaining the consent of Government to a partition of this mouzah. On the expiration of that time, the case will be brought up again for final disposal. We reserve the question of costs.

Decree modified.

NOTES.

[See also 16 Bom. 528.]

[9 Cal. 423]

APPELLATE CIVIL.

The 27th July, 1882.

PRESENT :

MR. JUSTICE WILSON AND MR. JUSTICE MACPHERSON.

Joyunti Dasi.....Plaintiff

versus

Mahomed Ally Khan and others.....Defendants.*

Beng. Act VIII of 1869, s. 27—Limitation—Suit for possession—Title.

The limitation provisions of s. 27, Beng. Act VIII of 1869, have no application to a case in which the plaintiff relies upon his title and seeks to recover possession upon the strength of that title, and in which the defendant denies that title.

Gooroo Doss Roy v. Ramnarain Mitter (B. L. R., Sup. Vol., 628 ; 7 W. R., 186); *Nistarinee v. Kali Pershad Doss Chowdhry* (21 W. R., 53); and *Nilmadhuh Shaha v. Srinibash Kurmoker* (I. L. R., 7 Cal., 442) referred to.

THE plaintiff in her plaint in this case stated as follows: "There was a jote in the name of my husband Joy Singh Dey Mondal, comprising puras 17-14-15 cottas of land, minus 1 pura granted as *inam* (reward), that is to say, puras 16-14-15 cottas of land bearing an annual jumma of Company's Rs. 27-14," within the lakhiraj talook of six of the defendants. "My husband and, after his death, I owned and held possession by payment of the rent of the said 1 pura of land obtained as *inam* or reward, and puras 16-14-15 cottas by jote right, that is to say, of puras 17-14-15 in all, for upwards of 20 years." The plaint then stated that between the 2nd and 15th December 1875, the defendants, "fraudulently and in collusion with one another," had taken away paddy and mustard seed, also cut and carried away grass and bamboos from the lands claimed, and had thrown down and carried away the materials of some tiled huts which stood on the [424] said land, "and thus dispossessed me from the said puras 17-14-15 cottas of land, and the defendants are now wrongfully and unlawfully enjoying possession of the said land without any right whatsoever." The plaintiff prayed "that my jote right and *inam* rights to the lands, from which I have been dispossessed, may be declared, and that possession of the same be awarded to me;" and also for damages for the crops carried away.

The Court of First Instance fixed twelve issues:—the first, whether the suit was governed by the provisions of the rent law; the seventh, limitation; and the ninth, "does the land in suit constitute the *inam* and jote of the plaintiff as alleged by her, and is her allegation of possession and dispossession true." On these issues it was decreed "that the plaintiff's jote right to the land in suit be declared, and that the plaintiff do get possession of the same." The claim for damages was dismissed on the ground of limitation, the plaint not having been filed till the 18th of June 1878. On appeal the Judge said:—

"Plaintiff in this suit, as her pleader now admits, claims nothing more than an occupancy right. Six of the persons she is suing are, she says, her landlords, and she is suing

* Appeal from Appellate Decree No. 1915 of 1880, against the decree of T. M. Kirkwood, Esq., Judge of Mymensingh, dated the 4th August 1880, reversing the decree of Baboo Nobin Chunder Ghose, First Subordinate Judge of that district, dated the 8th May 1879.

them for recovery of possession as a ryot, who has been illegally ejected by them; and the other six defendants are the agents of her landlords who took part in ousting her. This is a suit then for which s. 27 of Beng. Act VIII of 1869 lays down one year as the period within which it must be brought. It does not avail to say that the suit also claimed some of the land as *inam*, and that a claim to moveables was included. Such additional claims would not take the bulk of the claim, if as above, out of the one year rule; and, moreover, all such additional claims have been rejected by the lower Court as untenable; nor can the fact that the appellants have repudiated her claim to be their ryot in any way alter the limitation law applicable to the plaintiff on her own plaint. In the case of *Brindabun Chunder Sirkar v. Dhununjoy Nushkur* (I. L. R., 5 Cal., 246) (JACKSON and McDONELL, JJ.) it is laid down: 'The right, if any, which the plaintiff had in the present case is created entirely by his continued occupancy of the land. It does not rest upon any grant; it is not in general transferable, and it appears to me that if the tenant desires to maintain that right and have himself replaced in the position which he occupied before ouster, he is bound to bring a suit under s. 27 of Bengal Act VIII of 1869, within one year from the date of dispossession. I think, therefore, that the plaintiff's suit in this case ought to fail.' That ruling, it appears to me, is quite conclusive on the subject."

[425] The Judge then referred to *Dhurjobutty Chowdhrair v. Chamroo Mundul* (25 W. R., 217); *Gooroo Dass Roy v. Ram Narain Mitter* (B. L. R., Sup. Vol., 628; 7 W. R., 186); *Nistarinee v. Kali Pershad Dass Chowdhry* (21 W. R., 53); and *Gunga Gobind Roy v. Kala Chand Surma* (20 W. R., 455), distinguishing them from the case first cited, and decreed the appeal. The plaintiff appealed to the High Court.

Baboo Mohiny Mohun Roy and Baboo Rash Behary Ghose for the Appellant.

Baboo Gopaul Lall Mitter and Baboo Jogesh Chunder Roy for the Respondents.

The **Judgment** of the Court (WILSON and MACPHERSON, JJ.) was delivered by

Wilson, J.—In this case the District Judge has reversed the decree of the Subordinate Judge, and dismissed the suit, on the ground that it is barred by s. 27 of Beng. Act VIII of 1869, as not having been brought within a year after the plaintiff was dispossessed.

We are unable to agree with the view taken by the District Judge. It has been repeatedly decided both under s. 23 of Act X of 1859, and under the corresponding s. 27 of Act VIII of 1869, that the one section or the other has no application to a case in which the plaintiff relies upon his title and seeks to recover possession upon the strength of that title, and in which the defendant denies that title.

Such a suit might have been tried in a Civil Court while Act X of 1859 was in force; and such suit is not subject to the limitation laid down by s. 27 of Act VIII of 1869. *Gooroo Dass Roy v. Ram Narain Mitter* (B. L. R., Sup. Vol., 628; 7 W. R., 186); *Nistarinee v. Kali Pershad Dass Chowdhry* (21 W. R., 53); *Nilmadhub Shaha v. Srinibash Kurmocar* (I. L. R., 7 Cal., 442).

The decree of the District Judge will be set aside, and the case will go back to be heard in the lower Appellate Court on the merits.

Appeal allowed and case remanded.

NOTES.

[See also 31 Cal. 647; 8 C. W. N. 446; 17 Cal. 926.]

[=12 C L.R. 29]

[426] APPELLATE CIVIL.

The 5th December, 1882.

PRESENT :

SIR RICHARD GARTH, KNIGHT, CHIEF JUSTICE, AND MR. JUSTICE FIELD.

Gobind Chunder Addya.....Plaintiff

versus

Afzul Rabbani and another.....Defendants.*

Res judicata—Suit for rent dismissed for default—Subsequent suit for possession—Civil Procedure Code (Act X of 1877) ss. 13, 43, 102, 103.

In 1870 two plots of land, numbered 155 and 147, belonging to the same owner, were sold in execution of a decree. The purchaser of plot 155 sold it to A, who in 1873 sued the tenant of a portion of the land for rent. In this suit A prayed that it might be declared that he was the owner. The tenant alleged that B, the purchaser of plot 147, was the owner of the land in respect of which rent was sought to be recovered, and B was made a party to the suit. At the hearing A did not appear, and the suit was dismissed for default. Subsequently A sold plot 155 to the present plaintiff, who now sued for possession.

Held, that the suit was not barred as *Res judicata*.

Per GARTH, C. J.—The operation of s. 103 of the Code of Civil Procedure is confined to those cases only when a second suit is brought for the same object and cause of action as the suit which is dismissed.

THIS was a suit for possession of certain land together with mesne profits. It appeared that the land in question had originally belonged to one Abdool Hye. On the 5th of February 1870 this land, which was numbered 155, was sold in execution of a decree against one Abdool Hye, and was purchased by one J. S. Leslie. At the same sale another plot of land, also belonging to Abdool Hye, and numbered 147, was sold to one Syed Afzul Rabbani. On the 18th May 1870 Leslie sold the plot No. 155 to one W. W. Linton. In 1873 Linton instituted a suit against one F. W. Harper for the rent of plot 155; the plaintiff in that suit contained the following prayer: "The defendant refuses to admit that the plaintiff is entitled to the said premises or any part thereof. The plaintiff therefore prays that it be declared that the plaintiff is the owner of the said premises." As the defendant Harper repudiated Linton's title to receive rent, and [427] said that the rent of the land was payable to Afzul Rabbani, the Court made the latter a defendant. On the day fixed for the hearing of the suit the plaintiff did not appear, and the suit was dismissed under s. 114 of Act VIII of 1859 for default. On the 7th January 1879 lot No. 155 was purchased at a sale in execution of a decree against Linton by the present plaintiff Gobind Chunder Addya. The plaintiff now sued Afzul Rabbani and Harper for possession of the land, praying for possession of the land and for mesne profits against the first defendant, and for a decree directing the second defendant to pay rent to him.

The first defendant objected that the property in suit did not belong to lot No. 155 but to lot No. 147, and that the claim was barred under ss. 13 and 43 of Act X of 1877, and ss. 6 and 7 of Act XII of 1879.

*Appeal from Appellate Decree No. 596 of 1881 against the decree of J. F. Browne, Esq., Officiating Judge of the 24-Pergunnahs, dated the 20th January 1881, affirming the decree of Baboo Krishna Mohun Mukerjee, Second Sub-Judge of that district, dated the 11th March, 1880.

Both the lower Courts held that the suit was barred. The plaintiff appealed to the High Court.

The Advocate-General (Offg. Mr. Phillips) and Mr. Iell for the Appellant. Mr. Braunfield and Moonshi Serajul Islam for the Respondents.

The following **Judgments** were delivered by the Court (GARTH, C.J. and FIELD, J.)

Garth, C.J.—The plaintiff sues in this case to recover a small piece of ground with the building upon it ; and the suit has been dismissed in the Court below, upon the ground that the plaintiff is precluded by s. 103 of the Civil Procedure Code from bringing it.

It appears that the piece of land, which is the subject of the suit, belonged formerly, together with other land, to one Abdool Hye, and that two several portions of this land were sold under an execution against Abdool Hye on the same day ; one portion, No. 155, was sold to a Mr. Linton ; and another portion, No. 147, to Afzul Rabbani, the present defendant.

The plaintiff in this suit bought Mr. Linton's share at a sale in execution of a decree ; and he claims the piece of land now in suit, as belonging to the portion numbered 155, which Mr. Linton purchased.

On the other hand, the defendant Afzul Rabbani claims it as [428] part of the piece numbered 147, which he purchased ; and he has set up as a defence to the plaintiff's claim a judgment in a former suit which was brought by Mr. Linton for the rent of No. 155 against a person named Harper. That suit was dismissed under s. 114 of Act VIII of 1859, (which corresponds to s. 103 of Act X of 1877) because Mr. Linton did not appear at the trial.

Now s. 103 says, that " when a suit is wholly or partially dismissed under s. 102, " (that is, where the defendant appears, and the plaintiff does not appear) " the suit shall be dismissed ; and the plaintiff shall be precluded from bringing a fresh suit *in respect of the same cause of action.* "

The defendant here says that the former suit was brought for the same cause of action as this suit, and that therefore the plaintiff is precluded from bringing it.

Both the Courts below have dismissed the suit upon that ground ; and the plaintiff consequently appeals to us.

Now in order to determine whether those Courts were right, we must see what the nature of the former suit was.

It was a suit brought by Mr. Linton, the plaintiff's predecessor in title, against Mr. Harper, for the rent of the piece of land which is the subject of this suit. The defendant pleaded that the present defendant, Afzul Rabbani, was his landlord ; and that the piece of ground belonged to Afzul Rabbani as being part of lot No. 147.

Upon this defence being set up, the Court considered Afzul Rabbani as the person really interested in the dispute, and directed him to be made an intervening defendant. Accordingly Afzul Rabbani, intervened, for the purpose of supporting Mr. Harper's case, that the piece of land formed part of No. 147, and therefore was not Mr. Linton's property.

That suit was dismissed, because Mr. Linton did not appear at the trial ; and in this case the Courts below have held, that as Afzul Rabbani was made

an intervening defendant in the former suit for the purpose of having his title to this piece of ground decided as against Mr. Linton, the present plaintiff, who claims under Mr. Linton, is precluded by the result of that suit from trying this [429] suit against Afzul Rabbani ; and it has been argued here that the former suit was not solely for rent, but it was also for a declaration of the plaintiff's title to the land in respect of which the rent was claimed.

We have ascertained what the real nature of the former suit was ; and we find that it was not brought for possession of the land now in question, but merely to recover rent from Mr. Harper, though the plaintiff certainly asked for a declaration by the Court that he was entitled, *as against the defendant*, to the land of which the rent was claimed.

That being so, I am of opinion that the Courts below were wrong in deciding that Mr. Linton, (or rather the plaintiff in this suit who claims under Mr. Linton) is precluded from bringing this suit to try the title to the land as against the present defendant.

No doubt an issue was raised in the former suit as between Mr. Linton and the present defendant as to the title to the land ; but the suit was not brought against Afzul Rabbani, nor was it brought to try the title to the land, or to obtain possession of it as against him. It was simply brought to recover rent, and to have Mr. Linton's title as landlord declared as against Mr. Harper as his tenant. The question of title to the land as between Mr. Linton and Afzul Rabbani was merely raised incidentally to the main question. The matter is clearly not *res judicata* ; and I consider the operation of s. 103 of the Code of Civil Procedure is confined to those cases only, where a second suit is brought for the same object and cause of action as the suit which is dismissed.

Applying that principle to the present case, Mr. Linton, or those claiming under him, would no doubt be precluded from bringing a suit for the same rent which was sued for in the former suit ; but he is not precluded from bringing a suit to try the title to the land as against the present defendant.

The judgments, therefore, of both the lower Courts must be set aside, and the case must go back to the first Court to be tried on its merits. The respondent must pay the costs of this appeal, and the costs in the lower Courts will abide the result of the cause.

Field, J.—I also think that this case should be remanded to be tried on the merits.

[430] The facts are very simple : Two lots, numbered respectively 155 and 147, originally belonged to Abdool Hye. These lots were sold in execution on the same day. Lot 155 was purchased by one Mr. Leslie, who sold to Mr. Linton, whose interest was again sold in execution and purchased by the plaintiff in the present case. Lot No. 147 was purchased by Afzul Rabbani, the defendant in the case now before us.

Mr. Harper is a tenant of a portion of the land, as to which there is now a dispute whether it constitutes part of lot No. 155 or lot No. 147. Mr. Linton, believing that it formed part of lot No. 155, sued Harper for rent, relying upon a covenant in the lease, under which Harper held, to pay rent to Abdool Hye and his assigns.

In answer to that suit, it was pleaded that the particular piece of land occupied by Mr. Harper was not part of lot No. 155, but was part of lot No. 147, and that the rent was therefore payable to Afzul Rabbani. It would appear that Abdool Hye, the former owner, had instructed Mr. Harper to pay his rent to Afzul Rabbani.

This being so, it became necessary, in order to decide the suit for rent, to try the question of title ; in other words to try which plot of land contained the one bigha held by Mr. Harper.

The Court in which the rent suit was pending thought fit to make Afzul Rabbani a party to that case. Now this is a course the impropriety of which has been repeatedly pointed out by this Court. However, it was done, and an issue of title was raised, but when the case came on for hearing, Mr. Linton, the plaintiff, did not appear, and the case was dismissed under s. 114 of the old Code, Act VIII of 1859. It is now contended that the present suit, which is a suit brought to establish the plaintiff's title as against Mr. Harper and Afzul Rabbani is barred by the dismissal of the previous suit. This I think it clearly is not. It certainly is not barred by s. 13 of the Code of Civil Procedure, for the question of title was not heard and decided in that suit; and then as regards the express provision of s. 114 of Act VIII of 1859, which provides that a plaintiff whose suit has been dismissed for default shall be precluded from bringing a fresh suit in respect of the same cause of action, it appears to me that the cause of action in the previous suit was the non-payment of rent, and this is a [431] different cause of action from the cause of action in the present suit.

It is to be observed that the former suit was brought upon a Court-fee stamp assessed according to the value of the rent, and that there was no prayer for possession. It is clear, therefore, that no cause of action arising out of non-delivery of possession was alleged or put forward in the plaint; nevertheless, if the Court had tried the issue of title, the finding upon that issue must have had the effect of *res judicata* as between the parties, but inasmuch as that issue was not tried, the question raised thereby was not heard and decided, and therefore the matter is not *res judicata*, having regard to the express language of s. 13 of the Code. The cause of action in the present case is, to my mind, with reference to s. 114 of Act VIII of 1859, clearly distinguishable from the cause of action in the previous case; and the present suit is not therefore barred by the express provision contained in this section, which has moreover since been repealed.

Appeal allowed.

NOTES.

[The dismissal of a suit under s. 102 of the Code of 1882 is not intended to operate in favour of the defendant as *res judicata*. But when read with sec. 103 of that Code, it precludes a fresh suit in respect of the same cause of action, referring, irrespectively of the defence or the relief prayed, entirely to the grounds or alleged media on which the plaintiff asked the Court to decide in his favour:—(1909) 14 C. W. N. 298 (303). See also the Notes to 9 Cal 163.

With reference to GARTH C. J.'s remarks as to sec. 103, Hukm Chand in his C. P. O. (1900) Vol I, p. 713 observes, "The observation was however not necessary for the decision of the case, which turned on the ground that the cause of action in the suit was the non-delivery of possession of the land sued for; while that in the previous suit was the non-payment of rent, and there being no prayer for possession in that suit, no cause of action arising out of non-delivery of possession was alleged or put forward in the plaint. In that suit, the defendant had pleaded the proprietary title of the defendant in the subsequent suit, who thereon intervened, leading to an issue as to title being raised between the parties, but this was only incidental to the claim for rent, and did not affect the cause of action." According to FIELD J. the result would have been different if there had been a finding. The explanation of SANKARAN NAIR J. in (1911) 10 I. C. 75 : 21 M. L. J. 344 should also be noted. He there draws a distinction between cases where there is a finding on the issue and those where there is not; and the bar of *res judicata* applies to the former class, when the matter raised by that issue was alleged by one party and denied by the other, or should have been so alleged or so denied.

According to him, the bar of *res judicata* does not arise unless there is an *express* finding, or such a finding is necessarily implied and involved in the decree in the previous suit.

But the Full Bench in (1913) 23 M. L. J. 543 : (1913) M. W. N. 1 : 12 M. L. T. 500 did not accept Justice Sir SANKARAN NAIR's view.

The judgment of SUNDARA AYYAR, J. in this case criticising SANKARAN NAIR's judgment is the most masterly exposition of the subject of *Res judicata by implication*, to be found anywhere.]

[9 Cal. 431=12 C.L.R. 12]

APPELLATE CIVIL.

The 27th November, 1882

PRESENT:

SIR RICHARD GARTH, KNIGHT, CHIEF JUSTICE, AND
MR. JUSTICE FIELD.

Saraswati Dasi and others.....Defendants

versus

Dhanpat Singh.....Plaintiff.*

Evidence Act (I of 1872), s. 35—Land Registration Act (Beng. Act VII of 1876), s. 55—Entry in Register, Effect of.

Entries made under Beng. Act VII of 1876 by the Collector recording the names of proprietors of revenue-paying estates are not evidence under s. 35 of the Evidence Act of the fact of proprietorship. That section relates to the class of cases where a public officer has to enter in a register or other book, some actual fact which is known to him, *e.g.*, the fact of a death or a marriage. The entry by the Collector in the register under Beng. Act VII of 1876 is not, properly speaking, the entry of a fact. It is a statement that the person is entitled to the property; it is the record of a right, not of a fact.

Per GARTH, C.J.—*Semble*, that s. 55 of Beng. Act VII of 1876 constitutes [432] the Collector a competent Court under particular circumstances for determining as between two disputants the question of possession, and his recorded decision upon that question in the register might be evidence of the fact of possession as between those two parties.

Ram Bushan Mahto v. Jebli Mahto (I. L. R., 8 Cal., 853) explained.

THIS was a suit for the possession of two mahals, numbered respectively 412 and 1333. The plaintiff alleged that the mahals in question originally belonged to one Asrafunnissa Begum; that she in the year 1861 mortgaged them to one Hulash Chand, who in 1864 foreclosed, and in 1877 sold them to him. It appeared that the mahal No. 412 was registered in the name of one Rudro Narain, and the mahal No. 1333 in the name of Hulash Chand.

The defendants alleged that Asrafunnissa Begum in 1851 sold her rights in the mahal No. 412 to one Nilmadhub Chowdhry; that Nilmadhub Chowdhry subsequently sold to Rudro Narain, who in 1852 registered himself as the proprietor; that in 1865 the mahal was sold to one Kristo Lall Pari, and in 1872 to one Lokenath Ghose, through whom the defendants derived title. They also alleged that the mahal No. 1333 was sold in 1858 by Asrafunnissa Begum to Rudro Narain, and in 1872 to Lokenath Ghose.

It appeared that the mahals were farmed from 1251 (1844) to 1260 (1853) to one Khudiram Pari. In 1262 (1855) they were let in patni to his representatives, of whom Rudro Narain was one. It also appeared that Hulash Chand, after he had foreclosed, had obtained decrees for the rent of the mahals, and that decrees in 1281 (1874) and 1283, (1876) were satisfied by the defendant Saraswati Dasi, the mother of the infant defendants, or her attorney.

The plaintiff proved his case. The defendants were unable to prove the conveyances by Asrafunnissa to Nilmadhub, or by Nilmadhub to Rudro Narain, but they contended that the fact that Rudro Narain's name was registered, was sufficient evidence to rebut the *prima facie* case of the plaintiff.

* Appeal from Appellate Decree, No. 1954 of 1880, against the decree of A.J.R. Bainbridge, Esq., Judge of Moorshedabad, dated the 21st June 1880, affirming the decree of Baboo Menu Lall Chatterjee, Subordinate Judge of that district, dated the 30th December 1879.

Both the lower Courts decided in favour of the plaintiff.

The Defendants appealed to the High Court.

[433] Baboo Chunder Madhub Ghose for the Appellants.

Baboo Srinath Dass for the Respondent.

The **Judgment** of the Court (GARTH, C.J., and FIELD, J.) was delivered by **Garth, C.J.** -- I think there is no ground for this appeal.

The suit was brought by the plaintiff to have his name registered as the owner of two mahals, and he made out his title in this way :

Asrafunnissa was the original owner of the property, and the plaintiff's case was that Asrafunnissa mortgaged it to one Hulash Chand in 1861 ; that Hulash Chand foreclosed the mortgage in 1864 ; and that Hulash Chand then sold it to the plaintiff in 1877 ; and he has proved these facts to the satisfaction of the lower Court.

Then it is also admitted by both sides that one Khudiram farmed the property from 1251 to 1260 ; and that from the year 1262 it has been let in patni to the representatives of Khudiram, and it has been proved that Hulash Chand, under whom the plaintiff claims, sued the representatives of Khudiram for the patni rent and obtained a decree for the years 1281 and 1283, and, moreover, that the amount of that decree was paid by the present defendant or her attorney.

Now this of course is a strong *prima facie* case made out by the plaintiff. But then it is contended by the learned pleader for the appellant, that the lower Appellate Court has not attached due weight to the case set up by the defendant.

The defendant's case was that one Nilmadhub Chowdhry purchased Asrafunnissa's rights in one of these mahals No. 412 in the year 1851 ; that he sold it to one Rudro Narain on the 30th of January 1852 ; and that Rudro Narain has since been registered as the proprietor.

It is undoubtedly admitted by both sides that for many years the registered proprietor of this mahal has been Rudro Narain ; and the appellant's pleader contended that, although neither the sale certificate of 1251 to Nilmadhub Chowdhry, nor the sale from him to Rudro Narain was proved, the mere fact of Rudro Narain's name being registered as the owner of the property was sufficient **[434]** evidence of title or possession, or both, to rebut the *prima facie* case of the plaintiff. And whatever may have been the law previous to the Bengal Act of 1876, it is said that under that Act at any rate enquiries had to be made by the Collector before the registry was made, and that the registration, being the act of a public officer recording the result of those enquiries, would be some evidence of the fact recorded.

I think that the entries in the register can never be evidence of title nor even of possession, except under the circumstances which I shall presently mention.

Let us see how the registry is made under the Act of 1876.

Section 20 provides that until the new registers are prepared under that Act, the old existing registers are to be in force, and by s. 22 "the Board may order new registers to be prepared, whenever it thinks fit ; and such registers are to be prepared from the registers existing at the time of the order, and from entries of subsequent changes in the intermediate registers, and from any other authentic information available to the Collector."

The new registers being prepared in this way, the learned pleader contends that the entries thus made by the Collector, recording the names of the proprietors of revenue-paying estates, are, under s. 35 of the Evidence Act, evidence of the fact of proprietorship. But it seems to me that s. 35 does not say or mean anything of the kind, and I think that it would be a very alarming thing, in the interests of justice, if it did.

That section says, that "any entry in a public or other official book, register or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in the performance of a duty specially enjoined by the law of the country in which such book, register, or record is kept, is itself a relevant fact."

Now I understand this section to relate to that class of cases where a public officer has to enter in a register or other book some actual fact, which is known to him; as, for instance, the fact of a death or a marriage.

But the entry by the Collector in the register under the Act of 1876, that any particular person is the proprietor of certain land, [436] is not properly speaking the entry of a fact. It is a statement that the person *is entitled to the property*; *it is the record of a right not of a fact*; and although for the purpose of making that entry the Collector is sometimes bound to enquire who is the party in possession, it often happens that he makes it without any such enquiry.

If the production of the Register were *per se* evidence of what it records, that is to say, that such and such a person is the proprietor of certain property, there would never be any necessity, as it seems to me, to resort to other evidence of title. It would be quite unnecessary to prove or produce title deeds. The party who has to make out his case might keep back his title deeds if he has any, and content himself simply with producing an office copy of the register.

No authority has been cited in favour of that position, and speaking for myself I consider that to make such a use of s. 35 would be quite beside the proper object of the section.

I have said, however, that under certain circumstances I think that the register kept under the Act of 1876 might be evidence of possession. We made some observations to that effect in the case of *Ram Bushan Mahto v. Jebli Mahto* (I. L. R., 8 Cal., 853), which has been referred to by the pleader for the appellants, and I will now proceed to explain what we meant.

Section 55 of Act VII of 1876 provides for cases where there is a dispute between two persons, as to which is entitled to be registered, and the Collector has to ascertain which of those persons is in possession. The section runs thus: "If the applicant's possession of, succession to, or acquisition by transfer of the extent of interest in respect of which he has applied to be registered, is disputed by or on behalf of any person making a conflicting claim in respect thereof, and if the possession of the applicant in accordance with the application is not proved to the satisfaction of the Collector, the Collector shall determine, summarily, the right to possession in respect of the interest in dispute, and shall deliver possession accordingly, and shall make the necessary entry in the registers."

[436] Now that section, as it seems to me, constitutes the Collector a competent Court, under particular circumstances, for determining as between the two disputants, the question of possession; and his recorded decision upon that question in the register might (I do not say it would) be evidence of the

fact of possession as between those two parties; but this question does not arise here, and we are not called upon to determine it in the present case.

It is sufficient for our present purpose to say that, as the plaintiff here has made out a *prima facie* case, the District Judge was right in holding that the defendant had not brought forward any available evidence to rebut it.

The appeal will, therefore, be dismissed with costs.

Field, J.—I also think that this appeal must be dismissed. Both parties admit that the two properties which form the subject of this litigation originally belonged to Asrafunnissa Begum. The plaintiff makes title in this way: He says that those two properties were mortgaged by Asrafunnissa Begum to one Hulash Chand under a mortgage-deed, dated August 1861; that Hulash Chand foreclosed on 29th November 1861, and obtained possession of the properties; and that afterwards Hulash Chand, being in possession, and having a good title, sold them to him, the plaintiff.

This is a good title, and has been satisfactorily proved, and the question is, whether the defendants have proved a better title.

It seems to me that they have not. They also claim under Asrafunnissa. With respect to one property, numbered formerly 412, and recently, 2855, they say that Asrafunnissa Begum's right, title and interest was sold in execution in the year 1851, and was then purchased by Nil Madhub Chowdhry. The sale-certificate, under which Nil Madhub Chowdhry is said to have purchased, has not been produced, and the first link in the chain of title set up by the defendant is therefore wanting.

Then it is said that Nil Madhub Chowdhry sold to one Rudra Narain on the 30th of January 1852. This conveyance also has not been produced, and its non-production has not been accounted for. But the learned pleader for the appellant has [437] contended that this want of direct proof of title is compensated by the fact of Rudra Narain having been registered in the old Collectorate register as the proprietor of the property. Assuming that an entry in the quinquennial register may be relevant to prove any fact which the law required to be stated in that register, I do not see how this will help the defendant, because, as a matter of fact, neither the original register, nor a copy of the entry, has been produced in the present case. The learned pleader for the appellant relies, however, upon the admission that Rudra Narain was registered; but I think that we cannot substitute this admission for the register, or a copy of the register, which if produced would show what fact or facts was or were stated therein. I am not aware that the old quinquennial register required the fact of possession to be inserted therein; and we cannot assume that the entry in the register contained any statement as to Rudra Narain's possession.

Then as to the value of any entry in the register kept antecedent to Beng. Act VII of 1876, I think that its value is not under any circumstances very great, and its value would be particularly small in the present case in which it is sought to substitute this piece of evidence for those documents of title which ought to be, but are not, forthcoming.

It is well known that one of the reasons which led to the enactment of Beng. Act VII of 1876 was that the quinquennial registers kept under the old Regulation contained no legal sanction, and contained no provision which compelled persons succeeding to property by inheritance or transfer to have their names registered. It constantly has happened in the course of my experience that the person registered as proprietor was a person, who died half

a century ago ; and the very fact of these registers not being kept up to date, must very much diminish the value of any entry in them as evidence of the possession of any particular person at any particular time.

Under the provisions of the Beng. Act VII of 1876, there are several penalties attaching to non-registration, and there is, therefore, a much stronger presumption that the person whose name appears in the register kept under this Act is the person in [438] possession of the property. The value of an entry in this register certainly of any new entry may, therefore, be different from that of an entry in the register kept under the old Regulation. But even with respect to the Act of 1876, the only question which the Collector is entitled to enquire into is that of possession. He has no jurisdiction to deal with the question of title, which is specially reserved for the decision of the ordinary Civil Courts.

I think that in a case like the present, in which the plaintiff has made out a good title by the production of those documents which he might have been expected to produce, and has also given evidence of possession, the mere fact of registration, which at best is only evidence of possession cannot be taken to constitute a better title—a title, that is, which should overcome and prevail against the title proved by the plaintiff. Therefore, as regards the property numbered 412, there can be no doubt as to the correctness of the decision of the Court below.

Then as to the other property numbered 1333. I find that the Subordinate Judge says that it was conceded that the plaintiff's vendor was the recorded proprietor of the mahal bearing this number in the Collector's register, and this being so, he has, so far as regards registration, all the advantage that this can confer upon the defendants, while he has also proved a good title. He is, therefore, entitled to succeed as to this property also. Under these circumstances the appeal must fail, and be dismissed with costs.

Appeal dismissed.

NOTES.

[This case was *dissented* from in (1893) 20 Cal. 940 (942); but in 9 C.L.J. 91 it was held that registration of name under the Land Registration Act is evidence of *possession* but not of title as a proprietor so registered. See also 35 Cal. 120: 8 C.L.J. 245.]

[9 I.A. 197: 12 C.L.R. 520: 7 Ind. Jur. 107: 4 Sar. P.C. J. 395]

[439] PRIVY COUNCIL.

The 29th June and 15th July, 1882.

PRESENT :

SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH, AND SIR A. HOBHOUSE.

Misir Raghobardial.....Plaintiff

versus

Sheo Baksh Singh.....Defendant.

Res judicata—Civil Procedure Code, Act X of 1877, s. 13—

Competent Court.

The decision of a Court, in order to be conclusive in another Court, must have been that of a Court which would have had jurisdiction to decide the question raised in the subsequent suit in which the decision is given in evidence as conclusive.

The words "Court of competent jurisdiction," used in s. 13 of the Code of Civil Procedure, include the meaning that the first Court must not have been precluded by the pecuniary limit of its jurisdiction from deciding the question raised in the other. The two Courts must exercise such concurrent jurisdiction in regard to the pecuniary limit of their powers that the subject-matter of the second suit would not have been beyond the powers of the Court which disposed of the prior one.

The defence made to a suit on a bond for Rs. 12,000 and interest thereon, in a Court having no pecuniary limit of jurisdiction, was that in a prior suit for Rs. 1,665, balance of interest, brought in a Court with power to try suits not exceeding Rs. 5,000 in value, the principal sum due on that bond had been decided to be Rs. 4,790.

Held, that the issue as to the amount of principal due on the bond had not been heard, and finally decided by a Court of competent jurisdiction within the meaning of s. 13.

APPEAL from a decree of the Judicial Commissioner of Oudh (22nd November 1879,) dismissing an appeal from a decree of the Deputy Commissioner of Sitapore (25th February 1879).

This was a question of the application of s. 13 of the Code of Civil Procedure, Act X of 1877; it being alleged that the matter directly and substantially in issue in the suit had been similarly in issue in a former suit between the same parties, and had therein been heard and finally decided by a Court of competent jurisdiction.

The Courts, to the decisions whereof this case related, were constituted under the Oudh Civil Courts' Act (XXXII of 1871); [440] establishing, as Courts of First Instance, the following, *viz.*: The Court of the tahsildar, (with power to try suits up to Rs. 100 in value, extendible to Rs. 500); the Court of the Assistant Commissioner, or Extra Assistant Commissioner, (with powers up to Rs. 1,000, extendible to Rs. 5,000); and the Court of the Deputy Commissioner of the District, or in Lucknow, the Civil Judge, (without pecuniary limit of jurisdiction).

The two suits to which this appeal referred related to a bond for Rs. 12,000 for money lent, with interest at 1-8 per cent., alleged to have been executed by the defendant on the 21st November 1875. The first was brought by the present appellant on the 7th December 1877, in the Court of an Assistant Commissioner for interest due on the balance of an interest account, Rs. 1,665, giving credit for interest paid Rs. 2,475.

For the defence it was alleged that the payment of this latter sum not having been made for interest only, but in part for principal, should have been so credited; and that the principal due or sum originally lent, having been only Rs. 4,192, the credits more than balanced the account.

The Assistant Commissioner, erroneously considering that the pecuniary limit of his jurisdiction, *viz.*, Rs. 5,000, prevented his taking cognizance of the suit (as a question of the actual amount of debt secured by a bond for Rs. 12,000 was raised), on remand from the Commissioner, on this preliminary point, the suit was heard and decided by Extra Assistant Commissioner. An issue as to the amount of the principal due having been fixed, the suit was dismissed, on its appearing that the amount admitted to have been paid, *viz.*, Rs. 2,475, the original debt having been only Rs. 4,192, more than covered the claim.

Pending an appeal to the Commissioner, who afterwards heard and dismissed an appeal from the abovementioned decree, the period of the three years fixed in the bond for the re-payment of the principal expired; and the present appellant, on the 7th December 1878, brought the suit out of which this appeal arose, for principal Rs. 12,000 and interest Rs. 2,435, due on the bond of 1875. The Deputy Commissioner of Sitapore, before whom this suit was brought, gave judgment for the balance of Rs. 4,790, and interest thereon, holding the claim for Rs. 12,000, [441] principal, to be barred under s. 13 of the Code of Civil Procedure with reference to the abovementioned suit for interest. He was of opinion that the matter of the consideration given for the bond of 1875 had been directly and substantially in issue in the first suit, and that it had, accordingly, been heard and finally decided by a Court of competent jurisdiction.

An appeal, lying to the Commissioner (the same officer who at that time had heard the appeal in the other suit), was transferred to the Judicial Commissioner by whom it was dismissed on the ground that s. 13 had been rightly applied.

On this appeal,

Mr. J. F. Leith, Q. C., and Mr. C. W. Arathoon, appeared for the Appellant.

The Respondent did not appear.

For the appellant it was argued that the determination by the Extra Assistant Commissioner of a question incidental to the decision of the suit in his Court, in other words, the decision by him as to the original debt really due between the parties to the bond, with a view to determining the question of the amount of interest due, did not render s. 13 applicable to the suit before the Deputy Commissioner. The decisions on the former enactment, s. 2 of Act VIII of 1859, were referred to; and the requirement of s. 13 that the decision, in order to be conclusive, must be that of a Court of competent jurisdiction, was insisted upon. The Extra Assistant Commissioner, exercising powers only up to Rs. 5,000, was not a Court competent to finally decide upon a claim of Rs. 14,435. Reference was made to *Sukernoonce Debia v. Hureemohun Mookerjee* (6 W. R., Civ. Ref., 6); *Mussamut Edun v. Mussamut Bechun* (8 W. R., 175); *Anantha Narayan Appaiyan v. Ganapati Aiyar* (2 Mad. H. C. Rep., 469); *Aradhun Dey v. Golam Hossein* (8 W. R., 487); *Mahima Chandra Chuckerbutty v. Rajkumar Chuckerbutty* (1 B. L. R. A. C. 1; s.c., 10 W. R., 22); *Duchess of Kingston's case and notes thereto* (2 Smith's L. C., 778); [442] *Barres v. Jackson* (1 Phillips' Ch., 582); *Chander Coomar Mundal v. Nunnee Khamun* (11 B. L. R., 434); *Khugowlee Singh v. Hossein Bur Khan* (7 B. L. R., 673).

On a subsequent day, their Lordships' **Judgment** was delivered by

Sir R. Couch.—The suit, which is the subject of this appeal, was brought upon a bond, dated the 21st of November 1875 given by the respondent for Rs. 12,000, stated therein to have been borrowed from the appellant, the principal to be repaid within three years, and interest to be paid monthly at the rate of Rs. 1-8 per cent. per month. The three years having expired, the plaint was filed on the 7th of December 1878 in the Court of the Deputy Commissioner of Sitapur. The defendant (the now respondent) pleaded "want of full consideration, and that in a previous suit for Rs. 1,665, interest on this bond, the issue regarding consideration was decided in favour of defendant, the Court deciding that defendant had received only Rs. 4,790 and not Rs. 12,000," which

decision was upheld on appeal. Upon this a preliminary issue was framed by the Court as follows : "Is the issue regarding consideration a *res judicata* (s. 13, Act X of 1877) between the parties?" The decision of the Deputy Commissioner upon this issue was in favour of the defendant, and judgment was given for the balance found to be due of the principal sum of Rs. 4,790 and the interest thereon. From this decree there was an appeal by the plaintiff to the Judicial Commissioner of Oudh, who dismissed it, and the plaintiff has appealed to Her Majesty in Council from that dismissal.

The suit for interest was brought in December 1877, in the Court of the Assistant Commissioner of Sitapur, it being alleged that Rs. 4,140 was due for interest on a bond for Rs. 12,000, and it being admitted that the defendant had paid Rs. 2,475, the balance of Rs. 1,665 was claimed. The jurisdiction of the Assistant Commissioner was limited to suits where the amount or value of the subject-matter did not exceed Rs. 5,000, and the defendant objected that, if the plaintiff insisted on the validity of the bond, the case could not be tried before him. The Assistant Commissioner held that the case was beyond his jurisdiction, but [443] upon an appeal to the Commissioner, his order dismissing the suit was cancelled, and it was remanded for trial on the merits. The case was then tried by the Extra Assistant Commissioner, and evidence having been given on both sides, he found that the principal sum due on the bond was Rs. 4,790, and that the plaintiff was entitled to interest thereon, and the plaintiff having admitted the receipt of Rs. 2,475 on account of interest, which exceeded the sum he found to be due for interest by Rs. 822-7-9, he dismissed the suit. An appeal from this decision to the Commissioner was dismissed, and an application made to the Judicial Commissioner to allow an appeal from that order was rejected by him.

The question now before their Lordships depends upon the construction of s. 13 of Act X of 1877. Before considering that question, it will be well to refer to the state of the law in India when that Act was passed. Section 2 of Act VIII of 1859, the Code of Civil Procedure for which Act X of 1877 was substituted, provided that the Civil Courts should not take cognizance of any suit brought on a cause of action which should have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim. It is clear that this section would not have applied to the present case, the cause of action in the two suits—the non-payment of interest in one and the non-payment of principal in the other—being different. In fact, when the first suit was brought, the cause of action in the second had not arisen. But independently of this provision in the Code of Procedure, the Courts in India have adopted the rule laid down in the *Duchess of Kingston's case*, and have applied it in a great number of cases. It was recognized as the law in India by this Board in *Krugowlee Sing v. Hossein Bux Khan* (7 B L. R., 673), where, after quoting the passage in the *Duchess of Kingston's case*, in which the rule is stated, their Lordships say : "There is nothing technical or peculiar to the law of England in the rule as so stated. It was recognised by the civil law, and it is perfectly consistent with the second section of the Code of Procedure, under which this case was tried."

[444] *Mussamat Edun v. Mussamat Bechun* (8 W. R., 175) may be referred to as the leading case on this subject. In that case the Chief Justice, Sir BARNES PEACOCK, held that the two Courts must be Courts of concurrent jurisdiction, and "in order to make the decision of one Court final and conclusive in another Court, it must be a decision of a Court which would have had jurisdiction over the matter in the subsequent suit in which the first decision is given in evidence as conclusive." As to what is a Court of concurrent

jurisdiction, it is material to notice that there is in India a great number of Courts; that one main feature in the Acts constituting them is that they are of various grades with different pecuniary limits of jurisdiction; and that by the Code of Procedure a suit must be instituted in the Court of the lowest grade competent to try it. For instance, in Bengal, by the Bengal Civil Courts Act, No. VI of 1871, the jurisdiction of a Munsif extends only to original suits in which the amount or value of the subject-matter in dispute does not exceed Rs. 1,000. The qualifications of a Munsif and the authority of his judgment would not be the same as those of a District or of a Subordinate Judge, who have jurisdiction in civil suits without any limit of amount. In their Lordships' opinion it would not be proper that the decision of a Munsif upon (for instance) the validity of a will, or of an adoption, in a suit for a small portion of the property affected by it, should be conclusive in a suit before a District Judge or in the High Court, for property of a large amount, the title to which might depend upon the will or the adoption. Other similar cases are mentioned in the judgment of the Chief Justice. It is true that there is an appeal from the Munsif's decision, but that upon the facts would be to the District Court and not to the High Court. And that the decision should be conclusive would be still more improper as regards many other of the various Courts in India, the qualifications of whose Judges differ greatly. By taking concurrent jurisdiction to mean concurrent as regards the pecuniary limit as well as the subject-matter, this evil or inconvenience is avoided; and although it may be desirable to put an end to litigation, the inefficiency of many of the Indian Courts makes it advisable not to be too stringent in preventing a litigant from proving the truth of his [443] case. It appears to their Lordships that if this case had arisen before the passing of Act X of 1877, the High Courts in India would have rightly held that the decision of the Extra Assistant Commissioner in the first suit was not conclusive as to the amount of the principal sum due on the bond.

Section 13 of Act X of 1877 is as follows:— "No Court shall try any suit or issue in which the matter directly and substantially in issue has been heard and finally decided by a Court of competent jurisdiction, in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title."

The intention seems to have been to embody in the Code of Procedure, by ss. 12 and 13, the law then in force in India, instead of the imperfect provision in s. 2 of Act VIII of 1859. And as the words of the section do not clearly show an intention to alter the law, their Lordships do not think it right to put a construction upon them which would cause an alteration.

The first suit was for Rs. 1,665, for interest only, the principal not being then due, and the matter in issue was whether that sum was due. The plaintiff alleged that it was for interest on a bond for Rs. 12,000, which the defendant denied, and thus an issue was raised as to the consideration for the bond, but this was a collateral rather than a direct issue in the suit. The plaintiff might have succeeded without having a finding upon it if he had proved an admission by the defendant that the sum claimed was due for interest, or had shown that the Rs. 2,475 had been expressly paid on account of the larger sum which he said the defendant owed for interest. If the decision of the Assistant Commissioner is conclusive, he will, although he could not have tried the question in a suit on the bond, have bound the plaintiff as effectually as if he had jurisdiction to try that suit. Their Lordships think this was not intended, and that by Court of competent jurisdiction Act X of 1877 means a Court which has jurisdiction over the matter in the subsequent suit in which the decision is used as conclusive, or in other words, a Court of concurrent jurisdiction. In the judgment delivered by this Board in *Khugowlee Sing v.*

Hossein Bur Khan (7 B. L. R., 673, at p. 680), it is said that the *eadem* [446] *causa petendi* and judgment of a Court of competent or concurrent jurisdiction were both wanting in that case. This seems to show what was considered to be a competent Court. Their Lordships think that s. 13 of Act X of 1877 should be so construed, and consequently they will humbly advise Her Majesty that the orders of both the lower Courts should be reversed, and the suit be remanded for trial on the merits. The respondent will pay the costs of this appeal. *Appeal allowed.*

Solicitor for Appellant: Mr. T. L. Wilson.

NOTES.

[I. 'RES JUDICATA'—THE CONDITION OF COMPETENCY OF COURTS—THE TEST OF CONCURRENCY OF JURISDICTION—

This case lays down the test to be concurrency of jurisdiction to try the subsequent suit or suit in which the issue arises. This was re-affirmed by the Privy Council in 11 Cal. 301, where, after quoting from this case, their Lordships observed, "If this construction of the law were not adopted, the lowest Court in India might determine finally and without appeal to the High Court the title to the greatest estate in the Indian Empire."

The concurrency of jurisdiction must be as regards the *pecuniary* limits, (1905) 29 Mad. 65; (1894) 16 All. 183; (1900) 24 Bom. 456; as well as the subject matter:—34 Bom. 589.

The former Court should have been competent not only to try the particular matter in issue in the subsequent suit, but also the subsequent suit itself in which the issue is subsequently raised:—(1908) 35 Cal. 353; 12 C.W.N. 359; 7 C.L.J. 470, distinguishing 28 Cal. 78; 24 Bom. 456.

Execution proceedings are not suits, (1889) 11 Bom. 206. Formerly, it was held by some Courts that appealability and the mode thereof were also decisive tests of concurrency:—29 Mad. 195, overruling 17 Mad. 273; 24 Mad. 444; 27 Mad. 63; following 17 Mad. 168; 15 Bom. 104; 9 Bom. 75; (1891) P. R. 20 *contra* 28 Cal. 78; 25 Cal. 571; (1888) P. R. 145; 19 C.L.J. 34. The Legislature by the new explanation in the Civil Procedure Code 1908, sec. 11 Exp., it has done away with this test.

In applying the test regard is had (1) to the time when the suit was determined:—10 Cal. 697; 11 Cal. 153. Thus subsequent loss of jurisdiction through Legislative changes is no consideration:—(1892) 15 Mad. 491.

Nor subsequent changes in the market value:—10 Cal. 697; 8 Mad. 83.

But the subsequent accrual of additional claims, interest, for instance, was held material:—(1905) 29 Mad. 65.

Regard is had:—

(2) Only to the jurisdiction of the first Original Court and not of the Appellate Court above it, though the final decree is only that of the Appellate Court:—23 Cal. 415; 25 Cal. 571; 10 C. W. N. 529; 35 Cal. 415 *contra*, 9 Bom. 75; 15 Mad. 111 which required concurrency all along the line; 32 All. 67.

The following are disregarded:—

(1) Joinder of causes of action:—(1900) 28 Cal. 78. See also 35 Cal. 353.

(2) Joinder of unnecessary party.—15 Mad. 494.

II. NATURE OF COURTS

Courts of exclusive jurisdiction, or special Courts invested by the Legislature with powers of final adjudication their judgment will be *res judicata*:—*Wakefield Corporation v. Cooke* (1904) A. C. 31 (35); 9 Bom. L. R. 417; 19 All. 101.

Judgments of Courts without jurisdiction do not give rise to *res judicata*—(1900) P. L. R. 431.

Foreign Court's judgments are within the rule:—(1888) 13 Bom. 224. As regards revenue Courts see (1895) 18 All. 59; (1894) 16 All. 464; (1911) 33 All. 453; (1907) 29 All. 601; 20 Mad. 392; 30 Cal. 339; 24 Bom., 251; 9 Bom. L. R. 1028;

III. RES JUDICATA BY IMPLICATION—

Justice Sir Sankaran Nair in (1911) 21 M.L.J. 344; 10 I.C. 75, laid down that there must be an express finding or necessary implication from the decree to make an issue in the prior suit *res judicata*. In the course of his reasoning he laid stress on the passage in this judgment where with reference to the issue of consideration their Lordships said, "This was a *collateral* rather than a *direct* issue in the suit;" (9 Cal. 415). This judgment was upset on appeal in (1913) 23 M.L.J. 543 (1913) M.W.N. 1; 12 M.L.T. 500 F.B. and the judgment of Sundara Iyer J., is an exhaustive judgment on the whole subject. With reference to this particular argument, he was of opinion that the expression 'direct issue' as opposed to a 'collateral' one was used as in the *Duchess of Kingston's* case in 'the sense of an issue directly determining the subject-matter of the previous proceedings and not in the sense in which it is obviously used in the Indian Statute'.]

[9 Cal. 446—12 C.L.R. 481]

APPELLATE CIVIL.

The 3rd July, 1882.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE NORRIS.

Behary Lall and another.....Judgment-debtors
versus
 Goberdhun Lall.....Decree-holder.*

*Execution of decree—Limitation applicable to execution of a decree passed
 previous to the 1st October 1877—Limitation Acts (IX of 1871,
 Art. 167, and XV of 1877, Art. 179)—General Clauses
 Consolidation Act (1 of 1868), s. 6, Effect of.*

In execution of a decree, dated the 17th January 1877, the judgment-creditor applied on the 13th May 1878 to have the property of his judgment-debtor sold on the 16th September 1878. Subsequently, on the 2nd June 1881, he made a further application to have the decree executed.

Held, that the case was governed by the provisions of Art. 167† of Act IX of 1871, and not by those of Art. 179 of Act XV of 1877, and that as the application had not been made within any one of the periods given in the third column of Art. 167, it was barred by limitation.

Held, also, following *Mungul Pershad Ditchit v. Grijā Kant Lahuri* (I. L. R., 8 Cal., 51), that although there is no corresponding provision in Act XV of 1877 to that contained in s. 1 of Act IX of 1871 all applications for execution of a decree are applications in the suit which resulted in that decree.

*Appeal from Original Order, No. 60 of 1882, against the decree of Baboo Mohendro Nath Bose, Subordinate Judge of Mozufferpore, dated the 17th of December 1881.

†[Art. 167 :

Description of application.	Period of limitation.	Time when period begins to run.
For the execution of a decree or order of any Civil Court not provided for by No. 169.	Three years ...	The date of the decree or order, or (where there has been an appeal) the date of the final decree or order of the Appellate Court, or (where there has been a review of judgment) the date of the decision passed on the review, or (where the application next hereinafter mentioned has been made) the date of applying to the Court to enforce, or keep in force, the decree or order, or (where the notice next hereinafter made has been issued) the date of issuing a notice under the Code of Civil Procedure, section two hundred and sixteen, or (where the application is to enforce payment of an instalment which the decree directs to be paid at a specified date) the date so specified.]

Held, further, that under s. 6 of Act I of 1868 the repeal of Act IX of 1871 by Act XV of 1877 does not affect any proceedings commenced before the repealing Act came into force.

Ite Ratansi Khatianji (I. L. R., 2 Bom., 148) followed.

[447] THIS was an application made on the 2nd June 1881 for execution of a decree, bearing date the 17th January 1877. On the 13th May 1878 the decree-holder had made an application to the Court for the purpose of bringing the property of the judgment-debtors to sale under the decree on the 16th September 1878, and on the hearing of the present application it was urged on his behalf that the provisions of Art. 179 of Act XV of 1877 applied; and that as the present application had been made within three years from the latter date, he was entitled to have the decree executed.

The lower Court adopted this view, and, after disallowing the objection of the judgment-debtors granted the order prayed for.

The judgment-debtors, accordingly preferred this appeal against that order.

Baboo Jogesh Chunder Roy appeared on behalf of the Appellants.

Baboo Obinash Chunder Banerjee for the Respondent.

The **Judgment** of the Court (MITTER and NORRIS, JJ.) was delivered by

Mitter, J.—The question in this case is whether the decree obtained by the respondent against the appellants on the 17th January 1877 is barred by limitation. The lower Court has held that it is not barred, because an application had been made by the decree-holder within three years from the present application in order to bring certain property of the judgment-debtors to sale in execution. In its opinion the present case is governed by Article 179 of the present Limitation Act, *viz.*, Act XV of 1877. The words of Article 179, which, in the opinion of the lower Court, save the decree from being barred, are as follows: "The date of applying in accordance with law to the proper Court to take some step in aid of execution of the decree or order." The lower Court was of opinion that an application for the sale of a judgment-debtor's property is one that comes within these words.

In the corresponding article of the Limitation Act of 1871, *viz.*, Article 167, these words are not to be found. The appellants [448] contend that the lower Court is in error in deciding the question of limitation according to the provisions of the new Limitation Act. It should have decided it with reference to Article 167 of the Limitation Act of 1871, inasmuch as the decree, which is sought to be executed, was passed when that Act was in force.

The present application for execution was made to the lower Court for the 2nd June 1881, and the present Limitation Act came into force on the first day of October 1877. The question we have to decide is, whether this application is governed by the Limitation Act of 1877 or of 1871. It is contended on behalf of the appellants that this application must be considered to have been made in the suit which resulted in the decree of the 17th January 1877; and that the aforesaid decree not being yet satisfied, the application was made in a proceeding which was pending on the date when the new Act came into operation; and that, therefore, under s. 6, Act I of 1868, the new Act cannot affect the application in question which was made in a pending proceeding. In support of this contention the learned pleader for the appellants has cited before us the decision of the Judicial Committee of the Privy Council in *Mungul Pershad Dchit v. Gurja Kant Lahiri* (I. L. R., 8 Cal., 51). In that case the decree was passed when Act XIV of 1859 was in force, but the application for execution was made after the Limitation Act of 1871 had come into operation. The question for decision was, whether the application for execution was governed

by the Act of 1859 or that of 1871. Their Lordships held that it was not governed by the Act of 1871. "The Act," their Lordships said, "was to come into force on the 1st of July 1871, but it was enacted by s. 1 that nothing contained in s. 2 or in Part II should apply to suits instituted before the 1st of April 1873. It appears to their Lordships that a thing which applies to an application in a suit applies to the suit, and that an application for the execution of a decree is an application in the suit in which the decree was obtained, and that as regards suits instituted before the 1st of April 1873 all applications in it are excluded from the operation of the Act.

There is no provision in the Act of 1877 corresponding to that of s. 1 of the Act of 1871, referred to above by their Lordships [449] of the Judicial Committee. But they hold that all applications for execution of a decree are applications in the suit which resulted in that decree: therefore the application for execution in this case must be considered to have been made in a proceeding which commenced before Act XV of 1877 came into operation. It is true that the Limitation Act of 1871 was repealed by the Act of 1877, but this repeal under s. 6 of Act I of 1868 cannot affect any proceedings commenced before the repealing Act came into operation, there being nothing in the subject or context of the repealing Act repugnant to this provision.

It may be said that the subject of the Act in question is such that it precludes the operation of s. 6 of Act I of 1868; that a Limitation Act is an Act of procedure relating to suits; and that Acts relating to procedure, from the nature of their subject, apply to all pending proceedings from the date when they came into operation.

This question has been fully discussed by WESTROPP, C.J., in *Ratanji Kalianji* (I. L. R., 2 Bom., 148). After an elaborate discussion of the cases bearing upon the point he came to the conclusion that the rule in question is confined only to the procedure in Courts of Justice, no way prejudicing any of the parties to the suit.

The present application is, therefore, governed by Art. 167 of the Limitation Act of 1871, and as it was not made within any one of the periods given in the third column of that article, it is barred by limitation. We, therefore, reverse the judgment of the lower Court, and decree this appeal with costs.

Appeal allowed.

NOTES.

[This decision was dissented from in 11 Cal. 55 (58); see also 10 Cal. 748 (751); 7 Bom. 159 (163); as regards the effect of a New Limitation Act repealing the previous one, see also 16 Cal. 267; (1902) P.R. 4; (1901) P.R. 90; 40 I.A. 74.]

[2 C. L. R. 55]

[430] APPELLATE CIVIL.

The 14th December, 1882.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE AND MR. JUSTICE MITTER.

Koonjo Behary Roy.....Plaintiff

versus

Poorno Chunder Chatterjee.....Defendant.*

*Parties-Principal and Agent—Plaintiff—Gomashta—
Beng. Act VIII of 1869, s. 32.*

Under s. 32 of Beng. Act VIII of 1869 a gomashta has no right to bring a suit in his own name. He can only sue in the name of his employer, and conduct the suit for him like any other agent.

THE facts of this case sufficiently appear from the **Judgment** of

Field, J.—There are two points taken in this appeal, and I think the appellant must succeed upon both. The first point is that Koonjo Behary Roy as gomashta had no right to sue making himself plaintiff, even although it is stated in the plaint that he was suing on behalf of his employer Raj Kisto Mookerjee. In other words it is contended that the name of Baboo Raj Kisto Mookerjee must appear in the plaint as plaintiff, although the gomashta Koonjo Behary Roy may do everything in the suit that a recognized agent may do, regard being had to the provisions of s. 32 of Act VIII of 1869. Now all that s. 32 provides is that "every naib or gomashta thereto specially authorized by any writing under the hand of his employer shall, for the purposes of all suits, etc., be deemed to be the recognized agent of such employer within the meaning of s. 17 of Act VIII of 1859." Section 37 of the present Code corresponds with s. 17 of Act VIII of 1859. Now, it is quite clear that although, under the provisions of s. 36 of the Civil Procedure Code, any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party to a suit, may be made or done by his recognized agent, still it is clear that a recognized agent has no authority to constitute himself the plaintiff and bring the suit in his own name as plaintiff. Section 51 requires that the plaint shall be signed by the [451] plaintiff and his pleader. In the present case the plaint is not signed by Raj Kisto Mookerjee, but it is signed by Koonjo Behary Roy only. It is clear, therefore, that Koonjo Behary Roy, although he sets out in the plaint that he acts for his employer, was the real plaintiff. It is to be observed that the provisions of s. 69 of Act X of 1859 were different from the provisions of s. 32 of Beng. Act VIII of 1869, the former provisions appearing to contemplate the institution or defending of suits by naibs, gomashtas, etc., in the name and on behalf of their employers. In Beng. Act VIII of 1869 there is one section which allows agents of a certain class to bring suits in their own name, that is s. 24, which provides for all suits which under the provisions of this section may be brought by or against zamindars, or other persons in the receipt of the rent of land, being brought by or against surbarakars or tehsildars of estates held under khas management. It is clear from the distinction

* Appeal under s. 15 of the Letters Patent against the decree of Mr. Justice Field, dated the 28th June 1882, in appeal from Appellate Decree No. 792 of 1881.

in language between this section and s. 32 that the latter section does not contemplate that a naib or gomashtha should bring a suit in his own name. All that the section permits him to do is to do anything that a recognized agent may do under the provisions of the Code of Civil Procedure, and it has already been pointed out that a recognized agent is not competent to bring a suit in his own name.

The plaintiff appealed under s. 15 of the Letters Patent.

Bahoo *Taruck Nauth Sen* for the Appellant.

Bahoo *Bipro Doss Mookerjee* and Bahoo *Grija Sunker Mozoomdar* for the Respondent.

The **Judgment** of the Court (GARTH, C.J., and MITTER, J.), was delivered by

Garth, C.J.—We think that the learned Judge is quite right.

Under s. 32 of the Rent Law a gomashtha has no right to bring a suit in his own name. He can only sue in the name of his employer, and conduct the suit for him like any other agent.

It has been contended, indeed, that he did bring this suit as [452] agent, and that the plaint should be read in that sense; but it is difficult so to construe the language, and when we look at the verification of the plaint, it is clear that the gomashtha describes himself, and not his employer, as the real plaintiff.

This appeal must, therefore, be dismissed with costs.

Appeal dismissed.

NOTES.

[Compare the remark of the Privy Council on the amendment of the plaint substituting the zamindars name in a suit under Beng. I of 1879 :- 19 Cal. 678. see also 11 W.R. 43; 4 N.W.P. 59.]

[9 Cal. 452 12 C. L. R. 47]

APPELLATE CIVIL.

The 23rd November, 1882.

PRESENT:

MR. JUSTICE MITTER AND MR. JUSTICE NORRIS.

Ramdut Sing.....Defendant

versus

Mahender Prasad and others.....Plaintiffs.*

*Hindu Law—Joint family—Mitakshara—Decree against the father
of a joint family for lawful debts—Sale of the whole joint
estate in execution of decree against one co-sharer.*

A, a judgment-creditor, having obtained a decree against *B*, the father of a joint Hindu family governed by the Mitakshara law, in a suit to which the sons of *B* were not parties, but in which it was proved that the debt had been incurred for lawful purposes, proceeded to execute his decree by attaching and selling the joint family property. Thereupon the sons came in and objected to their interest in the property being sold in execution of a decree in a suit to which they were not parties, and, on their objection being disallowed, filed a suit against *A* and *B* to have it declared that their interest in the property was not liable to be sold to satisfy the decree.

Held, that the debt in respect of which the decree had been passed having been contracted for lawful purposes, the judgment-creditor was entitled to execute his decree against the whole of the joint family property.

Held, also, that the ruling in the case of *Deendyal Lal v. Jugdeep Narain Singh* (1. L. R., 3 Cal., 198) had no application to the facts of this case.

THIS was a suit brought by the sons against the father of a joint Hindu family governed by the Mitakshara law, and a person named Ramdut Sing, who had obtained a decree against the father in a suit upon a bond.

[453] Ramdut Sing had, on the 30th June 1867, advanced to Ram Narain Lal (the father) certain moneys upon the security of a bond to enable him to pay off a decree then outstanding in the hands of one Thakur Ram Sing. Subsequently Ramdut Sing brought a suit upon the bond against Ram Narain Lal and obtained a decree, and in execution thereof he proceeded to attach and sell the joint family property belonging to Ram Narain Lal and his sons, the present plaintiffs. In these execution proceedings the plaintiffs came in and objected to the sale of the entire family property, but their objection was disallowed by the Court executing the decree. Thereupon they instituted the present suit against Ramdut Sing and Ram Narain Lal, and sought to have it declared that they were entitled to joint possession of the lands in question after excluding their father's share, which they alleged was alone liable to be sold in execution of the decree against him, and they also prayed for the cancellation of the order in the execution proceedings by which their share also in the property was ordered to be sold.

* Appeal from Appellate Decree, No. 1624 of 1881, against the decree of J. F. Stevens, Esq., Officiating Judge of Sarun, dated the 27th June 1881, modifying the decree of Baboo Ramyad Lal, Munsif of Sewan, dated the 31st March 1881.

The first Court found as a fact that the money advanced by Ramdutt Sing upon the bond was advanced for and spent on lawful objects, as it had been obtained by Ram Narain Lal for the purpose of paying off a decree then outstanding against him in respect of a debt incurred by him to defray the marriage expenses of his sons. The Court accordingly dismissed the suit, on the ground that the plaintiffs were liable for their father's lawful debt, and held that the suit had been brought by the plaintiffs in collusion with their father in order to deprive the creditor of the means of satisfying his decree.

On appeal the lower Appellate Court held that the case was governed by the decision in *Deendyal Lal v. Jugdeep Narain Sing* (I. L. R., 3 Cal., 198), and that the sons, not having been joined as party defendants in the suit against their father, all that the judgment-creditor could attach, or was entitled to sell under his decree, was the right, title and interest of the father in the joint family property. It accordingly modified the decree of the lower Court by setting aside the order in the execution proceedings, disallowing the plaintiff's objection, and declared that nothing but [454] the right, title and interest of the judgment-debtor Ram Narain Lal was liable to sale in execution of the decree against him. The claim for confirmation of possession over a specified portion of the joint family property after excluding the share of Ram Narain Lal was disallowed. Against this decree the defendant Ramdutt Sing preferred a special appeal to the High Court.

Baboo Hury Mohun Chuckerbutty appeared for the Appellant.

Baboo Nil Madhub Bose for the Respondents.

The **Judgment** of the Court (MITTER and NORRIS, JJ.) was delivered by

Mitter, J.—In this case the District Judge has reversed the decree of the Court of First Instance, wholly relying upon the Privy Council ruling in the case of *Deendyal Lal v. Jugdeep Narain Singh* (I. L. R., 3 Cal., 198). It appears to us that this ruling has no application to the facts of this case. Here the creditor, the appellant before us, sued the father of a joint Mitakshara family upon a bond executed by him, obtained a decree, and in execution of that decree attached the family property. Thereupon the sons intervened and objected to the sale of the entire family property; their objection was disallowed by the execution Court. Thereupon, before the sale was brought about, the present suit was brought by the plaintiffs, the sons, to obtain a declaration that their interest in the family property is not liable to be taken in execution of the decree against the father. The Court of First Instance held that it was not proved that the bond debt was contracted for immoral purposes; on the other hand the finding is that it was contracted for the purpose of defraying the expenses of the marriage ceremonies of some of the plaintiffs. Upon that finding of fact the lower Court dismissed the suit, and so far as that finding is concerned, it has not been set aside by the lower Appellate Court, but the lower Appellate Court thinks that upon the facts found the ruling in the case of *Deendyal Lal* applies. It is quite clear that the decision of the lower Appellate Court is erroneous; the ruling in *Deendyal Lal's* case only applies where the father's interest alone is sold in execution of decree. In this case the plaintiffs, the sons, are seeking to establish the [455] non-liability of their interest in the family property to sale in execution of a decree against the father, and they must make out that the debt which was the basis of the decree was contracted for immoral purposes. As upon that point the finding of the Court of First Instance is against them, and that finding has not been set aside by the lower Appellate Court, it appears to

us that the suit was rightly dismissed by the first Court. We accordingly reverse the decree of the lower Appellate Court, and restore that of the Court of First Instance with costs in all the Courts.

Appeal allowed.

NOTES.

[See the Notes to 3 Cal. 198 ; 11 Cal. 21 in the LAW REPORTS REPRINTS. See also (1883) 7 Bom. 138 (445).]

[9 Cal. 455 : 11 C.L.R. 569]

APPELLATE CRIMINAL.

The 22nd September, 1882

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE FIELD.

Roghuni Singh and others

versus

The Empress.*

Criminal Procedure Code (Act X of 1872), ss. 119, 323—Evidence—Statements of witnesses to a Police Officer during an investigation—Refreshing memory—Medical witnesses, evidence of—Opinion of experts how elicited—Examining at Sessions trial Medical witness who has been examined before the Magistrate Post-mortem examination reports.

In giving evidence a Police officer may refresh his memory by referring to documents in which he has under s. 119 of Act X of 1872 reduced into writing statements of persons examined by him during an investigation, but the documents themselves cannot be used as evidence, and a Judge should not read such documents to a jury in order to point out discrepancies between the evidence and previous statements of the witnesses.

The evidence of a medical man who has seen, and has made a *post-mortem* examination of the corpse of the person touching whose death the inquiry is, is admissible. firstly, to prove the nature of injuries which he observed ; and, secondly, as evidence of the opinion of an expert as to the manner in which the injuries were inflicted, and as to the cause of death.

A medical man who has not seen the corpse is only in a position to give evidence of his opinion as an expert. The proper mode of eliciting such evidence is to put to the witness hypothetically the facts which the evidence of the other witnesses attempts to prove, and to ask the witness's [456] opinion on those facts. Section 323 of Act X of 1872 does not in any way preclude the Judge at a Sessions trial from calling and examining the medical witness who has been examined before the Magistrate, and in every case in which the deposition taken by the Magistrate is essentially deficient or requires further elucidation, such witness should be called and examined by the Sessions Judge.

* Criminal Appeal, No. 508 of 1882 against the sentence of H. Beveridge, Esq., Sessions Judge of Patna, dated the 25th August 1882.

A medical man in giving evidence may refresh his memory by referring to a report which he has made of his *post-mortem* examination, but the report itself cannot be treated as evidence, and no facts can be taken therefrom.

THE facts of the case are stated in the judgment of the High Court.

Mr. *Branson*, Mr. *M. M. Ghose*, and Baboo *Unakali Mookerjee* for the Prisoners.

The Deputy Legal Remembrancer (Mr. *Kilby*) for the Crown.

The **Judgment** of the Court (MITTER and FIELD, JJ.) was delivered by

Field, J.— This is an appeal from a sentence passed by the Sessions Judge of Patna upon three persons, Roghuni Sing, Ram Charan Singh, and Kanya Singh, who have been convicted, the first mentioned of murder, and the other two of abetment of murder, and have all three been sentenced to transportation for life. Two other persons, namely, Ram Lal and Bhoran, were tried, together with the appellants before us, and were acquitted by the unanimous verdict of the jury.

The prisoners, appellants, have been convicted by a majority of three out of five jurors.

It appears that the jury retired for eight minutes only, and in this case I desire to observe that this time was insufficient to enable the jury to consider the evidence, and deliberate thereupon amongst themselves.

The facts of the case for the prosecution are briefly these: Two persons, Radha Singh and Mewa Singh, were said to have taken a lease of some 10 bighas 13 cottahs of land from one Lakhon Mahton, ijaradar. On the morning of Monday, the 24th July 1882, these two persons, Radha Singh and Mewa Singh, went to a portion of the land consisting of some 10 cottahs, taking [457] with them three labourers, namely, Sukun, Gania and Badhan Mahton for the purpose of transplanting paddy plants. There can be no doubt that between Radha and Mewa on the one side, and Ram Lal on the other side, there had been previous litigation and dissension. The story of the prosecution is that about mid-day Ram Lal and Bhoran came and ordered Radha Singh and Mewa Singh and their workmen to desist and then went off, giving orders to the prisoners Roghuni Singh, Ram Charan Singh, Kanya Singh and others to beat Radha Singh and Mewa Singh, and their people, if they did not desist. There is no suggestion that Ram Lal and Bhoran were on the spot when the subsequent occurrence took place. It is then said that Gania and Sukun desisted from work, but that Badhan Mahton still went on working, whereupon Roghuni Singh, Ram Charan Singh and Kanya Singh came over, and Roghuni Singh struck Badhan on the head with a *lati*. Ram Charan Singh then struck him on the side of the temple, and Kanya Singh struck him on the side. There can be no doubt that Badhan Mahton died from congestion of the brain in consequence of having been struck on the head with some hard substance.

Now the case for the prosecution is that this hard substance was a *lati*, and that this *lati* was in the hands of the prisoner Roghuni Singh. The case for the defence on the other hand is, that the injuries to Badhan's head were not, and could not have been, inflicted by a *lati*, but that they were inflicted by a wooden instrument called an Arhan, and that Radha Singh himself had struck Badhan Mahton with this wooden instrument while aiming a blow at one of the opposite party, which missed him, and came down on the head of Badhan Mahton who was sitting down working transplanting the paddy plants. No witnesses were called in the Court of Session to prove the case set up by

the defence, and we have to consider only the evidence for the prosecution, and the manner in which that evidence has been dealt with by the Sessions Judge.

It is to be observed, however, that the prisoners, in their statements before the Court of Session, alleged that they seized Radha Singh, and took him to the Cutchery close by, where the jemadar of police was staying, and charged him, then and there, [458] with having caused the death of Badhan. Now, although the jemadar examined most of the other persons who were present on the scene, he did not examine Radha, and this does seem to show that at that particular time Radha did not occupy the position of a witness.

A number of objections have been taken before us to the evidence produced at the Sessions trial, and the manner in which that evidence was dealt with by the learned Judge in his summing up to the jury. I propose to deal only with two of these objections. The first is concerned with the observations which the Judge made to the jury as to the discrepancies between the account given by the witnesses in the Court of Session, and the previous account of the transaction given by them to the police jemadar.

I observe that the Sessions Judge read out to the jury the depositions or statements of the witnesses which were recorded by the police jemadar. I think that this was not a proper course. Section 119^a of the Code of Criminal Procedure provides that these statements shall not be signed by the person making them, nor shall they be treated as part of the record or used as evidence. It is, therefore, perfectly clear that these statements are not depositions, do not prove themselves, and cannot be treated as evidence. They might have been used by the police officer to refresh his memory. But even if this were done, the evidence given by the police officer after so refreshing his memory from these statements, and not the contents of the statements themselves, would have been the relevant evidentiary matter. There can be no doubt that the account given by the witnesses to the jemadar, and the account given by them at the trial, very materially vary. The Sessions Judge with reference to this said to the jury : —

“ Undoubtedly the discrepancies between the statements to the jemadar and those now made were a matter for serious consideration. The statements to the jemadar were recorded by him on the day of the occurrence, and if he had correctly taken them down they were more likely to be truthful than those made in Court a month afterwards. Now there were two suppositions which might be made as to the discrepancies. The first was that the jemadar had not accurately taken down the statements. The other was that the witnesses had really not mentioned Ram Lall and [459] Bhoran as giving the orders, and that the present statement to that effect and other alterations from the former statements were subsequent inventions of the witnesses. As regards the first supposition it was no doubt the case that the police did not always record statements correctly. This might arise from dishonesty and collusion, and it was evident in this case that the wealth was on the side of the prisoners. Some of them were zamindars and mukarardars, while Mewa Singh and Radha Singh were poor men who had been sold out of their lands and almost out of their houses : or there might be mere neglect or stupidity without dishonesty.”

* [Sec. 119 —An officer in charge of a Police-Station, or other Police officer making an investigation, may examine orally any person supposed to be acquainted with the facts and circumstances of the case, and may reduce into writing any statement made by the person so examined. Such person shall be bound to answer all questions relating to such case put him by such officer other than questions criminating himself.

Proviso.

No statement so reduced into writing shall be signed by the person making it, nor shall it be treated as part of the record or used as evidence.]

I think that it was improper to suggest to the jury that the fact of wealth being on the side of the prisoners might have influenced the police jemadar in recording the statements made to him by the witnesses, there being no evidence on the record that the prisoners or any persons on their behalf attempted to tamper with the police jemadar.

The second objection is that the Sessions Judge was wrong in calling Dr. Shaw, the Civil Surgeon, to contradict the deposition of the Assistant Surgeon Moulvi Asder Ali Khan. It is further said that, even if Dr. Shaw's evidence could have been admissible, it ought not to have been admitted without calling the Assistant Surgeon, and giving him an opportunity of explaining more fully the reasons for the opinions expressed in his deposition. The essential part of the deposition of the Assistant Surgeon is as follows :—

“The skull was fractured from the left temporal bone across the parietal bone, and the fracture was terminated at the end of the sagittal suture. The fracture was about four inches long. There was also a superficial wound a little above the left temporal region about two inches above the ear. *Underneath this wound there was no fracture.* This was a slight superficial wound. There was also an abrasion below the right ear; this was very slight and superficial. Neither of the ears were hurt. On removal of the scalp I found a patch of extravasated blood about 4 inches long and $2\frac{1}{2}$ to 3 inches broad just above the fracture.” And further on : “In my opinion one blow caused the fracture. Any flat substance would have caused that fracture. Under no circumstances would a *lati* cause such a fracture, because a *lati* would have cut open the scalp and would not have caused such a wide-spread extravasation of blood. Neither of these two *lati*s in Court could have caused the fracture. I examined the body thoroughly, but found no other hurt. The hurt above the left temporal region and the abrasion below the right ear could not have been caused by these *lati*s in Court, or any ordinary *lati*. The abrasion below the right ear may have been due to a fall, no *lati* whatever would have caused it.

[460] Dr. Shaw was called as a witness, and the following question was put to him by the Sessions Judge :—

Question.—“The Assistant Surgeon of Barh has stated in his evidence that the skull was fractured from the left temporal bone across the parietal bone, and the fracture was terminated at the end of the sagittal suture. The fracture was about four inches long. He has also said that no *lati*s could produce the said fracture, because a *lati* would have cut open the scalp, and would not have caused such a wide-spread extravasation of blood. Can you state if in your judgment this opinion of the Assistant Surgeon is correct?”

Answer.—“In my opinion, the opinion of the Assistant Surgeon is not correct. A blow from a *lati* might be given with sufficient force not to wound the scalp at all. Besides, the superficial wound described by the Assistant Surgeon in his report as half an inch long and a little above the left temporal region corresponds with the fracture, for he goes on to say that on removing the scalp the skull was found cracked running from about two inches above the left meatus across the temporal bone, the parietal, backwards and upwards, terminating at the sagittal suture. Judging from this the superficial wound corresponded to the upper third of the fracture. A fracture may extend further than the external wound. The Assistant Surgeon is also not correct in stating that there could not be an extravasation of blood, 4 inches long and $2\frac{1}{2}$ inches broad, caused by a round *lati*. Unless the wound has a particular appearance you cannot tell from a fracture whether it was caused by a flat board or a round *lati*. The *lati*s in Court could have produced a wound like that described by the Assistant Surgeon.”

There can be no doubt that Dr. Shaw in this deposition based his opinion in many important respects not upon the facts which the Assistant Surgeon stated, but upon facts somewhat, and in one respect essentially, different.

The Assistant Surgeon stated in his evidence that underneath the wound, that is the superficial wound above the left temporal region, there was no fracture. Dr. Shaw by a course of reasoning arrived at a different fact, namely, that "the superficial wound corresponds to the upper third of the fracture"; and upon this different fact in part bases his opinion. Then Dr. Shaw refers to the "report," that is the report of the *post-mortem*, written in the form usually filled up by Civil Surgeons at the time of making the *post-mortem* examination. Now this report was not evidence, and, therefore no facts, [461] could have been taken therefrom. The Assistant Surgeon might have used this report to refresh his memory when giving evidence; but the report itself was not admissible in evidence.

But there is a still further and a more important consideration. The Assistant Surgeon had actually seen the dead body, and had performed the *post-mortem* examination; and his evidence, as that of a medical expert was, therefore, admissible, first, to prove the nature of the injuries which he observed on the dead body; and, secondly, as opinion-evidence with respect to the manner in which those injuries were inflicted, and the cause of death. Now Dr. Shaw had not seen the dead body, and had not made the *post-mortem* examination, and the difficulty in which he felt himself placed appears from what he says in a subsequent part of his deposition, namely:

"It is difficult for me, without having seen the fracture, to form any definite conclusion about it. Reading a description would not help me so much as actually seeing the thing."

Dr. Shaw was in the position of an expert witness who could give nothing but opinion-evidence. The general rule as to evidence of this kind is that the questions must be put to the witness hypothetically, put in this way:

"Assuming such and such facts to be true, what is your opinion on the matter?"

"Assuming such and such an injury, an injury of such and such a kind to have been inflicted, what is your opinion as to the nature of the weapon by which it was possibly or probably inflicted?"

The facts thus hypothetically stated to the witness would of course be the facts which the evidence of the other witnesses in the case attempted to prove, and as to which it was for the jury to find whether they had been proved or not. If in this particular case the Sessions Judge of Patna had put the question to Dr. Shaw, assuming the injuries deposed to by the Assistant Surgeon, and had asked Dr. Shaw his opinion as to the weapon by which these injuries might or could have been inflicted, there might perhaps have been no valid objection to the evidence. But even if this course had been pursued, I think that having regard to the importance of the question at issue, it would have been only fair to the prisoners to put the Assistant Surgeon into the witness box, and give him an opportunity of stating his reasons for the positive assertions contained in his deposition. I may [462] observe that although s. 323 of the Code of Criminal Procedure allows the examination of a Civil Surgeon, taken and duly attested by a Magistrate, to be given in evidence in the Court of Session, it does not in any way preclude the Sessions Judge from calling the Civil Surgeon and examining him. And this course ought to be pursued in every case in which the deposition taken by the Magistrate is essentially deficient or requires further explanation or elucidation. Unfortunately, however, Dr. Shaw was not questioned in the manner just indicated; and he was asked to sit in judgment upon the Assistant Surgeon; asked substantially to exercise the functions of the jury in forming an opinion upon the credibility of the Assistant Surgeon's evidence. I think that this course was essentially an erroneous one. If the Assistant Surgeon had been placed in the witness box, and

allowed to give his reasons for the views contained in his deposition, he might have stated further facts, observed upon the *post-mortem*, which would strongly support the correctness of his views, or under further examination he might himself have seen reason to modify the positive opinion expressed by him before the Magistrate, and if Dr. Shaw had been questioned, assuming the facts to be as stated by the Assistant Surgeon, this gentleman also might have stated the reasons for his views. If as the result there was any substantial difference of opinion between the Civil Surgeon and the Assistant Surgeon, the jury would have been in a position to judge for themselves which view appeared to them most likely to be correct. I think that having regard to the great materiality of the question as to the weapon used, it is impossible to say otherwise than that the prisoners have been prejudiced by the manner in which the medical evidence was dealt with by the Judge and placed before the jury. Under those circumstances I think that this conviction must be set aside.

I have carefully considered the further order which ought to be passed in this matter, and I think that there ought to be a new trial. The prisoners called no witnesses to support the case set up by them; and, this being so, I cannot feel satisfied that their defence is so extremely probable as to make it undesirable in the interests of justice that they should a second time undergo a trial upon the serious charges preferred against them. I think [463]. I ought to point out that while two of the prisoners Ram Charan and Kanya have been convicted of abetting murder, there is nothing to be found in the Judge's charge explanatory of the law of abetment, and it does not appear what particular conduct on their part was considered to amount to abetment within the definition under s. 107 of the Indian Penal Code.

Re-trial ordered.

NOTES.

[I. MEDICAL WITNESS--

This case was approved of in (1888) 15 Cal. 589 (594) as regards the examination as expert. See also 39 Cal. 245. As to admissibility of reports as evidence, see (1903) 10 C.P.L.R. 122 (128); 4 C.W.N. 129.

II. REFRESHING MEMORY--

See also (1896) 22 Bom. 596; (1903) 16 C.P.L.R. 122; (1897) 17 B.R. (1897-1901) Vol. I, 31 (37).]

[9 Cal. 463]

APPELLATE CIVIL.

The 30th November, 1882.

PRESENT.

SIR RICHARD GARTH, KNIGHT, CHIEF JUSTICE, AND MR. JUSTICE FIELD.

Ram Chunder Poddar and others.....Defendants

versus

Haridas Sen.....Plaintiff.

Hindu Law—Widow's estate—Conveyance by presumptive heir—Ratification by widow—Effect of witnessing deed on rights of witness—Res judicata.

During the lifetime of a Hindu widow, her son, the then presumptive heir to the property of which she was in possession, conveyed it to purchasers by deeds to which she was

* Appeal from Appellate Decree, No. 529 of 1881, against the decree of R. F. Rampini, Esq., Acting Judge of Dacca, dated the 11th January 1881, reversing the decree of Baboo Gunga Churn Sircar, Subordinate Judge of that district, dated the 16th July 1880.

not a party. Subsequently she by separate deed ratified the conveyances. This deed was witnessed by a more remote reversioner. The son died during the lifetime of his mother, and the witness to the deed of ratification became the next reversionary heir.

Held, in a suit by him after the widow's death for possession, that at the time of the conveyances the son had a mere contingent reversionary interest in expectancy, and that the subsequent ratification by his mother could not operate as a surrender of her estate so as to change the conveyances, and make them enure as absolute conveyances, but could only amount to a conveyance of her interest.

Held, also, that the fact that the reversionary heir witnessed the deed of ratification, did not in itself amount to evidence of consent to it on his part.

A Hindu widow and her son, she then presumptive heir to property claimed by the widow, obtained a decree against a more remote reversionary heir. The son predeceased his mother, and the person against whom the decree had been obtained became the next reversionary heir.

Held, in a suit for possession by him, that the decree in the previous suit did not operate as a *res judicata*.

[464] THIS was a suit to recover possession of a share in certain talooks.

One Durpo Narain Roy died leaving three sons, Shib Das, Kali Das, and Kasi Das Roy. Shib Das died leaving a son Durga Das, who died leaving two sons, Hari Das, the plaintiff, and Rutneswar. Kali Das died leaving a daughter Monikornika, and a grandson Kashi Kishore, who predeceased his mother. Kashi Das died leaving a son Dabi Das, who died without issue.

On the 25th Magh 1256 (8th February 1850) Kashi Kishore sold the property in dispute to certain persons, the predecessors of the defendants. Monikornika was not a party to the deeds by which the property was conveyed but on the 8th Assin 1263 (22nd September 1856) she ratified the conveyance by a separate deed. This deed was witnessed by the plaintiff.

It appeared that previously to the time when the conveyances were made by Kashi Kishore, Monikornika and he had sued, among other persons, the plaintiff, to recover possession of the property sought to be recovered, and had obtained a decree. Monikornika died in 1879, leaving the plaintiff and Rutneswar her surviving, and without leaving any issue. Kashi Kishore having died during her lifetime the plaintiff now sued as reversionary heir of Monikornika's father Kali Das, to succeed to a moiety of the property held by Monikornika. The defendants contended that the sale by Kashi Kishore was for necessary purposes, and that the plaintiff and Monikornika consented to it. They also contended that the plaintiff had ratified the sale by witnessing the deed of the 8th Assin 1263 (22nd September 1856); and further that the plaintiff was barred by the decree in the suit against him by Monikornika.

The Subordinate Judge dismissed the suit, holding that Kali Kishore had a good title to convey, and that the plaintiff had ratified the conveyance by Kashi Kishore. On appeal the District Judge reversed this decision, holding that Kashi Kishore had no right to the property, and that he could execute no valid conveyance of it. He also held that the fact that the plaintiff witnessed the deed of the 8th Assin 1263 (22nd September 1856) did not amount to a ratification. The defendants appealed to the High Court.

[465] Baboo Mohini Mohun Roy and Baboo Lall Mohun Doss for the Appellants.

Baboo Rash Behary Ghose for the Respondent.

The following **Judgments** were delivered:—

Garth, C.J.—These suits were brought by two different plaintiffs to recover two several portions of the same property. They were dealt with by the

Courts below in one judgment, the plaintiff's claim being dismissed in each case by the Subordinate Judge, and decreed by the District Judge.

I propose to deal with one of the suits only, No. 529, and the same judgment will dispose of them both.

The plaintiff in that suit is Hari Das Sen. He claimed as the reversionary heir of one Kali Das Roy, and he says that his title accrued upon the death of one Monikornika, who was the daughter of Kali Das Roy. She died in 1879.

There is no doubt that the plaintiff was the reversionary heir of Kali Das Roy.

The defendants claim the property under two kobalas, dated the 25th Magh 1256 by which the property was conveyed to the predecessors of the defendants by a person named Kali Kishore Das, who was the son of Monikornika; and who, at the time when the conveyance was made, was the presumptive heir to the property; that is, if Monikornika had died at that time, he would have been the reversionary heir of Kali Das Roy.

The District Judge has decided that the defendant's predecessors in title took nothing under these kobalas, because Kali Kishore had at that time merely a contingent reversionary interest in the property, and he afterwards died or disappeared; so that at the time of Monikornika's death Kali Kishore was not forthcoming as the reversionary heir.

The learned pleader for the appellant has attempted to meet this difficulty in two ways.

In the first place he says that at the time when Kali Kishore executed these kobalas, he and Monikornika had brought a suit to recover possession of the property against several defendants, and amongst them, against the present plaintiffs; and as a decree was obtained by Kali Kishore and Monikornika in that suit [466] against all the defendants, it must be taken as against the present plaintiffs that they had a joint interest in the property, or at any rate that Kali Kishore had some substantial interest in it at that time; and that the decree operated as a *res judicata* between the parties to establish such an interest.

But upon looking into the proceedings in that suit, we find it clearly shewn that Monikornika was the person then entitled to the property as the daughter of the former owner, Kali Das Roy, and that Kali Kishore was her son; and there is nothing in the judgment to lead us to suppose that the Court intended to find a different state of things.

It is probable that Kali Kishore was made a party to that suit, because he had been put into possession of the property by Monikornika as her agent and manager, and it was thought advisable to make him a party in that character; or possibly he may have been made a plaintiff, because he was presumably at that time the reversionary heir; but in either case the mere fact of his being made a plaintiff, and recovering a decree against the present plaintiffs in conjunction with Monikornika, does not debar us from ascertaining in this suit what his and Monikornika's respective interests really were.

Now it is clear that Kali Kishore had no interest in the property at that time, except a possessory interest as manager, and a contingent reversionary interest after Monikornika's death. The decree, therefore, does not assist the defendants' case.

The appellant's pleader then relies upon another piece of evidence, a deed, which is called a deed of ratification, made to the defendant's ancestors by Monikornika herself on the 8th of Assin 1263. By that deed Monikornika professed to ratify the kobala that had been made by Kali Kishore in 1256;

and it is said that the ratification, coupled with the deed of 1256, had the effect of transferring the whole property absolutely to the defendants; and in support of this view we were referred to some authorities, and amongst others, to a case of *Trilochun Chuckerbutty v. Umesh Chunder Lahiri* (7 C. L. R., 571) decided by MORRIS and PRINSEP, JJ.

In that case a Hindu widow, who had inherited her husband's estate, conveyed away that estate by deed with the concurrence [467] of the presumptive reversionary heir; and it was held, following a previous decision of BAYLEY and MARKBY, JJ., to which I shall presently refer, that the alienation made by the Hindu widow, with the concurrence of the reversioner, had the effect of passing the whole estate.

It would appear from the report that the learned Judges were at first disposed to think that the consent of the reversioner was not enough to pass the estate; but they seem to have considered themselves bound by the judgment in the case to which I have referred.

That case was *Mohunt Kishen Geer v. Busgeet Roy* (14 W. R., 379), and it is necessary in determining how far that case is binding upon us as an authority, to ascertain what the facts of it really were, and what was the ground of the Court's decision.

In that case a Hindu widow, who had inherited certain property from her husband, had, in conjunction with the next reversionary heirs to that property, executed a conveyance to a purchaser; and BAYLEY and MARKBY, JJ., seem to have considered that such a deed operated to convey any estate which those persons by any arrangement amongst themselves had the power of conveying.

MARKBY, J., in his judgment, after saying that the whole estate passed, observes: "To hold otherwise would only necessitate the adding of two or three words to the conveyance, because the widow may at any time surrender the property to the apparent next taker, who will then become absolute owner."

It seems then that this judgment proceeded upon the ground that, in the view of the learned Judges who were parties to it, the conveyance operated, first as a surrender of the widow's estate to the reversionary heirs, and then as an absolute conveyance by them to the purchaser of their interest in the property.

I confess that if the facts of the present case were substantially the same as those of the two cases I have mentioned, I should like to consider whether they were rightly decided; but it seems to me, that the facts here are very distinguishable.

There never was in this case, as it seems to me, any conveyance by the widow and Kali Kishore Das, which could operate in law [468] as a surrender by the widow, and a conveyance of the reversionary interest, which Kali Kishore would have taken upon that surrender. And for this reason; because his kobala was executed in 1256, seven years before the deed of ratification by the widow.

At the time when he executed this conveyance it is clear that he had a mere contingent reversionary interest in expectancy; that being so, the ratification of that conveyance by the widow seven years afterwards could not have operated as a surrender of her estate, so as to change the effect of Kali Kishore's previous deed, and make it enure as an absolute conveyance of the property. It seems to me that her deed could only amount to a conveyance of her interest.

Then the appellant's pleader further argues that the subscribing witnesses to this deed of ratification were the plaintiffs themselves, and that as they signed the deed as subscribing witnesses, they must be taken to have consented to and to have known the effect of it.

I think that as a proposition of law that doctrine cannot be maintained. No doubt if parties subscribe a deed as witnesses, and there is evidence, or the circumstances of the case induce the Judge to believe that they knew what the contents of the deed were, the Judge is at liberty to infer that they were consenting parties to it.

But the inference so drawn by the Court would be *an inference of fact*; and we have no right to make such inferences on second appeal. We were referred to the case of *Rajlakhi Debia v. Gokul Chandra Choudhry* (3 B. L. R. P. C., 57), in which the Privy Council, as I understand the report, distinctly say that the mere fact of a person attesting a deed is no evidence in itself that he consented to it, or knew its contents, and a passage has been also cited from Sugden on Vendors and Purchasers to the same effect.

I should have thought that no authority was necessary for such a proposition. It constantly happens that persons subscribe deeds as witnesses without having the least notion what they contain; and if people were to be held bound by any instrument which they so subscribe, it might be a dangerous thing to witness any other man's signature.

[469] No doubt in such a case as that of *Matadeen Roy v. Mussoodun Singh* (10 W. R., 293) to which we were referred, decided by PEACOCK, C.J., and MITTER, J., there would be strong ground for presuming knowledge of the contents of the deed, and consent to the deed being made.

That was the case of two brothers, who were co-sharers in a property; one of them conveyed the whole of that property, absolutely to a purchaser, and the other brother stood by, and was a subscribing witness to the deed. It does not appear what the other evidence in the case was; but both Courts below had inferred, as a matter of fact, that the brother who subscribed his name as a witness knew the contents of the deed, and was a consenting party to it; and all that PEACOCK, C.J., and MITTER, J., decided was, that they had no right to say, as a matter of law, that the inference which the lower Courts had drawn was wrong. It was an inference of fact which they, sitting in Special Appeal, had no ground for questioning.

But here we are asked to say that the District Judge was wrong in not drawing such an inference. We clearly should not be justified in saying anything of the kind.

It appears to me, therefore, that there is no sufficient ground for disturbing the judgment of the Court below. It may be that the justice of the case is with the defendants. It has been pressed upon us that the defendants have been in possession for a good many years; that they have given good consideration for the property; and that it is very hard that they should be ousted from it.

This may be all very true; but unhappily in the present state of the law we have no power to do full justice between parties in second appeal. We have only to decide whether, so far as we can see, the lower Appellate Court has been guilty of any error of law.

It seems to me that there is no ground for disturbing the lower Court's judgment; and I think that this appeal, and also the appeal No. 531, should be dismissed with costs.

Field, J.—The property which forms the subject of these two appeals admittedly belonged to one Kali Das. The plaintiffs are the grandsons of Shiva Churn, the uterine brother of Kali Das. [470] After the death of Kali Das and Kali Das's widow, a suit was brought in 1252 by Monikornika, the daughter of Kali Das, and her son Kali Kishore, as joint plaintiffs, to recover certain property which included the properties forming the subject of the present litigation. Monikornika and Kali Kishore obtained a decree, and in 1253 took possession in execution of that decree. Subsequently, that is on the 25th of Magh 1256, Kali Kishore sold the property to defendants in the present case, and on the 8th of Assin 1263 Monikornika, who had not joined in the conveyance of 1256, gave to the defendant a letter of ratification.

Now the first question which we have to consider is, what did Monikornika and Kali Kishore obtain by the decree of 1253.

It has been contended that they obtained an absolute and complete title to the property, and that we cannot go behind their decree in order to determine what their interest under the decree really is.

I think that it is not necessary to go behind the decree. Upon the language of the decree itself, it appears to me clear that Monikornika and Kali Kishore obtained nothing more than the interest to which they were entitled under the ordinary Hindu law.

The decree recapitulates the contents of the plaint, sets out the fact of Kali Das's death and the death of Kali Das's widow, and proceeds to allege that Monikornika and Kali Kishore are in consequence the rightful owners (Nagdar malik) according to the Shastras.

Now, according to the Shastras, the right of property which they possessed was a life interest, so far as Monikornika was concerned, and reversionary right, so far as Kali Kishore was concerned. It, therefore, appears to me that they acquired, by the decree, not an absolute interest, which entitled them to dispose of the property at their will and pleasure, but such an interest as Hindu law confers upon persons in their position.

In the conveyance of 1256 reference is made to the decree; and in the subsequent letter of ratification, the decree is again referred to; and it appears to me (no question of purchase for valuable consideration without notice being raised) that what the purchaser under the conveyance of 1256 and the letter of ratification of 1263 took was the interest which Monikornika and Kali Kishore acquired under the decree of 1253, that is, their interests under ordinary Hindu law.

It has been contended that this case ought to be decided upon the principle laid down in the cases of *Mohunt Kishen Geer v. Busgeet Roy* (14 W. R., 379); *Raj Bullubh Sen v. Oomesh Chunder Roy* (I. L. R., 5 Cal., 44); and *Trilochun Chuckerbutty v. Umesh Chunder Lahiri* (7 C. L. R., 571); the principle that is that a conveyance by the widow and the immediate reversioner is a good conveyance of the absolute title, even as against any reversioner who, not being the next reversioner at the time of the conveyance, subsequently, by the death of a nearer reversioner, became entitled to the property upon the death of the widow.

It appears to me that this case can be properly distinguished from the principle upon which the cases just cited were decided. Were it otherwise, with the greatest respect for the learned Judges who decided these cases, I am, as at present advised, by no means satisfied of the soundness of that principle. It may well be contended that although the presumptive reversioner may make a good conveyance of his own reversionary right, he cannot grant away the reversionary right of another and more remote reversioner who may

possibly derive title through another and different line of descent. It is not necessary, however, on the present occasion to pursue this question further, because, in the cases now before us, there has been no conveyance executed by Monikornika, the widow, and Kali Kishore, the presumptive reversioner, jointly.

But then it is contended that the effect of the conveyance of 1256, taken with the subsequent letter of ratification, is really the same as if the widow and the presumptive reversioner joined in conveying the property.

It appears to me that this is not so. It would have been possible for the widow to retire in favour of the next reversioner, and if that had occurred Kali Kishore would have become the owner of the property, and might have conveyed an absolute interest therein. But there is no suggestion that this ever took [472] place, and all that Kali Kishore could convey in 1256 was his own reversionary interest, and when Monikornika granted the letter of ratification in Assin 1263, it appears to me that the only effect this could have was to ratify the conveyance; so far as regarded her own life interest, which she had obtained under the decree to which the letter of ratification expressly refers.

There was, then, a valid transfer of Kali Kishore's reversionary interest, which subsequently by his civil death became valueless; and there was a valid conveyance of the widow's life interest; but that act which upon the authority of the cases already noticed could have made these two coalesce so as to create an absolute ownership in the property never took place. Neither did Monikornika retire in favour of Kali Kishore, nor did Monikornika and Kali Kishore at the same time execute a joint conveyance.

It has then been contended that inasmuch as the letter of ratification of 1263 was witnessed by Hari Das and Rutneswar, the plaintiffs in the present cases, they are estopped from saying that the letter taken with the previous conveyance had not the effect of transferring an absolute interest.

Now, in the first place, it has been pointed out by my Lord that the Judge in the Court below has found against this contention on the question of fact. He has found that Hari Das and Rutneswar are not estopped by the contents of that letter. In the next place, supposing that they were well aware of the contents of that letter, in the view that I have already taken, that letter merely amounted to a ratification of the transfer of the life interest, and the fact of Hari Das and Rutneswar ratifying by their attestation the transfer of the widow's life interest, cannot estop them from claiming the property upon the widow's death, when they become the immediate reversionary heirs entitled to possession.

For these reasons it appears to me that the view taken by the Judge below is correct, and that these appeals must therefore be dismissed with costs.

Appeals dismissed.

NOTES.

[I. ALIENATION WITH CONSENT OF REVERSIONERS—

Consent, according to the Calcutta High Court, is only presumptive evidence of necessity :—(1913) 17 C.L.J. 499, F. B., where the question was fully discussed with reference to all the authorities, and especially 30 All. I.P.C. See also (1913) 19 I. C. 258; 22 M.L.J. 486; (1912) 17 I. C. (Mad.) 487; (1900) 25 Bom. 129; 10 Cal. 225.

II. ATTESTATION AND CONSENT—

Mere attestation is not sufficient evidence of consent: 13 C.W.N. 931; 39 Cal. 780; 33 Cal. 618; 19 A.W.N. 213; 9 C.L.J. 453; 19 I. C. 255; 5 I. C. 252; 20 Mad. 269; 3 C.W.N. 207; 1 O.C. 252.]

[7 Ind. Jur 476]

[473] SMALL CAUSE COURT REFERENCE.

The 2nd February, 1883.

PRESENT :

SIR R. GARTH, KNIGHT, CHIEF JUSTICE, AND MR. JUSTICE WILSON.

G. C. Simson and others

versus

Gora Chand Doss.

Contract—Sale of goods —Delivery by instalments —Tender—Abandonment of excess—Extension of jurisdiction of Small Cause Court.

A contract made between the plaintiffs and the defendant stipulated for the delivery to the defendant of 7,500 bags of Madras Coast castor seed, which were to be shipped "per steamers," and then stated that shipment of 2,500 bags was to be made in December. On the 12th December 1,690 bags arrived by Steamer 'Shahjehan,' and notice in writing was given to the defendant, who requested that the delivery might be postponed owing to his not having godown room. On the 14th December the defendant refused to take the 1,690 bags, on the ground that he was not bound to take a portion of the 2,500 bags, but only the whole at one time. On the 16th December the defendant tendered the value of 2,500 bags which was refused, and on the same day the plaintiffs resold the 1,690 bags. On the 17th December the plaintiffs informed the defendant that 810 bags, the balance of the 2,500 the December shipment, were due on the 18th, and they did arrive on the 19th, but were refused by the defendant on the same ground as before, and they were accordingly resold by the plaintiffs.

Held, that according to the terms of the contract there was a legal and proper tender of the December shipment by the plaintiffs, and that the defendant having committed a breach of the contract in not accepting the bags, the plaintiffs were justified in reselling them at once and suing for damages.

Whilst the pecuniary jurisdiction of the Small Cause Court was limited to Rs. 1,000, the plaintiffs brought a suit for that amount for damages for breach of a certain contract after abandoning the excess, and in that suit they elected a non-suit under s. 53, Act IX of 1850.

Held, in a suit brought in respect of the same damages for the full amount due to them, that the plaintiffs were not precluded by their having abandoned the excess in the former suit, from recovering the full amount sued for.

THE following case was stated for the opinion of the High Court by H. Millett, Esq., Chief Judge of the Court of Small Causes of Calcutta, under s. 69 of Act XV of 1882, and s. 617 of the Code of Civil Procedure :—

"In this suit a special case has been signed and filed by the pleaders of both parties, leaving it for this Court to come to a [474] conclusion on the facts so stated, on the understanding that the matter is to be referred to the High Court. Though practically a special case, two matters are left for the Court to adjudicate upon rather as questions of fact than of law. They are these: *Firstly*, whether the two shipments alleged to have been made in December have been proved to have been so made by the evidence of two witnesses examined *de bene esse* in this case; *secondly*, as to what was the ground on which the previous suit between the same parties on the same cause of action was non-suited. I propose, though somewhat out of order, to deal with these two points at once.

"First: After hearing the evidence of William Edge, Master of the Steamer 'Shahjehan,' and of Peter Sutton Budd, Master of the Steamer 'Shahzada,' I am satisfied the two shipments of 1,690 bags, and 810 bags respectively, were made in the month of December, and are therefore so far in compliance with the terms of the contract. Second: The first suit was instituted between the parties on the 15th April 1882, heard on the 9th and 12th June, and judgment given on the 23rd June 1882; all the proceedings therefore in that suit were governed by Act IX of 1850, and not by Act XV of 1882, the Act which at present governs the procedure of this Court. In that suit no evidence was produced to prove that the two shipments above referred to were made in the month of December. Taking the case of *Bowes v. Shand* (L. R., 2 App. Cas., 455), as a guide, it appeared to me that it was necessary for the plaintiffs to prove this fact before they could succeed, and in delivering judgment I suggested to Mr. Gaspar, the pleader of the plaintiffs, the advisability of this course. He accordingly elected a non-suit under s. 53 of Act IX of 1850, and brought the present suit on the 6th July 1882.

"Though the facts are fully set out in the special case, it may be well shortly to summarize those material to this dispute.

"The contract was dated the 22nd November 1881, and was for the delivery of 2,500 bags of Madras Coast castor seed, shipment in December 1881. On the 12th December 1881, 1,690 bags arrived by the Steamer 'Shahjehan,' and notice in writing was given to the defendant, who requested the delivery to be [475] postponed owing to his not having godown room. On the 14th December 1881 the defendant, then acting under the advice of his attorneys, refused to take the 1,690 bags, on the ground that he was not bound to take a portion of the 2,500 bags, but only 2,500 at one time. On the 16th December the defendant tendered the value of 2,500 bags which was refused, and on the same day the plaintiffs resold the 1,690 bags, being the shipment by the 'Shahjehan.' On the 17th December the plaintiffs informed the defendant that 810 bags, the balance of the 2,500 bags December shipment, were due on the 18th of the same month, and they did arrive on the 19th. This lot of 810 bags the defendant refused to take on the same grounds as those stated with respect to the previous lot of 1,690 bags, and they were accordingly resold by the plaintiffs.

"The first question is whether the tender of 1,690 bags and 810 bags in two separate lots was a proper tender in accordance with the terms of the contract. I may state at the outset that no difficulty could arise on the meaning of the word 'shipment,' for both the steamers in which the two lots arrived were at Coconada, the port of shipment, for about 48 hours each, and that in the month of December. It is necessary also to remark that the first tender of 1,690 bags was a tender of that number as 'part of 2,500 bags.' At the hearing of the previous suit the question now raised was fully argued by Counsel, and the pleaders of both parties have now without argument left me to decide it. Several cases were then cited, but in my opinion only one, *viz.*, *Brandt v. Lawrence* (L. R. 1 Q. B. D., 344), really touches the point now in dispute. It must be remarked that the alleged breach is not a failure to ship any monthly shipment, for the monthly shipment was made, but the failure to tender the whole of one monthly shipment at one and the same point of time. In *Hoare v. Rennie* (5 H. and N., 19) the contract was to make certain shipments of iron in June, July and August. The pith of the dispute is stated in the judgment of WATSON, B., thus: 'The contract is for the shipment of a quantity of iron in certain proportions to be paid for on delivery. On performance of the contract the defendants agree to [476] pay for the iron. The breach charged is that the defendants shipped a

small quantity in June, and declared they would not ship any more. There is evidently a mistake in this report, as the word *defendants* should be 'plaintiffs,' for it was the plaintiffs who had to ship. The distinction between that case and this is apparent, for here the plaintiffs have all along alleged that the tender of the 1,690 bags was only a part performance of the contract. The same remarks will apply to *Reuter v. Sala* (L. R., 4 C. P. D., 239). The contract there was for 25 tons of Penang pepper. The plaintiffs, the shippers, alleged that they had tendered 25 tons, making a declaration of 25 tons as a tender of the whole. The defendants, the buyers, said there were only 20 tons, which was found to be the case, and they were accordingly found to be entitled to refuse such number as being an incomplete tender. In *Houck v. Muller* (L. R., 7 Q. B. D., 92,) the contract was to deliver certain iron equally in November, December and January. The plaintiff, the buyer failed to take delivery of the November instalment, but insisted upon his right to take the other two; and it was found he was not so entitled. The learned Judges in that case approved of *Hoare v. Rennie*, no reference having been made either in the course of the argument or in the judgment to *Grandt v. Lawrence*, decided four years previously. *Grandt v. Lawrence* (L. R., 1 Q. B. D., 344) was a case in which the plaintiffs agreed to ship 4,500 quarters of Russian oats during February. In that month he shipped 1,139 quarters, and tendered them to the defendant in part fulfilment of the contract; the defendant refused to accept them. The plaintiffs afterwards shipped, but not in February, the balance of the 4,500 quarters, which the defendant also refused to accept, and the question was whether the defendant was bound to accept the 1,139 quarters which arrived within time, and it was held he was. This is, if anything, a stronger case than the present one; for all the goods have in this case arrived within time, and if *Brandt v. Lawrence* is good law, the defendant was bound to accept the 1,690 bags tendered as a portion of the whole 2,500. There is no material difference in the wording 'by steamer or steamers' as used in the contract in *Brandt v. [477] Lawrence* and the wording 'per steamers' as used in this contract. This point, therefore, I find in favour of the plaintiffs.

"The second question to some extent depends upon the first. On it, it is contended that the plaintiffs had no right to resell the first lot until the whole quantity had arrived; but if the tender of the first lot was a good one, and the defendant refused to accept it, the plaintiffs had a right to resell on such refusal. I am far from saying that any such action would be taken if the plaintiffs had only tendered a small lot, but under the circumstances stated I am of opinion that there was a substantial performance of the contract, and that they are, therefore, entitled to succeed.

"The third question raised affects the right of the plaintiffs to recover in this suit more than Rs. 1,000. The first suit brought was for Rs. 1,000, after abandoning an excess of Rs. 132-6-7 and all other excess. At that time this Court had no jurisdiction to hear a suit of a higher value, so that the plaintiffs, if they wished to bring their first suit in the Small Cause Court, could not recover more than that amount.

"At the time the second suit was instituted the pecuniary jurisdiction of the Court had been increased to Rs. 2,000, and they then claimed the full amount of damages alleged by them. The effect of the non-suit was to put the plaintiffs, except as regards limitation, in exactly the same position they were in formerly, and I can see no objection to their bringing the suit for the amount claimed. If the jurisdiction of this Court had not been extended, there would,

I presume, have been nothing to prevent the plaintiffs bringing the first suit in the High Court had they been so disposed. This question will also be decided in favour of the plaintiffs.

"These are the only three points in the statement given to me by the 1 leaders, and as there is no dispute as to the amount of damages, there will be a decree for the plaintiffs for the full amount sued for.

"The questions for the opinion of the High Court will be—

"1. Whether there was a legal and proper tender on the part of the plaintiffs, and whether there was a breach on the part of the defendant.

[478] "2. Whether the tender of a portion of the goods contracted for was a sufficient tender to entitle the plaintiffs to resell and sue for damages; and whether the plaintiffs were justified before the expiration of December in reselling a portion of the goods after the defendant had made a tender of the full price.

"3. Whether the plaintiffs are now entitled to recover any amount in excess of Rs. 1,000, they having abandoned an excess above that amount in the previous suit.

"Contingent on the opinion of the High Court there will be a decree for the plaintiffs for the full amount claimed."

Mr. *Phillips* and Mr. *Lewis* for the Plaintiffs.

Mr. *Pugh* for the Defendant.

The following were the **Opinions** of the Court (GARTH, C.J., and WILSON, J.)

Garth, C.J.—I think that this case is abundantly clear. It seems to me that the learned Judge is right on both points, and that we should answer the questions referred to us in accordance with that view. I think that the defendant should pay the costs of this reference.

Wilson, J.—I am of the same opinion. I would only add a few words. It appears to me that what we have first to do is to ascertain the terms of the contract. The contract is for the delivery of 7,500 bags of castor seeds which were to be shipped "per steamers," and then the contract goes on to state, "shipment 2,500 bags per s.s. 'Moharaja,' now expected on Madras Coast, 2,500 bags in December 1881 and 2,500 bags in January 1882." "Terms cash on delivery, which is to be taken from steamer's side, Calcutta, or from jetty on arrival of steamer."

This is the whole of the contract so far as it is material, and taken altogether it seems to me abundantly clear from it that so far as the two latter portions are concerned, the 2,500 bags are to be delivered in December and 2,500 bags in January, having been shipped by "steamers," which, I think, clearly means shipped by any number of steamers, provided that the instalment sent by each steamer is a reasonable one, and then delivery is to be taken [479] from the ship's side or from the jetty on arrival of each ship, and cash paid on delivery.

This seems to me to be a perfectly clear contract, and it agrees as closely as possible with the contract in the case of *Brandt v. Lawrence* (L. R. 1 Q. B. D., 344), in which case also the option of shipping in several instalments was given, and yet each instalment was to be received on arrival and paid for on delivery. On that construction of the contract, it follows of necessity that the plaintiffs were entitled to tender the goods as they did tender them, and that the defendant was bound to receive and pay for them.

With regard to the case of *Reuter v. Sala* (L. R. 4 C. P. D.. 239). It has no very close bearing on this case. The question in that case, so far as it concerns the present, was whether the *contract* there made was severable, whether it might be split up and the person who entered into it might refuse to perform or disable himself from performing a portion and yet insist on performing the rest. The Court there held that a *contract* cannot be split up in that sense. The question in this case is not whether the contract may be split up, but whether the *performance* of it may be divided, and that depends on the terms of the contract. I concur, therefore, in the mode in which it is proposed to answer the questions referred to us.

Attorneys for the Plaintiffs: Messrs. *Watkins and Watkins*.

Attorneys for the Defendant: Baboo *W. C. Bonerjee and Son*.

NOTES.

[See 24 All. 161 as to payment of debt by instalments.]

[9 Cal. 479 : 13 C.L.R. 63]

APPELLATE CIVIL.

The 29th January, 1883.

PRESENT :

SIR RICHARD GARTH, K.T., CHIEF JUSTICE AND MR. JUSTICE FIELD.

Hury Doyal Guho.....Decree-holder

versus

Din Doyal Guho.....Judgment-debtor.*

Set-off—Cross decrees—Civil Procedure Code (Act X of 1877) s. 246.

A Judgment-debtor may set-off against the amount of the decree against him, the amount of a decree which he has obtained against the decree-holder and other persons.

[430] IN this case one Hury Doyal Guho sought to execute a decree which he had obtained against one Din Doyal Guho. The Subordinate Judge allowed Din Doyal Guho to set-off a sum of Rs. 51-13, the amount of a decree which he had obtained against Hury Doyal Guho and another person. Hury Doyal appealed to the District Judge, who held that the set-off was allowable and dismissed the appeal. Hury Doyal appealed to the High Court.

Baboo *Boykunt Nauth Dass* and Baboo *Koluda Kinkur Roy* for the Appellant.

Baboo *Guru Dass Banerjee* for the Respondent.

The following **Judgments** were delivered :—

Field, J.—Three points were raised in the grounds of appeal in this case. The first point (as to costs), and the third point raised in the first and third grounds of appeal respectively were given up at the hearing; and we have only to dispose of the question raised in the second ground of appeal.

The decree-holder (Appellant) Hury Doyal Guho Mujumdar contends that the Court below was wrong in allowing the judgment-debtor Din Doyal Guho to set-off against the amount of the decree-holder's decree the sum of Rs. 51-13,

* Appeal from Appellate Order, No. 211 of 1882, against the order of R. F. Rampini, Esq., Judge of Dacca, dated the 6th April 1882, affirming the order of Baboo Nobin Chunder Gangooly, First Subordinate Judge of that district, dated the 23rd January 1882.

being the amount of a decree which Din Doyal, the judgment-debtor, had obtained against the decree-holder appellant and another person. I have considered this matter, and think that the decision of the learned District Judge is correct upon this point. Illustration (b) of s. 246 of the Code of Civil Procedure is as follows: "*A and B co-plaintiffs obtain a decree for Rs. 1,000 against C, and C obtains a decree for Rs. 1,000 against B. C cannot treat his decree as a cross-decree under this section.*" The reason of this is plain. The liability of *C* under the decree obtained by *A* and *B* is a liability not to *B* only, who is *C*'s debtor under the second decree, but to *B* and another person *A*.

In the case now before us, *A*, the decree-holder, has obtained a decree against *C*, namely the decree which is now being executed, but *C* also obtained a decree against *A* and *B*, namely the decree for Rs. 51-13. Now it is clear that *C* could, if he chose, [481] execute this second decree for the whole amount as against *A*. He is, therefore, in my opinion equally entitled to execute in another way, that is, by setting off the amount thereof as against *A*'s decree. This was the very point decided in the case of *Mitchell v. Oldfield* (4 T. R., 123).

I think, therefore, that the order of the District Judge is correct, and that this appeal should be dismissed with costs.

Garth, C.J.—I have had some doubt about this case, but as my learned brother is disposed to approve of the judgment of the Courts below, and as his view is in accordance with the English authorities, I do not think it right to differ from him.

My doubt has arisen from the language of s. 246. That section is a re-enactment of s. 209 of the old Code; and both are founded upon the equitable principle, which has long prevailed in England, of setting-off cross judgments in execution (*see* Archbold's Chitty's Practice, 11th edition, 711). My learned brother is quite right in saying that according to the English rule the judgment-debt due from Din Doyal in this case would have been set-off against the debt due to Din Doyal from Hury Doyal and another; the principle being, that if the decree-holder in the one case has a right to take out execution against the decree-holder in the other case, the judgment may be set-off.

But s. 246 provides that this shall be done only *when the cross decrees are "between the same parties;"* and a strict adherence to this language would no doubt tend to simplify the rule, although it would contract its operation.

I am not disposed, however, to dissent from the view of my learned brother. It is undoubtedly consonant with justice, as well as with the English rule, although it may sometimes render the application of the section more difficult to the subordinate judiciary.

Appeal dismissed.

NOTES.

[SET-OFF—CROSS-DECREES—

See the C. P. C. 1908 O. 21 r. 18 whereof clause 4 which makes express provision was inserted in this Code for the first time. *See* also 14 All. 339; 9 Cal. 920.]

[10 I.A. 4: 12 C.L.R. 511: 7 Ind. Jur. 161: 4 Sar. P.C.J. 406]

[482] PRIVY COUNCIL.

The 15th and 16th November, 1882.

PRESENT:

LORD FITZGERALD, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH
AND SIR A. HOBHOUSE.

Hurrih Chunder Chowdhry.....Judgment-debtor

versus

Kalisunderi Debi.....Judgment-creditor.

[On Appeal from the High Court at Fort William in Bengal.]

Transmission for execution of order of Her Majesty in Council—Civil Procedure Code, Act X of 1877, ss. 231, 588, 593 and 610—Evidence of such order—Appeal against an order of a Judge of the High Court refusing transmission—Letters Patent, 1865, s. 15—Execution on the application of one of several decree-holders.

The provisions of Act X of 1877, s. 610, are not to be construed as restricting the only admissible evidence of an order of Her Majesty in Council to a certified copy, on an application for execution made under that section. They must be read as directory, having the object that proper information regarding the order shall be supplied to the Courts in India.

Where the original order (given, according to the practice in England, to the successful party, or to one of such parties) had not been filed in the High Court, so as to enable the proper officer to supply a certified copy: *Held* that a copy, though not certified by him, might accompany a petition for execution under s. 610.

A decision by the Judge appointed to dispose of matters relating to appeals to Her Majesty in Council, refusing to transmit for execution her order restoring a decree, is a judgment within the meaning of s. 15 of the Letters Patent of 1865, and is appealable to the High Court.

Held, also, that a refusal to transmit such an order for execution was not a misapprehension on the part of the Judge of the extent of his jurisdiction, although, if it had been, this itself would have been a ground of appeal.

Section 588, Act X of 1877, restricting appeals against orders, does not apply to prevent an appeal to the High Court from the order of a Judge of that Court.

The effect of a Privy Council judgment being that each of two co-plaintiffs was entitled to a moiety of a taluk in the possession of the defendant, who then purchased the interest of one of them: *Held* that the other co-plaintiff could obtain execution according to the extent of her interest in the estate.

APPEAL from an order of the High Court (13th January 1881) reversing an order (27th February 1880) made by the Judge appointed to dispose of matters relating to appeals to Her Majesty in Council. The order of the High Court directed [483] transmission (Act X of 1877, s. 610) which the Judge had refused, of an order of Her Majesty in Council (18th April 1878) for execution by the Subordinate Judge of the Mymensingh district. That order in Council had been issued upon a judgment to the effect that a decree of the High Court (5th August 1875) should be reversed, and that a decree (10th March 1874) of the Subordinate Judge of the Mymensingh district should be restored.

This appeal arose out of orders made on proceedings taken in execution after the judgment of the Judicial Committee, and issue of the order of Her Majesty in Council thereon, in *Bhoobun Mohini Debia v. Hurrish Chunder Chowdhry* (I. L. R., 4 Cal., 23; s.c., L. R., 5 I.A., 138). That suit was decided in 1874 by the Court of Original Jurisdiction, the Subordinate Judge of Mymensingh, in favour of two co-plaintiffs, Chandermuni Debi and Kalisunderi Debi. In 1876 the High Court, on the appeal of the defendant, Hurrish Chunder Chowdhry, reversing that decision, dismissed the suit (24 W. R., 268). In 1878 the original decree made by the Mymensingh Court was restored by the Judicial Committee of the Privy Council. The decree, as originally made and as restored, declared the title of Chandermuni Debi and Kalisunderi Debi, co-plaintiffs in the suit to a certain taluk in the Mymensingh District under the will of Kassiswari Debi, deceased, the validity of whose devise, under a right derived by her from a sanad executed in her favour by her brother, had been disputed by the son of the latter. The son, Hurrish Chunder Chowdhry, defendant in the suit brought by Chandermuni and Kalisunderi, had taken possession; and after the decision of the Subordinate Judge he obtained its reversal by appealing to the High Court. But on an appeal to the Privy Council preferred by Chandermuni's daughters, she being then dead, and Kalisunderi refusing to join in further proceedings, the decree of the Mymensingh Court, in favour of Chandermuni and Kalisunderi, was restored. On this final decision against him, Hurrish Chunder Chowdhry purchased the interest in the taluk which had belonged to Chandermuni from the two appellants, and when the order in Council, following upon the judgment of the Judicial Committee, arrived in India, it came into his hands.

[484] Kalisunderi Debi, with a view to enforce the order in Council restoring the original decree which she jointly with Chandermuni had obtained, applied to the Judge in charge of the Privy Council appeals' department of the High Court for an order under s. 610 of Act X of 1877, transmitting for execution or enforcement the order in Council to the Court of Mymensingh.

Hurrish Chunder Chowdhry objected to Kalisunderi's petition for execution: 1st, that it was not accompanied by a certified copy of the order in Council; 2nd, that the decree affirmed by the order in Council could not be executed in part, by one only of the two original co-plaintiffs: whose rights, as between themselves, had not been determined, and were, in fact, in conflict.

This application having been rejected by PONTIFEX, J., the Judge appointed to dispose of matters relating to appeals to Her Majesty in Council * his order was reversed on appeal by a Bench of the High Court (GARTH, C.J., WHITE, J., and MITTER, J.). Both the Puisne Judges held that an appeal would lie from the order in question, and also that the order was wrong. But the Chief Justice, without differing from them as to the latter opinion, i.e., in regard to the merits of the order, held that the duties of the Judge in the Privy Council Department being, in respect of transmitting the order in Council under s. 610, only ministerial, his order, refusing to transmit, could not be made the subject of an appeal to the High Court, as it could not fall under s. 15 of the Letters Patent of 1865.

The case on appeal and the judgments are fully reported in I. L. R., 6 Cal., 594.

On this appeal,

* The High Court Rules of 4th June 1867 provide for the appointment of one Judge to dispose of matters relating to appeals to Her Majesty in Council. The Rules of 1st September 1877 refer to him as "the Judge in the Privy Council Department."

Mr. J. Graham, Q. C., and Mr. J. T. Woodroffe appeared for the Appellant.

Mr. R. V. Doyme for the Respondent.

For the appellant it was argued that the respondent not having any title to execute this decree, the objection that she had failed [486] to comply with the requirements of s. 610 of the Code of Civil Procedure, as a certified copy of the order in Council did not accompany her petition, must prevail. It was no answer to this that the original order had come into the possession of the appellant, who withheld it. The latter was entitled to insist that the respondent was not in a position to obtain execution of the decree of the Court of First Instance, as restored by the order of Her Majesty in Council. To that restoration the respondent, not having appealed, might be a party, but the appellant could rely, on the other hand, on her inability to file the required certified copy; there being also a substantial objection to her obtaining execution of the decree.

[The Registrar here stated the practice in reference to orders of Her Majesty in Council, sent to the Indian Courts after appeals had been disposed of. The original order, when issued, was made over to the agent of the successful party, or parties, who filed it in the Court from which the appeal had been preferred, and a certified copy was kept in England.]

It was also contended that the application for transmission of the order for execution had been rightly refused in reference to the provisions of s. 231 of Act X of 1877, inasmuch as the decree, not having dealt with the rights of the two co-plaintiffs as between themselves, could not be thus executed, *i.e.*, in part, and by the respondent alone. That the respective rights of Chandermuni and Kalisunderi had not been determined was shown by the concluding words of the judgment in *Bhoobun Mohini Debia v. Hurrish Chunder Chowdhry* (I. L. R., 4 Cal., 23). These were to the effect that it was "unnecessary to decide what the rights of the co-plaintiffs might be, *inter se*." And that their rights might conflict appeared from the nature of their interest in the disputed property. To grant execution to Kalisunderi alone would be to enable her to take a certain share in property in which her interest had not been determined, as against Chandermuni and the representatives of the latter; so that, in effect, it would be to make a material addition to the judgment of the Privy Council. Accordingly the order of PONTIFEX, J., was right, and this [486] application, on the merits, ought not to be allowed. Reference was made to *Abedoonissa Begum v. Ameeroonissa Khatoon* (L. R., 4 I. A., 66; S.C. I. L. R., 2 Cal., 327).

Also, it was argued, with reference to the difference of opinion among the Judges in the Court below, that whether the order refusing to transmit was right or wrong, and whatever might be the remedy in the latter case, no appeal would lie, from the order made by the Judge, to the High Court. The Judge appointed to dispose of matters relating to appeals to the Privy Council derived his authority through the Statute 24 and 25 Vic., Cap. 104, s. 11, from the Statute 3 and 4 William IV, Cap. 4, s. 21, and the rules made under the latter. The Judge, so acting, did not derive his powers from ss. 9 and 13 of the Statute of Victoria; and, therefore, no appeal from his order would lie under s. 15 of the Letters Patent of 1865. On this point reference was made to *Ananda Mayi Dasi v. Purnachandra Roy* (B. L. R., Sup. Vol., 506; 6 W. R., Mis., 70), and *In the matter of Feda Hossein* (I. L. R., 1 Cal., 431). Even if, however, the Judge in charge of the Privy Council Department of the High Court could be considered as exercising the powers belonging to the High Court and could be held to be acting in the discharge of duties within the contemplation of the

Statute 24 and 25 Vic., Cap. 104, s. 13, and also of the Letters Patent of 1865, s. 15, the latter did not apply so as to authorize an appeal in this kind of proceeding. In this instance the proceeding was ministerial, under s. 610 of the Code of Civil Procedure, Act X of 1877, and was not an order made in the exercise of judicial discretion. Against this order, therefore, no appeal under the 15th section of the Letters Patent of 1865 could lie. On this point were cited *Mowla Buksh v. Kishen Pertab Sahi* (I. L. R., 1 Cal., 102); *Mussamut Amirannissa v. Behary Lal* (25 W. R., 529). Moreover, even supposing that the right of appeal might have been asserted before the cases in which appeals lay against orders had been exhaustively declared in s. 588 of Act X of 1877, that right no longer remained after the coming into operation of that section, as amended by [487] Act XII of 1879. On the subject of the powers of the Indian Legislature to effect the provisions of the Letters Patent of 1865, reference was made to in *the matter of Feda Hossein* (I. L. R., 1 Cal., 431); *Queen v. Meares* (14 B.L.R., 106). Again, s. 591 of Act X of 1877 showed that s. 588 regulated the entire matter of orders appealable under the Code, and no such order as the one in question was appealable to the High Court without express authority, which had not been given.

[At the end of the opening of the appellant's case Sir R. P. COLLIER intimated that their Lordships considered it necessary to hear Counsel for the respondent only on the question whether the order of the 27th of February 1880 was correct or not, in regard to the rights, under the decree affirmed by the order in Council of the 18th April 1878, belonging to the parties entitled to the benefit of that decree; in other words, on the question whether the order of the Judge in the Privy Council Department of the High Court was correct on its merits.]

It was then argued for the respondent that whatever might have been the rights of the co-plaintiffs in the suit as between themselves, it was clear that Kalisunderi was entitled to possession of that moiety of the taluk which fell to her share, as declared; and that whatever rights the appellant as purchaser of the right, title, and interest of the other co-plaintiff might have acquired in the share which had been Chandermoni's, still the respondent had a life-interest. There was no ground for holding that the rules governing the execution of decrees were inapplicable; and nothing stood in the way of the enforcement of Her Majesty's order in Council, so far as it was in favour of the respondent, on her application under s. 610.

Mr. J. Graham, Q. C., was heard in reply.

At the conclusion of the arguments, their Lordships' Judgment was delivered by

Sir R. P. Collier.—In order to make the subject of this appeal intelligible a short statement is necessary. In the year 1819 Sumbuchandra by a sanad, conveyed to his sister Kassiwari a certain [488] taluk. Upon the construction of this sanad, various questions have since arisen. Kassiwari, treating the sanad as having conveyed to her an absolute estate, disposed of it by her will, the material part of which is this: "Of the whole of the rest of the rent-paying and rent-free immovable properties in benami and in my own name, in my possession and not in my possession, in which I have a right and interest, a moiety shall after my death be received by my daughter Chandermoni, and if she adopt a son, by that adopted son, otherwise by her daughters, i.e., by my granddaughters,"—naming them—"in equal shares; and the children born of their wombs, or adopted by them, shall from generation to generation get their (the granddaughters') respective shares in the order of succession, and the other moiety shall be received by my daughter-in-law, Srimati Kalisunderi Debi,

and if she adopt a son, by that adopted son, and by his children from generation to generation in the order of succession. But the same shall remain in the possession of my daughter-in-law Kalisunderi Debi, till the said adopted son shall have attained his majority ; and in case there shall be a misunderstanding between him and my daughter-in-law after he shall have attained his majority, the said adopted son and my daughter-in-law, Srimati Kalisunderi Debi, shall receive equal shares" (of the property.) "But, after the death of Kalisunderi Debi, her adopted son, or any surviving lineal heir of her adopted son, shall obtain the same" (her share of the property.)

Upon the death of Kassiswari, the now appellant, Hurrish Chunder, who was the son of Sambhuchandra, took possession of this property ; whereupon an action was brought to obtain possession of it by Chandermuni and by Kalisunderi, who were then widows, Kalisunderi having adopted a son, Chandermuni not having made an adoption. The plaint in that action claims possession. It recites the sanad from Sumbuchandra the will and the death of the testatrix ; and proceeds : "In virtue of this will, I, plaintiff No. 1,"—*i.e.*, Chandermuni,— "and I, plaintiff No. 2,"—Kalisunderi—"on behalf of the minor, have since her death, become entitled to hold and enjoy all the aforesaid moveable and immoveable properties." The plaint goes on to state that the defendant had unjustly intruded himself into this [489] land. The defendant denied most of the allegations in the plaint, among them the adoption of a son by Kalisunderi.

The plaintiffs obtained a judgment and a decree from the Court of First Instance ; and it is necessary now to determine, as far as possible, what was the precise effect of that judgment. The issues raised were—"(1st) Can Kalisunderi prefer this suit jointly with Chandermuni ; (2nd) Had Kassiswari Debi authority to make a will, and did she make one ; (3rd) If so, is the will valid, and can the plaintiffs, jointly or individually, prefer the present action for the recovery of the taluk with wasilat ; (4th) Is it necessary to consider the question of adoption of a son or otherwise in the present action ?"

The Judge, after disposing of the first two issues in favour of the plaintiffs, proceeds thus : "Touching the third issue, it is true the original will is not forthcoming, but an attested copy has been filed. I would accept the copy as evidence, as it was attested by the registration authorities, who have the original in their safe custody. The opposite party, I may remark, does not distinctly and emphatically deny the existence of the original will, the execution of which has been substantiated by witnesses." He finds in favour of the will. He proceeds : "But even supposing there was no will executed, yet Chandermuni Debi as the successor and child of Kassiswari Debi, can sue for the entire taluk ; and she herself has no objection to have Kalisunderi as a co-plaintiff ; therefore, the plaintiffs can sue in the manner they have." It may be observed that there is no allegation of, or issue upon, Chandermuni's heirship to Kassiswari, and the learned Judge's dictum on the subject is merely obiter. "For the aforesaid reasons it is not necessary to consider the question of adoption of Sharat Chandra Lahiri, the minor. To my mind the plaintiffs can sue upon the will of Kassiswari, the existence and genuineness of which I do not doubt." Their Lordships regard this as, in effect, a suit for the purpose of establishing the will ; and the only question to which the issues relate, and which really seems to have been tried, was whether it was valid, comprising the questions whether it was executed, and whether the testatrix had the right to make it. The decree is in pursuance of the judgment, and goes on to affirm : "The plaintiffs [490] institute this against the defendant, on the basis of the said will, for the recovery of possession after establishment of their shikmi right," and so on. And it concludes : "That this case be decreed with costs in favour

of the plaintiffs, and that the plaintiffs do recover from the defendants possession of the disputed mouzahs and the costs of Court and wasilat from this day until realisation, with interest at the rate of 6 per cent. per annum." It is true that, if the plaint be read with technical strictness, the second plaintiff sues only in right of her adopted son ; but it does not seem to have been so understood by the Judge, who meant to give each of the ladies possession of half the property, and declined to try the question of adoption, because, whether the adoption were proved or disproved, Kalisunderi's right to immediate possession remained. Their Lordships are not prepared to say that the Judge was wrong in taking this broader view of the question before him.

An appeal was preferred to the High Court against this judgment, and it was reversed by the High Court on the ground that the testatrix only took an estate for life, and, therefore, was incompetent to dispose of the property by will ; but the High Court also treat the action as one brought for the purpose of establishing the validity of the will. The daughters of Chandermuni (she having died before the last-mentioned judgment) appealed to the Queen in Council, and by Order in Council the judgment of the High Court was reversed, and the judgment of the Subordinate Court was affirmed. With respect to the judgment of the Subordinate Judge, their Lordships observe : " No dispute was raised as to the genuineness of the will of Kassiswari, or its validity to pass whatever interest she was capable of devising. The Subordinate Judge gave judgment in favour of the plaintiffs. The grounds of his judgment, which are not very clearly stated, would appear to be that, in his opinion, Chandermuni took an absolute estate under the sanad on the death of her mother ; but that, having elected to take under her mother's will and to admit the co-plaintiff to a half share of the estate, both the plaintiffs were entitled to maintain the action against the defendant." Their Lordships also observe that their decision was not intended to conclude any question between the co-plaintiffs.

[491] The judgment of the Queen in Council was sent to India to be executed, but in the meantime the defendant had acquired the interest of the plaintiffs in Chandermuni's moiety, whereupon an application was made to Mr. Justice PONTIFEX, on behalf of Kalisunderi, who claimed the other moiety, for an execution of the judgment of the Court of First Instance as far as that moiety was concerned.

Mr. Justice PONTIFEX was the Judge appointed under the power, which had been previously conferred by Statute upon the High Court, to execute a portion of their jurisdiction, *viz.*, that which related to enforcing the orders of the Privy Council, and other questions having to do with the relations of the Privy Council to the Courts in India. That learned Judge refused to direct execution under s. 610 of Act X of 1877, which regulates the procedure for enforcing the execution of any order of Her Majesty in Council. That section is to this effect : " Whoever desires to enforce or to obtain execution of any order of Her Majesty in Council shall apply by petition, accompanied by a certified copy of the decree or order made in appeal, and sought to be enforced or executed, to the Court from which the appeal to Her Majesty was preferred. Such Court shall transmit the order of Her Majesty to the Court which made the first decree appealed from, or to such other Court as Her Majesty, by her said order, may direct, and shall (upon the application of either party) give such directions as may be required for the enforcement or execution of the same : and the Court to which the said order is so transmitted shall enforce or execute it accordingly in the manner and according to the rules applicable to the execution of its original decrees." Mr. Justice PONTIFEX in a short judgment observes : " This is an application for the execution of a Privy Council decree, in

part, by one of two plaintiffs. The original Court passed a decree in favour of both the plaintiffs. On appeal to this Court that decree was overruled. One of the plaintiffs only appealed to the Privy Council, and on appeal to the Privy Council the decree of the original Court was restored, and that of this Court reversed. The Privy Council, in their judgment, expressly said they would not decide the rights of the plaintiffs, *inter se*. Subsequently the defendant who is in possession [492] of the property, bought the interest of the appealing plaintiff. The party who did not appeal, having applied to execute the decree, has been met with two objections, the first under s. 610 of Act X of 1877, that that application could not be granted because it was not accompanied by a certified copy of the decree of Her Majesty in Council; but the defendant himself has got that certified copy, and, therefore, I think the objection under s. 610 cannot be sustained."

Their Lordships think it well, before proceeding further, to say that they entirely agree with the learned Judge in this view, which was adopted by the Appellate Court. The practice with respect to the decrees of Her Majesty in Council seems to be this: The original decree is given to the successful party, or to one of the successful parties, to the appeal. That is taken to India, and it is the duty of the person to whom it is given, as he is informed by a written circular, a copy of which has been read, to file that original decree in the High Court of Calcutta. That being done, the proper officer of the Court in Calcutta would be able to give a certified copy, or indeed the Registrar of this Board would be able to do the same. It seems that in this case the defendant got, through Chandermuni, whose interest, as before stated, he had taken, the original order. He neglected to file it, as he ought to have done, in the Court, and it was under those circumstances that Mr. Justice PONTIFEX held that a copy of that order, though perhaps not a certified copy, might be properly admitted; and their Lordships think he was right. The provisions of s. 610 cannot be construed as restricting the only possible evidence to the certified copy, but as directory words with the object of ensuring that proper information upon the subject of any Order in Council should be supplied to the Courts in India. Mr. Justice PONTIFEX proceeds: "The other objection to the execution of the decree of the Privy Council was that the decree of the original Court, upheld by the Privy Council, could only be executed as a whole, and not partly by one of the two plaintiffs. Mr. *Phillips* relies on s. 231 of Act X of 1877. Now the two plaintiffs claim under a will which is not free from difficulty. The Privy Council declined to construe the will as between the two plaintiffs claiming under it. I think, therefore, [493] I must refuse this application for execution, and the applicant must be left to a regular suit to enforce her claim to any share of the property." From this order or judgment of Mr. Justice PONTIFEX an appeal was preferred to the High Court. All three of the learned Judges of the High Court, the Chief Justice and the two Puisne Judges, were of opinion that Mr. Justice PONTIFEX had exercised a wrong discretion, and that he ought to have sent the case for execution; but the Chief Justice was of opinion that no appeal would lie from the proceeding before him, and that his error could not be set right. The two Puisne Judges were of opinion that an appeal would lie under s. 15 of the Royal Charter of 1865, which is in those terms: "We further ordain that an appeal shall lie to the said High Court of Judicature at Fort William in Bengal, from the judgment (not being a sentence or order passed or made in any criminal trial) of one Judge of the said High Court, or of one Judge of any Division Court, pursuant to s. 13 of the said recited Act," the said recited Act, with regard to this matter, having enabled the Court to confer upon a Judge, or a division of the Court, the power of the Court itself. These learned

Judges held (and their Lordships think rightly) that whether the transmission of an order under s. 610 would or would not be a merely ministerial proceeding, Mr. Justice PONTIFEX had in fact exercised a judicial discretion, and had come to a decision of great importance, which, if it remained, would entirely conclude any rights of Kalisunderi to an execution in this suit. They held, therefore, that it was a judgment within the meaning of s. 15.

The Chief Justice was of opinion that it was not a judgment, and he seems to have based his opinion in a great measure upon the ground that, in his view, Mr. Justice PONTIFEX had no jurisdiction to inquire at all whether or not Kalisunderi had a right to execution; that his function was merely ministerial; that all he could do, or ought to have done, was to transmit the decree of Her Majesty in Council to the lower Court for execution; that he usurped a jurisdiction which did not belong to him; and that under those circumstances no appeal would lie. Their Lordships do not think that Mr. Justice PONTIFEX can be properly treated as having usurped jurisdiction; but, if he had, this would [494] have been a valid ground of appeal, and they are unable to agree with the Chief Justice, that if a Judge of the High Court makes an order under a misapprehension of the extent of his jurisdiction, the High Court have no power by appeal, or otherwise, in setting right such a miscarriage of justice.

It only remains to observe that their Lordships do not think that s. 588 of Act X of 1877, which has the effect of restricting certain appeals, applies to such a case as this, where the appeal is from one of the Judges of the Court to the full Court.

The remaining question is whether Mr. Justice PONTIFEX was right in refusing to make the order in question; and their Lordships are of opinion that learned Judge was wrong. They are unable to subscribe to the doctrine that a decree can only be executed as a whole and not partly by one of the plaintiffs—a doctrine, which, as pointed out by the High Court, would lead to the consequence that a defendant could prevent the execution of a decree by buying the interest of one of the plaintiffs. The effect of the judgment which had to be enforced was, in their Lordships' view, as has been already expressed, that the second plaintiff, Kalisunderi, was entitled to possession of half of the estate in question. The defendant had obtained the share of Chandermuni's representatives. As far, therefore, as that share was concerned, he was in no better position to dispute any right the plaintiff might have to execution than Chandermuni herself would have had; and it appears to their Lordships that Chandermuni would have had no right in this suit to dispute the title of the plaintiff to present possession of a moiety of the land. As a defendant he had no better rights. As against the plaintiff he was a wrong-doer; and as against him she had an immediate right to possession. But it has been asserted that he had a right to have the question of the adoption by Kalisunderi determined and that this question could not be determined in an execution proceeding, to which latter proposition their Lordships assent. But if the adoption were set aside, still Kalisunderi would have a life interest in the property, and could maintain the action in respect of that interest. With this view, as already pointed out, the Judge of first instance found in her favour, declining to try the question of adoption, and it is his judgment which has [495] now to be executed. Any possible hardship which the defendant might complain of in the present judgment operating as an estoppel against him, or otherwise unfavourably to this trial of his question, should it ever arise, will be obviated by a declaration that the decree is to be executed in respect only of the share to the possession of which Kalisunderi is entitled under and by

virtue of the will, and that nothing in this judgment shall affect any right which the defendant may at any time have to question the validity of the adoption.

Their Lordships will, therefore, humbly advise Her Majesty to affirm the judgment of the High Court, coupled with this declaration, and to dismiss this appeal with costs.

Appeal dismissed.

Solicitors for the Appellants : Messrs. *Watkins & Lattey*.

Solicitors for the Respondent : Messrs. *Barrow & Rogers*.

NOTES.

[I. ORDERS WHEN JUDGMENTS WITHIN LETTERS PATENT, SEC. 15 :—

The Letters Patent, Cl. 15, is not controlled by sec. 588 C. P. C. 1882 :—(1901) 25 Mad. 555 ; (1902) 4 Bom. L. R. 342 (349) ; (1903) 13 M. L. J. 497 (498).

The following orders were held to be judgments within the Letters Patent :—Order remanding a case :—(1907) 13 C. W. N. 105 ; (1908) 35 Cal. 1096. Order refusing to set aside award :—(1899) 26 Cal. 361. Order refusing to stay issue of probate :—(1901) 5 C.W.N. 781.

The following were held not to be judgments :—Order refusing extension of time for furnishing security for the costs :—(1890) 18 Cal. 182. For preferring appeal :—(1906) 33 Cal. 1323 : 10 C. W. N. 986 : 3 C. L. J. 545. Order refusing application under s. 169 of VI of 1882 :—(1895) 17 All. 438. Order dismissing appeal from order of lower Court remanding the case :—(1897) 20 Mad. 407 ; see also (1898) 22 Mad. 68 (84) : 8 M. L. J. 231 ; (1907) 13 C. W. N. 105 ; (1908) 35 Cal. 1096. Order for amendment of decree :—(1892) 14 All. 226 (230) : 12 A. W. N. 14 **F.B.** Order refusing leave to appeal in *forma pauperis* :—(1889) 11 All. 375 : 9 A. W. N. 70 ; but see 26 Cal. 361 (377). Order granting certificate of fitness for appeal to the Privy Council :—(1890) 17 Cal. 455.

II. INHERENT POWERS TO RECTIFY MISTAKES—

See (1904) 28 Mad. 127 : 14 M.L.J. 436 ; (1900) 23 Mad. 517 ; (1896) 23 Cal. 580.

III. PRIVY COUNCIL—ORDERS IN COUNCIL—HIGH COURT'S POWERS—

See also 22 Cal. 971 ; 26 M.L.J. 185.

IV. JOINT DECREE-HOLDERS—EXECUTION BY ONE OF PART OF THE DECREE—

See *per* Bhashyam Ayyengar (1902) 25 Mad. 431 (447) **F. B** ; (1905) 33 Cal. 306 : 10 C.W.N. 297 : 3 C.L.J. 112 (no notice necessary where no possibility of prejudice against the other decree-holder ; also 18 Mad. 464 ; 23 Bom. 623 ; (1910) 7 I. C. 474 : (1910) P. R. 61 : (1910) P.W.R. 90 ; C.P.C., 1908, O. 21, r. 15.]

[= 9 Cal. 465 : 12 C.L.R. 292 : 7 Ind. Jur. 472]

APPELLATE CIVIL.

The 6th December, 1882.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE NORRIS.

Baso Koorer and others.....Plaintiffs

versus

Hurry Dass and others.....Defendants.*

Hindu Law—Mitakshara—Joint family trade—Alienation of ancestral property by some of the members of the family --Interest of adult son affected by sale in execution of a decree against his father—Parties to suit.

A family, governed by Mitakshara law, carrying on a trade in the names of some of its members, having become indebted to the defendants in a large amount in respect of advances made for the purposes of the trade, some of the head members of the family executed a bond in favour of the defendants for the amount due, and hypothecated certain family properties which stood in their names as collateral security therefor. The amount not having been paid on the due date, the defendants brought a suit on the bond against the persons who had executed it, and obtained a decree which, however, did not direct that the properties hypothecated should be sold. In execution of that decree the interest of the judgment-debtors in the hypothecated properties, and in other family properties, were sold, and [496] were purchased by the defendants, who, subsequently, under their purchase, obtained possession of the shares of the judgment-debtors and of those of their sons. The decree not having been satisfied by those sales, the defendants brought a suit against the remaining head members of the family to have it declared that their interests in the family properties were liable to satisfy the decree, and that suit also was decreed. Under the last decree the interests in the family properties of the judgment-debtors under that decree were sold, and were purchased by the defendants who subsequently obtained possession of the shares of those judgment-debtors and of the shares of their sons. Some of the sons of the judgment-debtors in both decrees were adult at the time when the suits were instituted. In suits brought, many years after the sales, by members of the family who had not been parties to the previous suits, to recover their shares in the family properties, *held*, that the interest of all the members of the family had passed on the sales.

Per MITTER, J.—There is no distinction in principle between the case of an adult son and that of a minor son as regards a son's interest in ancestral property being liable to pass on a sale of such property in execution of a decree against his father only; but if an adult son proves that he would have been able to save the property by paying off the debt out of his private funds, if he had been a party to the suit, *quere*, whether he should not be allowed to have the sale set aside on payment of the debt due under the decree.

A son's interest may pass on a sale of ancestral property in execution of a money decree against his father, but whether it does or does not pass will have to be determined by the circumstances of each case.

Delay in bringing proceedings to impeach sales is a matter for consideration in determining what interests pass on the sale.

THE suits out of which these two appeals arose were two of many brought by members of a joint Hindu family governed by Mitakshara law, to

*Appeals from Original Decrees, Nos. 60 and 61 of 1881, against the decree of Baboo Mohendro Nath Bose, First Subordinate Judge of Mozufferpore, in Tirhoot, dated the 27th December 1880.

recover their shares in the joint family properties which were in the possession of the defendants under purchases at sales in execution of decrees against some of the members of the family.

The facts, and the questions arising in the suits, fully appear in the judgment of the Court.

Mr. Branson and Baboo Chunder Madhub Ghose for the Appellants.

Mr. R. E. Twidale, Baboo Mohesh Chunder Chowdhry, and Baboo Darkanath Mookerjee for the Respondents.

[497] The Judgment of the Court (MITTER and NORRIS, JJ.), was delivered by

Mitter, J.—The plaintiffs in these two suits are members of a joint family of which Chumun Lal was the common ancestor. Chumun Lal left six sons him surviving, *viz.*, Behari Lal, Kanhya Lal, Sheo Lal, Domun Lal, Shoukhi Lal and Amrit Lal; but Amrit Lal may be left out of consideration, as he died without issue leaving a widow Radha Koor. There was a question raised in the lower Court as to the date of the death of Chuman Lal, but the lower Court has found that it took place in 1262 (1855). We concur in this finding. Of the descendants of the surviving five sons of Chuman Lal, it is sufficient for our purpose to state that Behari Lal had three sons, *viz.*, Bhowani Pershad, Peary Lal and Gopal Lal, and that Sheo Lal had a son named Durga Pershad. In the suit out of which appeal No. 60 arises, the plaintiffs are the widow and sons of Kanhya Lal, and the sons and wives of Bhowani Pershad, of Gopal Lal and of Domun Lal. In the other suit the plaintiffs are sons of Shoukhi Lal, sons and wife of Durga Pershad, and wives of Nuthoo Lal and Gopi Lal who are the sons of Peary Lal. In both these suits one Mohabir Pershad, not belonging to the family, has joined as plaintiff. He is the *benamidar* of one Bunwari Lal, a rich banker in the district of Mozufferpore, who has purchased a share of the disputed property from the other plaintiffs.

It appears that this family carried on a trade of saltpetre in the names of some of its members. The principal defendants in this case, who acted as the bankers of this family for a long time, used to advance money from time to time with which this trade was carried on. On the 26th November 1864 there was an adjustment of accounts between the parties, and the sum of Rs. 24,283-15-6 was found due to the defendants. On that date a cash loan of Rs. 9,716 odd annas 6 pie having been taken by the joint family, a bond for the consolidated amount for Rs. 34,000 was given by the head members of the family to the defendants. This bond was executed by Kunhay Lal, Domun Lal, Bhowani Pershad, and Gopal Lal. The reason for these four persons only executing the bond was that the properties, [498] which were hypothecated as collateral security in it, stood in their names. All these properties are situated within the district of Tirhoot.

The money covered by this bond not having been paid on the due date, a suit was brought against these four persons. It was decreed on the 10th February 1866. The Court in its judgment found that the money was taken for the purpose of carrying on the family trade mentioned above. This decree was obtained in the District Court of Patna. There was no direction in it for the sale of the hypothecated properties.

In execution of this decree the properties in dispute in this case, consisting of the hypothecated properties as well as certain properties which had not been hypothecated, were brought to sale in the District Court of Mozufferpore, in the years 1866-67-68. Two of these sales, however, took place so late as in

the year 1871. The defendants who became the auction-purchasers in these sales took possession under colour of their purchase of the shares of their judgment-debtors as well as of their sons.

The money covered by the decree not having been satisfied, the defendants brought another suit against the head members of the remaining branches of the family, viz., Shoukhi Lal, Durga Pershad, Nuthoo Lal, Gopal Lal, and Gobardhun for a declaration that they were entitled to have the balance of the decree realized by the sale of their property. This suit was decreed in their favour on the 30th June 1868, the Court finding that the original debt, contracted under the bond of 26th November 1864, was binding upon the joint-family. Under this decree the remaining shares of the family properties mentioned above were brought to sale in the years 1868 and 1869. The defendant in these instances also became the auction-purchasers, and, under colour of their purchase, took possession of the shares of their judgment-debtors as well as of their sons.

Some of the sons of the judgment-debtors in both these decrees were adults. The present suits were brought in February and March 1879, on the allegation that by these sales only the interests of the persons, who were defendants in these two suits passed, and that the plaintiffs are entitled to recover back their shares from the auction-purchasers. It will have appeared from the dates given [499] above that the suits were brought in some instances more than 11 years after the auction sales; and in no instance are the dates of the suits less than eight years from the date of the auction-purchase. The lower Court being of opinion that the original debt was binding upon the whole family, and finding that there was long delay in bringing these suits, dismissed them with costs. The lower Court has also found that the majority of the properties in dispute in this case were acquired after the death of Chumun Lal.

In these two appeals nothing has been urged before as regards the properties acquired after the death of Chumun Lal. With reference to the remaining properties two objections have been taken to the decree of the lower Court: *First*, that as regards the plaintiffs who had attained their majority before the suits against their fathers were brought (and which suits resulted in the decrees of the 10th February 1866 and 30th June 1866), their shares did not pass by the auction sales; *secondly*, that as regards properties not hypothecated in the bond of the 26th November 1864, nothing but the interests of the judgment-debtors passed under the auction sales.

With reference to these two grounds, the learned Counsel for the appellants has placed before us all the decided cases bearing upon them, and has contended that the balance of authorities is in favour of the contention raised by him.

The only cases cited in support of the first objection are *Laljee Sahoy v. Fakeer Chand* (I. L. R., 6 Cal., 135), and *Upooroop Tewary v. Lalla Bandhjee Sahoy* (I. L. R., 6 Cal., 749).

The last-mentioned case does not, in our opinion, support this contention. It has rather a contrary tendency. The facts of that case are that a Mitakshara father executed a bond hypothecating a certain ancestral property. He had at that time an adult son. Upon the mortgage bond, a decree was obtained against the father alone, and in execution of that decree the mortgaged property was sold and purchased by the defendant, who, under colour of his purchase, took possession thereof. The son then brought a suit to recover possession of his share, and it was held that the mortgage [500] by the father would not be binding upon the son, unless it was shown that the son had either expressly or impliedly consented to it, and the case was remanded to try

that question. It is, therefore, an authority for the proposition that although an adult son may not have been made a defendant, yet if a particular property were property liable to be sold in execution of the decree which may have been passed against the father, the whole property would pass. This case, therefore, instead of supporting the appellant's contention, goes to show that where a property is liable for the debt contracted by the father, it may be brought to sale in execution of a decree based upon that debt; and that that sale would pass the interest of the son (whether minor or adult), notwithstanding that he was not made a party to the suit in which the decree was passed.

The case of *Laljee Sahoy v. Fakker Chand* (I. L. R., 6 Cal., 135) does to a certain extent support the appellant's contention. There also a certain ancestral property had been mortgaged by a father, and it was proved that the mortgage had been made with the consent of the son, who was adult at the time of the mortgage. The suit upon the mortgage bond was brought only against the father, and, a decree having been obtained, the ancestral property was brought to sale. The purchaser obtained possession of it, and after nearly the lapse of twelve years the son brought a suit to recover possession of his share.

Mr. Justice PONTIFEX, in delivering judgment in that case, made the following observations:—

"The result, in fact, seems to be that, *qua* ancestral property, the son is as equally liable for his father's debts if not incurred for immoral purposes, as for his own debts; but if the interests of an adult son were affected by a decree against the father *alone*, which, in our opinion, is not the law, the unreasonable consequence might be that the son's interest would be more liable for the payment of the father's debt than for the debt and perhaps the prior debt of the son, for no creditors of the son could touch his interest without suing him."

No doubt this passage lends some colour to the contention that, in order to affect an adult son, the suit must be brought against [301] him also; but the result of the decision shows that full effect was not given by the learned Judges to the dictum laid down above; for they held that, as the son had stood by and allowed the mortgagee to believe that the mortgage covered the whole sixteen annas of the property, and then allowed him to take possession under his purchase, and to remain in unmolested possession for nearly twelve years, he was estopped from afterwards claiming his share in the property sold.

These observations show that the son was bound by the mortgage because he had, by his conduct, allowed the mortgagee to believe that the mortgage would affect the whole sixteen annas of the property; but according to the dictum extracted above, a decree passed upon a mortgage bond binding upon the son would not affect him unless made a party to the suit. The conduct of the son, therefore, in not bringing a suit for a period of eleven years and upwards, could not make the auction-purchase made by the mortgagee himself extend over the whole sixteen annas of the property if really its legal effect were to convey the father's interest only.

Therefore, although there are certain observations in this judgment which lend some support to the contention of the learned Counsel, the final result of the decision is that the adult son was held bound by the sale which was effected in execution of a decree against the father alone. Therefore, the cases cited by the learned Counsel do not support the objection taken by him.

Then, apart from the decided cases, there does not appear to us to be any difference in principle between the cases of adult and minor sons. It has been now conclusively held that an ancestral property in the possession of a father

and a son, whether an adult or not, is liable for the father's personal debts, provided that these debts are not proved to have been contracted for immoral purposes. That being the law, it is difficult to understand upon what ground the distinction between the case of an adult and a minor son can be supported.

In the case of an adult son, it may be urged that he ought to be made a party to the suit, because that may enable him, in some cases, to save the family property by paying the debt out of his own private funds, if he be possessed of any. If a case like this be made out by an adult son in any suit, the question may arise [502] whether he should not be allowed to have the sale set aside on the payment of the debt due under the decree; but that is not the case here. It is not said here that the adult sons, by reason of their not having been made parties, were deprived of the opportunity of saving the property by paying off the debt.

Beyond this, it does not appear to us that there is any other reasonable ground upon which it can be said that the law should, in the case of an adult son, be different from what it is in the case of a minor son. The first ground taken before us, therefore, is untenable.

As regards the second objection, it seems to us that the balance of authorities is against the contention raised by the learned counsel.

The cases cited before us in support of this contention are *Ruder Perkuash Misser v. Hurdai Narain Sahu* (5 C. L. R., 112); *Laljee Sahoy v. Fakeer Chand* (I. L. R., 6 Cal., 135); *Bhagwat Dassa v. Gouri Kunwar* (7 C. L. R., 218); and *Ramphul Singh v. Deg Narain Singh* (I. L. R., 8 Cal., 517).

When these cases are narrowly examined, it appears that the only decision which supports the contention is that of *Ramphul Singh v. Deg Narain Singh*. In the other three cases it is not broadly laid down that in execution of a money-decree against the father, his interest in the joint property can only be brought to sale. What has been decided in these cases is that, having regard to the circumstances of each transaction forming the basis of each of those suits, what was sold was the interest of the father alone.

The learned counsel relied very strongly upon the judgment of the Privy Council in the case of *Deendyal Lal v. Jugdeep Narain Singh* (L. R., 4. I. A., 247; s. c., I. L. R., 3 Cal., 198). In the case of *Umbika Prosad Tewary v. Ram Sahay Lall* (I. L. R., 8 Cal., 898), I have gone at some length into this question, and it seemed to me then, as it seems to me now, that what was decided by their Lordships in the Judicial Committee in the case [503] of *Deendyal Lal v. Jugdeep Narain* was simply this,—that the interest of a member of a joint Hindu family in joint property is liable to be sold in execution of a decree against him. On the other hand, there is a current of decisions showing that, in execution of a money-decree against the father alone, the whole family property may be brought to sale, and that, when such property is sold, the son cannot get the sale set aside, unless he proves that the debt, for which the decree was passed, has been contracted by the father for immoral purposes. See *Junnuk Kishoree Koonwar v. Rughoonundun Singh* (S. D. A., 1861, 213); *Balmokund v. Jhoona Lall* (S. D. A., N. W. P., 2 Sol. Ca., 469); *Beer Pershad v. Doorga Pershad* (W. R. 1864, 310); *Budree Lall v. Kantoo Lall* (23 W. R., 260); *Anooragee Koorer v. Bhugobutty Koorer* (25 W. R., 148); *Luchmi Dai Koori v. Asman Singh* (I. L. R. 2 Cal., 213; 25 W. R., 421); and *Ponappa Pillai v. Poppuwayangar* (I. L. R., 4 Mad., 1).

Many of these cases are based upon the decision of the Judicial Committee of the Privy Council in the case of *Muddun Thakoor v. Kantoo Lall* (L. R. 1 I. A., 321; s. c. 14 B. L. R., 187).

It is said that this last-mentioned case is only an authority for the proposition that, where a father mortgages ancestral property, the son cannot recover his share of it unless it be shown that the mortgage debt was contracted for illegal purposes.

The observations of the Judicial Committee do not warrant us in taking this narrow view of their decision. All that they say is that it was shown in that case that a Court of Justice had given a decree against him (the father) in favour of the creditor, and that the Court had given an order for the particular property to be put up for sale under the execution. A reference to the Paper Book before the Privy Council will show that the decree was a simple money-decree; that there was no reference in it to [504] any mortgage; and that the sale was made in the ordinary way, there being no special directions given for the sale of the whole ancestral property. Then, again, the Judicial Committee expressly confirm the ruling in the case of *Junnuk Kishoree Kooncar v. Rughoonundan Singh* (S. D. A., 1861, 213). In that case there was no sale in execution of a mortgage decree. The sales which were upheld in that case were all sales in execution of simple money-decrees. There is no ground, therefore, for supposing that their Lordships of the Judicial Committee intended that the operation of the principle laid down in the case of *Muddun Thakoor v. Kantoo Lall* (L. R., 1 I. A., 321, s.c., 14 B. L. R., 187) should be restricted in its application only to sales in execution of decrees based upon bonds, under which ancestral properties are hypothecated.

It being clear, therefore, that in each case it will have to be determined whether the whole ancestral property has been sold, and whether the sale can be impeached by the son or not, there cannot be the least doubt, having regard to the facts of the case before us, that the decrees made by the lower Courts are correct upon the sale proceedings; there is not the slightest doubt that the whole family property was sold. It is also clear that the debts, which were the foundation of the decrees in execution of which the properties were brought to sale, were debts contracted by the heads of the several branches of the joint family for family purposes. Under these circumstances, and especially having regard to the length of time which elapsed between the dates of sale and the dates of the institution of these suits, we are of opinion that the decision of the lower Court is correct. We, therefore, dismiss both these appeals with costs.

Appeals dismissed.

NOTES.

[See 12 Cal. 389; 4 All. 309; (1902) 4 Bom. L. R. 587 (594) as regards the consent of adult members; see also (1900) 3 Bom. L. R. 322; (1892) 20 Cal. 453; (1883) 7 Bom. 435 and the Notes to 3 Cal. 198 and 13 Cal. 21 in the **LAW REPORTS REPRINTS.**]

[=12 C.L.R. 251]

[505] APPELLATE CIVIL.

The 14th February, 1883.

PRESENT :

MR. JUSTICE WILSON AND MR. JUSTICE MACLEAN.

Huro Prasad Roy Chowdhry.....Plaintiff

versus

Chundee Churn Boyrageo and others.....Defendants.*

Enhancement of rent—Land let for purpose of clearing at certain rent.

When land is let for the purpose of clearing jungle, or other reclamation, and on this ground, or any other ground mentioned in the lease, a reduced rent is provided for the first few years, and it is said that the rent is to be at a certain rate as the full rent, such rent is not liable to enhancement.

Baboo *Rashbehary Ghose* and Baboo *Bhobany Churn Dutt* for the Appellant.

Baboo *Sreenath Dass* and Baboo *Gyanendro Nath Doss* for the Respondent.

THE facts of this case sufficiently appear from the **Judgment** of the Court (WILSON and MACLEAN, JJ.) which was delivered by

Wilson, J.—We think that in this case there is no ground for interfering with the decision of the Court below.

The suit was for enhancement of rent of a holding. It appears that the holding of the defendant was a tenure created under a certain amulnama. We must take it, the document itself not being before us, that the terms of the document are correctly stated in the judgment of the lower Appellate Court. It is there stated: "It appears from the rubokaris and amulnama, dated 8th February 1849, that the land of this tenure was originally taken for the express purpose of clearing jungles. It was a khalari land. After the abolition of salt-manufacture, it became covered with jungle. The authorities thought it proper to let it out to the best advantage. As labour and capital must be laid out before this land could be brought into cultivation, it was thought fit to make a jungleburi tenure in favour of the defendants, the maximum rent whereof was fixed at 8 annas per bigha. Under the rulings in *Watson v. Joggeshar Attah* (Marsh., 330); [506] *Golam Ali v. Gopal Lal Thakoore* (15 B. L. R., 125; s.c. 19 W. R., 141); and *Soorasoodery Dabee v. Golam Ali* (9 W. R., 65); I agree with the Court below in holding that this tenure is not liable to enhancement under the Rent Law."

Now, the question is shortly this: When land is let for the purpose of clearing jungle or other reclamation, and on this ground, or any other ground mentioned in the lease, a reduced rent is provided for the first few years, and it is said that the rent is to be at such and such rate, a sum as the full rent—does that mean, as the words seem to import, that the full rent is to be the full rent as long as the tenure subsists, or is such a rent liable to enhancement under the provisions of the Rent Law? We agree with the lower Appellate Court in holding that the decision of the Privy Council in *Soorasoodery*

* Appeal from Appellate Decree No. 1301 of 1881, against the decree of Baboo Krishna Mohun Mookerjee, Second Sub-Judge of the 24-Pergunnahs, dated the 21st April 1881, affirming the decree of Baboo Gobind Deb Mookerjee, Officiating Second Munsif of Diamond Harbour, dated the 28th June 1880.

Dabee v. Golam Ali (9 W. R., 65) is an authority for holding that the former view is the true one, and that in the present case that rent cannot be enhanced.

This appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[See also (1905) 1 C. L. J. 572.]

[9 Cal. 506 : 12 C. L. R. 488]

APPELLATE CIVIL.

The 20th February, 1883.

PRESENT :

MR. JUSTICE WILSON AND MR. JUSTICE MACLEAN.

Protab Chunder Chuckerbutty.....Auction-purchaser

versus

Panioty.....decree-holder

and another.....Judgment-debtor."

Sale in execution of decree — Setting aside sale "Saleable interest"—

Civil—Procedure Code (Act XIV of 1882) s. 313.

The fact that property sold in execution of a decree is subject to a mortgage upon which a decree has been obtained, which fact is not disclosed prior to the proclamation of sale, is not sufficient to enable an auction-purchaser to set aside the sale on the ground that the judgment-debtor had "no saleable interest" in the property, within the meaning of s. 313 of the Civil Procedure Code.

Naharmul Marwari v. Sadut Ali (8 C. L. R., 468), distinguished.

THIS was an application by an auction-purchaser to set aside the sale of a property sold in the execution suit on the ground that the right, title and interest of the judgment-debtor in the property had been mortgaged by him to one Iswar Chunder [507] Shaha, who had obtained a decree on the mortgage, and that the fact of the mortgage was not revealed in the affidavit which was filed on behalf of the decree-holder prior to the proclamation of the sale. The Munsiff held that this was not a sufficient ground for an auction-purchaser to set aside a sale, considering that some rights remained in the judgment-debtor, and that therefore it could not be said that he had "no saleable interest" within the meaning of s. 313 of the Civil Procedure Code.

The auction-purchaser appealed to the High Court.

Baboo Rash Behary Ghose for the Appellant.

Baboo Huro Mohun Chuckerbutty for the Respondents.

The **Judgment** of the Court (WILSON and MACLEAN, JJ.) was delivered by

WILSON, J.—We think there is no ground for interfering with the order made in this case. The question is whether the Court below ought to have set aside the sale in execution under the terms of s. 313 of the Procedure Code. That section says: "The purchaser at any such sale may apply to the Court to set aside the sale, on the ground that the person whose property purported to be sold had no saleable interest therein." It is said in this case that the judgment-debtor had no saleable interest in the property, on the ground that the property had

* Appeal from Original Order No. 379 of 1882, against the order of Baboo Aditya Chunder Chuckerbutty, Officiating Second Munsif of Putookhally, dated the 30th September 1882.

been mortgaged, and that before the sale to the present appellant a decree in a suit on the mortgage had been obtained. We are not prepared to lay down broadly the proposition that wherever there is a mortgage on the property and a mortgage decree has been obtained, there is no saleable interest in the judgment-debtor. We are asked so to hold on the authority of the case of *Naharmul Murwari v. Sadut Ali* (8 C. L. R., 468). We do not understand that the Court there intended to lay down any such proposition. That case was a peculiar one in its circumstances, and the order made was a very special one. The Court did not set aside the sale as between the purchaser and the decree-holder. It set aside the sale so far as to protect the purchaser, who, by reason of the mortgage, had perhaps obtained no profitable interest in the property from having to pay the balance of his [508] purchase-money, after satisfying the decree-holder's claim, into the pocket of the judgment-debtor himself. That is a very different case from the present one, which is a case between the decree-holder and purchaser, and not a case between the judgment-debtor and the purchaser. That case, therefore, appears to us not to govern this case.

The appeal will be dismissed with costs.

Appeal dismissed.

NOTES.

[See also 9 All. 167 (168) : 7 A.W.N. 6 : 10 Cal. 368 (372) : 36 I. A. 32, 37.]

[9 Cal. 508 : 12 C.L.R. 255]

APPELLATE CIVIL.

The 21st February, 1883.

PRESENT:

MR. JUSTICE MITTER AND MR. JUSTICE FIELD.

Jutadhari Lal.....Defendant

versus

Rughoobeer Persad and others.....Plaintiffs.*

Costs—Liability of shares of members of joint family for.

Pending an appeal, the plaintiff, who was the appellant, died, leaving one adult and four minor sons. The adult son prosecuted the appeal, which was dismissed, as was the suit in the Court below, with costs. The decrees for costs were sold by the defendant to a third person, who caused certain property which belonged to the estate of the plaintiff to be sold in execution. *Held*, in a suit by the minor sons to recover possession of the shares in the property sold, that as all the sons were interested in the litigation all their shares were liable for the costs, and the suit was dismissed.

THIS was a suit to recover possession of certain lands. It appeared that one Jubhoo Lal Sahoo brought a suit against one Dukhit Sahoo for possession of a house and for rent. This suit was dismissed with costs. Jubhoo Lal Sahoo appealed, but died before the appeal was heard. His eldest and only adult son, Mohabeer Persad, prosecuted the appeal, which was dismissed with

* Appeal from Appellate Decree, No. 2320 of 1881, against the decree of Baboo Kali Prosunno Mukerji, Second Sub-Judge of Sarun, dated the 11th November 1881, reversing the decree of Baboo Tara Prosunno Banerjee, Sudder Munsif of that district, dated the 28th June 1880.

costs. Dukhit Sahoo sold the decree for costs to one Jutadhari Lal. The property, the subject of the present suit, was sold in execution of the decree, and was purchased by Jutadhari Lal. The present suit was brought by the four minor sons of Jubhoo Lal Sahoo against Jutadhari Lal, Dukhit Sahoo and Mohabeer Persad to recover four-fifths of the property sold, on the ground that, as they had not been represented upon the appeal or in the execution proceedings, their shares in the property did not pass to the purchaser, but only the share of Mohabeer Persad. The plaint contained the usual charges of fraud and collusion between the defendants. The Munsiff found that these charges were not proved, and held that the whole of Jubhoo Lal Sahoo's share passed under the sale, and dismissed the suit. The Subordinate Judge reversed the Munsiff's decision, holding that the share of Mohabeer Persad alone could be affected by the execution proceedings. The defendant Jutadhari Lal appealed to the High Court.

Baboo Mohesh Chunder Chowdry for the Appellant.

Baboo Saligram Singh for the Respondents.

The **Judgment** of the Court (MITTER and FIELD, JJ.) was delivered by

Mitter, J.—The plaintiffs are the minor sons of one Jubhoo Sahoo. It appears that Jubhoo Lal Sahoo had brought a suit against the defendant No. 2, in this case, *viz.*, Dukhit Sahoo, for recovery of possession of a house and for recovery of the rent due on account of that house. This suit was dismissed on the 9th of October 1874, and Jubhoo Lal was made liable for costs. Against that decree Jubhoo Lal preferred an appeal, and while that appeal was pending Jubhoo Lal died. The appeal was then prosecuted by Mohabeer Persad, who was the sole adult son of Jubhoo Lal, the other two sons, the plaintiffs in this case, being minors. The appeal was dismissed, and the appellant was made liable for costs. The decrees for costs passed by the Court of First Instance as well as by the Court of Appeal, having been sold by the defendant No. 2 to the defendant No. 1, Jutadhari Lal, the appellant before us, they were executed, and the property now in suit was sold in execution, and purchased by Jutadhari Lal himself. The present suit was brought to recover the share of the plaintiffs in the property sold, on the ground that they not having been represented either in the Appellate Court or in the execution proceedings, their shares were not affected by the sale; what passed under it was the share of Mohabeer Persad alone, who prosecuted the appeal, and against whom alone the execution proceedings were taken. There is no doubt in this case that one of the decrees was against Jubhoo Lal himself. It is also the fact that Jubhoo Lal had himself preferred the appeal which was subsequently dismissed, [510] it having been prosecuted after his death by his adult son, Mohabeer Persad. The original suit related to a certain property appertaining to the estate of Jubhoo Lal, and if the appeal had succeeded the plaintiffs would have shared in the benefit arising from that success. Under these circumstances, it is but just to hold that Mohabeer Persad prosecuted the appeal as the representative of the joint family, consisting of himself and his minor brother, who were all interested in the result of that litigation. This is precisely the view which was taken under similar circumstances by their Lordships of the Privy Council in the well-known case of *Bissessur Lal Sahoo v. Luchmessur Sing* (L. R., 6. I. A., 233). That being so, it seems to us clear that the view of the rights of the parties taken by the Court of First Instance is correct; what was sold was the property of Jubhoo Lal, who was the real debtor. That he was the real debtor so far as the decree of the first Court is concerned admits of no doubt; and, having regard to the circumstances of the case, it seems to us that, as to the

costs of the Appellate Court, the real debtor was also Jubhoo Lal, that is to say, that his estate was liable for these costs. The lower Appellate Court, in deciding in favour of the plaintiffs, relied upon the Full Bench decision in *Assamathem Nessa Bibee v. Roy Lutchmeeput Singh* (I. L. R., 4 Cal., 142). That case seems to us to be distinguishable from the present in many ways, but the principal and most striking distinction that appears to us is this: There the original debtor was a Mahomedan, and the persons who were sued in that case after the death of the original debtor could not, as in a Hindu family, be said to have represented the particular heir whose name was left out. It is sufficient to refer to this distinction in order to show that the principle laid down in that case cannot apply to the present case.

On the whole, we are of opinion that in this case what was sold was the property of Jubhoo Lal.

We therefore set aside the decree of the lower Appellate Court and restore that of the Munsiff with costs.

Appeal allowed.

NOTES.

[See also 3 Bom. L. R. 322.]

[12 C.L.R. 445]

[511] APPELLATE CIVIL.

The 14th March, 1883.

PRESENT :

MR. JUSTICE CUNNINGHAM AND MR. JUSTICE MACLEAN.

Srinath Dutt.....Judgment-debtor
versus

Gopal Chundra Mittra and others.....Decree-holders.*

*Sale in execution of decree —Debt secured by mortgage of immovable property—
Civil Procedure Code (X of 1877), s. 266.*

A debt secured by mortgage of immovable property cannot be sold in execution of a decree under the provisions of the Civil Procedure Code applicable to moveable property.

IN this case in execution of a decree obtained by Gopal Chundra Mittra, the interest of Srinath Dutt, one of the judgment-debtors in certain property which had been mortgaged to him by one Ugendro Nath Dutt, was sold as moveable property. Srinath Dutt applied to have the sale set aside on the ground that his interest, involving as it did an interest in immovable property, was not a debt such as could be sold under the provisions of the Civil Procedure Code relating to moveable property.

The District Judge refused the application. He said: "The argument by which this debt is sought to be converted into immovable property is, so far as I understand it, this: that according to the Transfer of Property Act a mortgage is a transfer of an interest in immovable property; that under the Limitation Act "immovable property" includes any interest arising out of land, and also in Article 144 puts any interest in immovable property on exactly the same footing as immovable property itself in respect of limitation. The fallacy in this argument I think consists in looking upon a debt which is

* Appeal from Original Order, No. 319 of 1882, against the order of J. P. Grant, Esq., Judge of the 24-Pergunnahs, dated the 7th July 1882.

secured by the pledging of land as a benefit arising out of that land. Properly viewed it is an incumbrance on the land. For special purposes of limitation it may be advisable to put such an interest on the same footing as immoveable property, but this does not make them both the same thing. A debt remains a debt, however much it may be hedged round with safeguards and conditions, some of them involving land. The language of s. 66 of the Civil Procedure Code on this point is clear; it speaks of bonds **["312"]** or other securities for money, thus clearly contemplating a mortgage bond."

The District Judge accordingly dismissed the application.

Srinath Dutt appealed from that decision to the High Court.

Baboo *Bhabany Churn Dutt* for the Appellant.

Baboo *Bhubun Mohun Doss* for the Respondents.

The **Judgment** of the Court (CUNNINGHAM and MACLEAN, JJ.) was delivered by

Cunningham, J. The question to be decided in this appeal is whether a debt secured by mortgage of immoveable property has been rightly sold in execution of decree, under the provisions of the Civil Procedure Code applicable to moveable property.

The learned Judge below has regarded it merely as a debt, and has held that it was rightly sold as moveable property. We feel some difficulty in adopting this view. A mortgage is not merely a debt; it represents a substantial interest in the mortgaged property, *viz.*, the right of selling it, under certain conditions, in realization of the debt. It is obvious that if the debt alone, apart from the security, is sold in execution, the full value of the mortgage will not be realized. The case does not appear to be expressly provided for by the Code. We think that in such cases there should be an attachment under s. 274 as well as under s. 268. In the present case, as the debt alone was sold, a material irregularity producing substantial injury to the judgment-debtor appears to have occurred, and the sale must be set aside under s. 311, and the purchase money refunded under s. 315.

The appeal must be decreed with costs.

Appeal allowed.

NOTES.

[ATTACHMENT OF MORTGAGE DEBT—

The proper procedure is to treat it as moveable property C.P.C. 1908, O. 21, r. 46:—12 Cal. 546; 20 Cal. 805; 15 All. 134; 26 Bom. 305; 10 Mad. 169; (1911) 22 M. L. J. 105, *contra* 9 Mad. 5; 14 C.P.L.R. 5 (6). It is enough if it had been treated as immoveable property:—10 Mad. 169 (178).]

[=12 C.L.R. 500]

[513] APPELLATE CRIMINAL.

The 27th February, 1883.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE FIELD.

Rongai and other-

versus

The Empress.*

Practice—Repeal of Act —Appeal to High Court—Code of Criminal Procedure, Act X of 1872, s. 36—Act X of 1882, s. 408—High Court, Revisional Jurisdiction.

On the 9th of December 1882, a person was convicted under ss. 457 and 109 of the Indian Penal Code, and sentenced to three years' rigorous imprisonment by a Deputy Magistrate of Assam, exercising special powers under s. 36 of the old Code of Criminal Procedure, Act X of 1872. The new Code of Criminal Procedure came into force on the 1st of January 1883. The prisoner presented an appeal to the High Court from the conviction and sentence above mentioned on the 23rd of January 1883.

Held, by FIELD, J. (MITTER, J., expressing no decided opinion) that the case was governed by s. 408 of the new Code of Criminal Procedure, and that no appeal lay to the High Court.

Held, by the Court, that the case was a fit one for the exercise of the High Court's Revisional Jurisdiction, and should be dealt with under the powers conferred on the High Court by virtue of that jurisdiction.

IN this case the prisoners were charged by the Deputy Commissioner of Assam with having committed offences under s. 457, ss. 457 and 109, and s. 411 of the Indian Penal Code. The charges were proved to the satisfaction of the Deputy Commissioner, who sentenced the prisoners to three years' rigorous imprisonment on the 9th of December 1882. The Deputy Commissioner was invested with powers under the provisions of s. 36, Act X of 1872. The prisoners appealed to the High Court on the 23rd of January 1883.

Baboo Hurry Mohan Chuckerbutty for the Appellants.

The following **Judgments** were delivered :—

Mitter, J.—In this case three persons—Rongai, Gouri Khan and Beerai—were convicted under s. 457, coupled with s. 109, by an officer exercising the special powers vested in him under s. 36, Act X of 1872. They were each of them sentenced to three [514] years' rigorous imprisonment on the 9th of December last. An appeal was presented to this Court on the 23rd of January last, and on the appeal coming on for hearing before a Division Bench of this Court on the same day, the following order was passed :—“ The appeal is admitted, send for the record and issue the usual notices.” The case being

* Criminal Appeal, No. 40 of 1883, against the order of H. J. Pect, Esq., Deputy Commissioner of Luckimpore, dated the 9th December 1882.

now called on before us to be heard finally a question has arisen,—whether this Court is competent to hear this case as an appeal against the conviction and sentence of the lower Court. It appears, with reference to the provisions of the old Code, that the provisions of the old Code and those of the new Code are not precisely the same. Under the old Code the test which determined the venue of appeal in cases like the present was whether the officer in the lower Court exercised the special powers mentioned in s. 36. In this case it is clear that the Deputy Commissioner against whose judgment this appeal has been preferred, was exercising the special powers vested in him under s. 36 of the Code of 1872. As Magistrate he could not pass the sentence which was passed in this case, and it is also apparent on the proceedings that he was exercising the special powers under that section. That being so, it is quite clear that under the old Code the appeal lay to this Court, but under the new Code the right of appeal to this Court is restricted only to those cases in which the sentence passed by officers of this description, *viz.*, officers vested with special powers under the provisions of s. 36, requires confirmation by a superior Court. Then, whether under the old Code or under the new Code, it is quite clear that the sentence which was passed in this case did not require confirmation by a superior Court. That being so, it is also quite clear that if the new Code applies, the appeal in this case would not lie to this Court. The last section of the new Code provides that all pending proceedings would be governed by it, and if the present case could be considered as a case pending on the 1st of January 1883, no doubt the new Code would have applied; but, as already stated, the case was disposed of in the lower Court on the 9th December 1882. On the other hand, by s. 2 of the new Code, Act X of 1872 having been repealed, and this appeal having been preferred on the 23rd of January, the appellants could not claim any right of appeal which they had under the old Code, [515] as that Code was not in force on that day. The section which deals with the right of appeal under the new Code is s. 408, and that section is to the following effect: “Any person convicted on a trial held by an Assistant Sessions Judge, a District Magistrate or other Magistrate of the first class, or any person sentenced under s. 349 by a Magistrate of the first class, may appeal to the Court of Session. Provided that “(a), when in any case an Assistant Sessions Judge or a District Magistrate passes any sentence which is subject to the confirmation of the Court of Session, every appeal in such case shall lie to the High Court.” The section says generally that any person convicted on trial by the officers abovementioned may appeal to the Sessions Judge, and in certain cases to the High Court. Therefore, I am inclined to think that the right of appeal in this case would be governed by the provisions of the new Code. That being so, the appellants, as a matter of right, would not be entitled to appeal to this Court; but it seems to me that it is not essentially necessary in this case to decide this question, because whether the appeal lies to the Sessions Judge or to this Court, this seems to be a fit case for the exercise of the revisional powers given to us by the new Code. It is, therefore, not necessary for me to express a decided opinion on this point, but treating the case whether as an appeal or under the revisional powers vested in this Court, it seems to me that the conviction of the lower Court cannot stand.

[His Lordship having gone through the evidence said] :—

On the whole, I do not think that the evidence is sufficient to support the conviction of the prisoners. We accordingly set it aside and direct their immediate release.

Field, J.—In this case the appellants were convicted on the 9th of December last by a Deputy Commissioner in Assam exercising the special powers which could be conferred under s. 36* of the Code of Criminal Procedure, Act X of 1872. That the Deputy Commissioner as District Magistrate was exercising these powers appears on the face of these proceedings, and with reference to the provisions of s. 270, Act X of 1872, it is also clear that the District Magistrate was exercising these powers because it appears from the sentence awarded, *viz.*, three years' rigorous imprisonment, that such officer was exercising such [516] special powers. As District Magistrate the Deputy Commissioner could only have passed a sentence of two years' rigorous imprisonment. This being so, it is clear that under the provisions of s. 270, just referred to, the appeal lay to the High Court, and not to the Court of Session. But it is to my mind clear that the present Code, Act X of 1882, has altered the law. Section 408 of the present Code enacts thus generally: "Any person convicted on a trial held by an Assistant Sessions Judge, a District Magistrate or other Magistrate of the first class, or any person sentenced under s. 349 by a Magistrate of the first class, may appeal to the Court of Session, provided that when in any case an Assistant Sessions Judge or a District Magistrate passes any sentence which is subject to the confirmation of the Court of Session, every appeal in such a case shall lie to the High Court." Now it is clear to my mind that the words "District Magistrate" here include a District Magistrate vested with special powers under s. 30 of the present Code. It is, therefore, clear that all cases tried by a District Magistrate so vested are, as a general rule, appealable to the Court of Session, unless in any particular case the sentence, being subject to the confirmation of the Court of Session, is appealable to the High Court. Now the sentence passed in the present case is a sentence of three years only; that sentence, according to the old law, and to the new law, did not and does not require confirmation, and therefore it is clear to my mind that under the words of the present Code the appeal in this case lay to the Court of Session, because the sentence passed was not subject to the confirmation of the Court of Session. The appeal was presented to the High Court after the 1st of January, and the question arises whether the High Court has jurisdiction to entertain the appeal so presented. It appears to me that the High Court, as a Court of Appellate Jurisdiction, cannot entertain this case as an appeal. Section 558 of the present Code relates to pending cases. Now this was not a pending case, and, therefore, it does not come within the purview of that section. Then it is contended that s. 6 of the General Clauses Act, 1 of 1868, will apply. It appears to me that this appeal cannot, within the meaning of that section, be termed a proceeding commenced before the repeal of Act X of 1872. The [517] proceedings on the original trial terminated on the 9th of December. The proceeding before us is an appeal, and no such proceeding was commenced

* [Sec. 36:—In the territories subject to the Lieutenant-Governor of the Punjab, and in the territories administered by the Chief Commissioners of Oudh, the Central Provinces, and British Burmah, in Coorg, and in those parts of the other provinces, in which there are Deputy Commissioners or Assistant Commissioners, the Local Government may invest the Deputy Commissioner, or other Chief Officer charged with the executive administration of the district in criminal matters, with power to try as a Magistrate all offences not punishable with death, and to pass sentence of imprisonment for a term not exceeding seven years, including such solitary confinement as is authorized by law, or of fine, or of whipping, or any combination of these punishments authorized by law; but any sentence of upwards of three years imprisonment passed by any such officer shall be subject to the confirmation of the Sessions Judge, to whom such Deputy Commissioner is subordinate. Such Sessions Judge may either confirm, modify, or annul any sentence referred for confirmation.]

before us on the 1st of January. That being so, it appears to me that the case must come under the general language of s. 408, viz., that any person convicted on a trial held by a District Magistrate may appeal to the Court of Session. That language is general; it is in no way restricted to persons convicted after the Code came into operation, and it is sufficiently wide to include the cases of persons convicted before the new Code came into force. This being so, I am of opinion that the appeal in the present case ought to have been made not to the High Court but to the Court of Session. I am, however, quite of opinion with my learned colleague that having regard to the distance of Assam from Calcutta, having regard to the mistakes that may probably be committed upon a change in the law, and moreover having regard to the facts of this particular prosecution, it is a proper case in which to exercise the revisional jurisdiction of this Court. This being so I have concurred in hearing this case as a case taken up for revision. As to the remarks on examination of the evidence, and generally on the merits of the case which have just been made by my learned colleague, I entirely agree, and I think that these appellants must be acquitted and discharged.

Convictions set aside.

[9 Cal. 517 : 12 C.L.R. 141]
APPELLATE CIVIL.

The 22nd December, 1883

PRESENT :

SIR RICHARD GARTH, KNIGHT, CHIEF JUSTICE, AND MR. JUSTICE MITTER.

Ramkristo DassPlaintiff

versus

Sheikh Harain.....Defendant.*

Suit for rent—Landlord and tenant—Registered owner, suit by, where the relationship of landlord and tenant is not shown to exist—

Beng. Act VII 1876, s. 78.

The mere fact of a person being registered under the provisions of Beng. Act VII of 1876 as proprietor of the land in respect of which he seeks to recover rent is not sufficient to entitle him to sue for it.

[518] Where a landlord who was registered as owner of the land in respect of which he claimed rent, sued the occupier for such rent, but was only able to prove the fact that he was the registered owner, and was unable to show that the relationship of landlord and tenant existed, or that he had a good title to the estate of which he was the registered owner :

Held that the suit was rightly dismissed.

THIS was an appeal under s. 15 of the Letters Patent against the decree of Mr. Justice O'KINEALY. The plaintiff in this and some analogous suit sued for arrears of rent in respect of the years 1283 to 1285 (1876—1878) for lands situate in a certain talook No. 170, of which he was registered as owner. The defendant denied that the relation of landlord and tenant existed, and alleged that for the particular lands for which the rent was claimed he paid rent to a third party named Omakant.

* Appeal under s. 15 of the Letters Patent against the decree of Mr. Justice O'Kinealy, dated the 13th September 1882, in appeal from Appellate Decree No. 1549 of 1881.

The Court of First Instance decreed the suit, but the Subordinate Judge on appeal, holding on the evidence on the record that the relationship of landlord and tenant did not exist, reversed that decree and dismissed the suit.

The plaintiff then preferred a special appeal to the High Court, and on the hearing of the appeal before Mr. Justice O'KINEALY it was contended that inasmuch as the plaintiff had got his name registered in respect of the land, the defendant holding the land was bound to pay him rent without any contract, express or implied, and that he could sue him for rent. Mr. Justice O'KINEALY, however, held that if the relationship of landlord and tenant did not exist, the suit could not be maintained merely from the fact that he was the registered owner. It was further contended in special appeal that the Courts below should have decided whether the land in question lay within plaintiff's lands or within the boundaries of the chak belonging to Omakant; but the Court held that it was quite unnecessary to enter into the question of the plaintiff's title as against a party not on the record, when the other finding was sufficient to dispose of the suit.

Several other questions were raised on behalf of the plaintiffs on Special Appeal, which are immaterial for the purposes of this report, and the Court after disposing of them held that on the facts, as proved, there was nothing to show that the relationship of landlord and tenant existed, and accordingly dismissed the appeal.

[519] The plaintiff accordingly preferred the present appeal.

Baboo *Omakuli Mukerjee* appeared for the Appellant.

Baboo *Jogesh Chunder Rai* for the Respondent.

The **Judgment** of the Court (GARTH, C. J., and MITTER, J.) was delivered by

Garth, C. J.—The plaintiff is the registered owner of a revenue-paying estate under Beng. Act VII of 1876, and in this and other analogous cases he sues certain tenants of that estate to recover rent for the lands which they hold; and for the purposes of the question, which we have to determine, we must assume that he has proved no title to the rent which he claims, beyond the mere fact that he is the registered proprietor. The question is, whether that fact alone entitles him to recover rent from the defendants.

The Court of First Instance considered that it did; but the Subordinate Judge and the learned Judge of this Court have both decided against the plaintiff. He now appeals to us relying on the language of s. 78 of Beng. Act VII of 1876.

That section says that "no person shall be bound to pay rent to any person claiming such rent as proprietor or manager of an estate or revenue-free property in respect of which he is required by this Act to cause his name to be registered, or as mortgagee, unless the name of such claimant shall have been registered under this Act."

It is contended that under the provisions of that section the registered owner of a revenue-paying estate has a right to sue the tenants for rent, although he has not entered into any contract with them, and although he cannot prove a good title to the estate of which he is the registered owner.

We think that the section does not say or mean anything of the kind. It is true that the owner of the estate cannot sue for rent, *unless he is registered*; but it by no means follows, that one who is not the true owner, can sue because he is registered.

This point is very clear, and has been decided by this Court on several previous occasions.

Speaking for myself I heartily wish it were the law, that the registered owner, and the registered owner only, was entitled to sue [520] the tenants for rent; and that, not only as regards revenue-paying, but all other estates.

Unfortunately, however, that is not the law at present; and we must therefore dismiss this appeal with costs.

It is admitted that the appeals, numbered 1550 to 1553 inclusive, will be governed by this decision. Those appeals, therefore, are also dismissed with costs.

Appeal dismissed.

NOTES.

[See (1895) 23 Cal. 87 (109) F. B. and 8 Cal. 853 *supra*.]

[9 Cal. 520 12 C.L.R. 209]

FULL BENCH REFERENCE.

The 9th March, 1883.

PRESENT :

SIR RICHARD GARTH, KNIGHT, CHIEF JUSTICE, MR. JUSTICE MITTER,
MR. JUSTICE McDONELL, MR. JUSTICE PRINSEP, AND
MR. JUSTICE WILSON.

Ulfatunnissa *alias* Elahijan Bibi.....Defendant

versus

Hosain Khan.....Plaintiff.

Registration Act (III of 1877), s. 49—Unregistered bond—Evidence—Mortgage.

An unregistered bond containing a personal undertaking to repay money borrowed, and also a hypothecation of land above Rs. 100 in value as security, may be used in evidence to enforce the personal obligation.

THIS was a suit for money lent and interest. The plaintiff alleged that the defendant had borrowed from the plaintiff the sum of Rs. 2,500 on the 3rd of February 1878, and that on the same date she executed a bond, whereby she promised to pay the money within a year. The bond had been lost by the plaintiff before the institution of the suit, but on the trial secondary evidence of its contents was given by one of the plaintiff's witnesses, who is thus referred to by the lower Appellate Court: "He drew up a draft of the plaint to be filed with the bond before it was lost, and was plaintiff's advisor at the time. He is therefore in the best position of all the witnesses to speak as to its contents. He says the bond contained these words: "I promise to pay the amount of the bond peaceably (*apoya*)—if not, you will sell the property which is mortgaged, and you may then proceed [521] against my other property." The defendant contended that the bond should have been registered, and, that not having been done, submitted that the plaintiff's suit should be dismissed. The Court of first Instance gave the plaintiff a decree, which was affirmed on appeal, the Judge citing *Mattongeney Dassee v. Ramnarain Sadkhan* (I. L. R., 4 Cal., 83), and *Krishto Lall Ghose v. Bonomalee Roy* (I. L. R., 5 Cal., 611). The defendant appealed to the High Court on the ground (*inter alia*) that the lower Appellate Court was wrong in holding that the bond was legally admissible as evidence in the case. The

* Full Bench Reference made by Mr. Justice Wilson and Mr. Justice Field, dated the 6th September 1882, in appeal from Appellate Decree No. 699 of 1881.

case came on for hearing before a Division Bench of the High Court (WILSON and FIELD, JJ.) who referred the point for the decision of a Full Bench, with the following remarks :

Wilson, J.—The main question raised in this appeal is one upon the construction of s. 49 of the Registration Act (III of 1877).

The instrument sued on was not produced ; but the loss having been proved, secondary evidence was given of its contents. The exact terms of the document do not appear ; but the witnesses all agree that the document, which they call a bond, contained an acknowledgment of a loan of Rs. 2,500, a promise to repay the amount, and a mortgage of immoveable property to secure it.

The suit is a personal suit to recover the money. And the question is, whether the document can be given in evidence in support of such a personal claim, it not having been registered.

Section 49 says : "No document required by s. 17 to be registered shall affect any immoveable property, or confer any power to adopt, or be received as evidence of any transaction affecting such property or conferring such power."

The whole question appears to turn upon the meaning of the word *transaction*. Where under one contract and for one consideration two obligations are undertaken, one affecting land and the other not, is the whole one transaction within the meaning of the section ? Or may it be said that there are two distinct transactions, provided the obligation which does not affect land [522] be both intelligible and capable of performance without reference to the other which does ?

Apart from authority, I see great difficulty in saying that the transaction means anything but the whole bargain. It is a familiar rule of construction that words not of a technical nature are to be understood in their ordinary and natural sense unless a reason to the contrary appear ; and I rather think that any one, not a lawyer, who had borrowed money on mortgage, and executed a mortgage bond, would be surprised if he were told that he had been engaged in two separate transactions. And the difficulty is increased by the words that precede,—which say that "no document required by s. 17 to be registered shall affect any immoveable property." If the later words be read in such a sense as to make the word 'transaction' mean such part of the bargain as relates to land, it is not clear to my mind how they are to have any operation at all, or how they can apply to any case not already covered by the previous words.

The authorities bearing upon the question appear to stand thus : In Act XX of 1866, s. 49,* the words of the enactment were : "No instrument required by s. 17 to be registered shall be received in evidence in any Civil Proceeding in any Court, or shall affect any property comprised therein" unless registered. Upon these words a Full Bench of this Court held that all that was forbidden was the reception of the document "in evidence as a document affecting an interest in land"—*Luchmiput Singh Dugar v. Mirza Khairat Ali* (4 B. L. R., (F. B.), 18). The same view was taken by the Madras High Court in *Valaya Padayachy v. Moorthy Padayachy* (4 Mad. II. C., 174). The Bombay High Court followed these rulings, though in the first instance without wholly approving them, in *Tukaram Vithoji v. Khandoji Malharji* (6 Bom. H. C. O. C.

*[Sec. 49 :—No instrument required by section 17 to be registered shall be received in evidence in any Civil proceeding in any Court, or shall be acted on by any public servant as defined in the Indian Penal Code, or shall affect any property comprised therein, unless it shall have been registered in accordance with the provisions of this Act.]

Effect of non-registration of documents required to be registered.

134); and *Sangappa Bin Ningappa v. Basappa Bin Parappa* (7 Bom. H. C. A. C. 1). The section under which these cases were decided deals only with the effect and admissibility of the instrument, and says nothing about the transaction.

The language of s. 49 in the Act of 1871 was the same as that of the present Act. Under these Acts four cases, so [523] far as I am aware, have been decided. The case of *Raja Balu v. Krishnarav Ramchandra* (I. L. R., 2 Bom., 273) came before GREEN, J. That was a suit for damages for breach of a covenant contained in a document which also conveyed land. The learned Judge held that, even assuming the covenant not itself to affect land, yet, inasmuch as it could not be construed without referring to the conveyance, effect could not be given to it. The question whether a term not affecting land, if intelligible and capable of performance separately, could be enforced, did not arise. The case of *Mattongeney Dossee v. Ramnarain Sadkhan* (I. L. R., 2 Cal., 33), came before GARTH, C. J., and MARKBY, J. The bond was somewhat singularly worded, and some doubt was expressed whether it contained a personal promise to pay. But assuming that it did, the Court said: "In this case the document is not divisible. It discloses one transaction only, and that the transaction which the plaintiff must necessarily prove for the purpose of making out his case." And again it is said: "The transaction was one and indivisible." In that case I understand the Court as meaning by "the transaction" the whole bargain.

The case of *Krishto Lall Ghose v. Bonomalee Roy* (I. L. R., 5 Cal., 611), came before MITTER and TOTTENHAM, JJ. In that case again there was a bond containing a covenant to repay a sum of money borrowed and a mortgage to secure it. It was held that the two things were separable, and that the money might be recovered. That decision seems to me to involve the view, that transaction means not the bargain, but that term of the bargain which affects land.

It is true that the learned Judges who decided that case distinguish it from that before GARTH, C.J., and MARKBY, J.; but I feel great difficulty in seeing the distinction with sufficient clearness to enable me to say with confidence under which authority the present case falls.

In the case of *Sheo Dial v. Prag Dat Misser* (I. L. R., 3 All. 229), a similar question came before a Full Bench of the Allahabad High Court. The defendant had executed a bond by which he [324] bound himself to pay a sum of money borrowed, and hypothecated land as security. The Court held that the plaintiff could sue for the money, though the bond was not registered. OLD-FIELD, J., in that case says expressly, and the other learned Judges seem to me to say by necessary implication, that the promise to pay and the hypothecation were distinct transactions.

In this state of the authorities, the question being one of very general importance, I think the matter should be referred to a Full Bench.

The question which I propose to refer is, whether the absence of registration is a bar to this suit.

Field, J.—I concur in making this reference to a Full Bench.

Baboo *Srinath Dass* and Baboo *Grija Sunker Mozumdar* for the Appellant.

Baboo *Mohiny Mohun Roy* and Baboo *Makund Nath Roy* for the Respondent.

The **Judgment** of the Full Bench was as follows:—

The question we have to decide is, whether an unregistered bond, containing a personal undertaking to repay money borrowed and also a hypothecation of land above Rs. 100 in value as security, may be used in evidence to enforce the personal obligation.

The section on which the case turns is s. 49 of the Registration Act, III of 1877, which says: "No document required by s. 17 to be registered shall affect any immoveable property comprised therein.....or be received as evidence of any transaction affecting such property....., unless it has been registered."

In the previous Registration Act, XX of 1866, the corresponding section was s. 49, which provided that: "No instrument required by s. 17 to be registered shall be received in evidence in any civil proceeding in any Court, or shall affect any property comprised therein," if unregistered.

Under that Act it was held by a Full Bench of this Court in *Luchmiput Singh Dugar v. Mirza Khairat Ali* (4 B. L. R. (F. B.), 18), that a [525] bond, such as that in question, was admissible to prove the debt. And the same view was taken by the High Courts of Madras, Bombay and N.-W. Provinces—*Vallaya Padyachy v. Moorthy Padyachy* (4 Mad. H. C., 174); *Tukaram Vithoji v. Khandoji Maltharji* (6 Bom., H. C. O. C., 174); *Sangappa Bin Ningappa v. Bassappa Bin Parrappa* (7 Bom. H. C. A. C., 1); *Seeta Kulwar v. Jugurnath Pershad* (4 Agra, H. C. 170). Under the Act, therefore, it was settled law for the whole of India that an unregistered document like the present was effectual and might be used in evidence to charge the person, though not the land. On a matter of such general importance, we think we ought not to hold the law to be changed, unless we see very clearly that the Legislature intended to change it. But when the language of the two Acts is compared it is seen that the words of the later are not more stringent, but less stringent, than those of the earlier.

We think also that in dealing with one of several Acts forming a consecutive series relating to the same subject, like the Registration Acts, we ought, as far as possible, to apply to the sections of the later Act the same method of construction which has been applied to the corresponding sections of the earlier. In the Full Bench case already referred to, the words "shall be received in evidence or shall affect" and were held to mean "should be received in evidence as a document affecting" land. We are applying exactly the same method of interpretation in holding that the words "shall be received as evidence of any transaction affecting land," mean, shall be received as evidence of any transaction so far as it affects land. And this we think is the true construction.

The view which we thus take of the section renders it unnecessary to consider the question discussed in some of the cases, and in the referring order, whether a document of this kind embodies only a single transaction or may properly be said to contain two.

We answer the question referred to us in the negative, and dismiss the appeal with costs.

NOTES.

[COMPULSORILY REGISTRABLE DOCUMENT WHICH REMAINED UNREGISTERED—EVIDENTIARY VALUE—

The mortgage-debt may be proved thereby, though it is inadmissible for enforcing the security:—15 Mad. 253; 11 C. L. R. 166; 20 Bom. 553; 4 All. 3; 32 Mad. 410; 19 M. L. J. 584.

It may be used for evidencing any collateral purpose which does not require registration:—15 C. W. N. 375; 9 Bom. L. R. 393 (*contra* 1900 P. R. 102) *c.g.*, limitation, 26 Cal. 384; receipt of money, 12 W. R. 495; nature of possession, 27 Bom. 515 (*contra* 17 M. L. J. 469); extinguishment of mortgage, 23 Mad. 92; proving the contract, 12 Mad. 505; 10 Cal. 315; an agreement to lease being itself within the definition of lease was held by the Madras High Court to stand on a different footing:—(1910) M. W. N. 745 F. B.; *see also* 12 C. L. J. 464; 14 C. W. N. 65.

See also 13 All. 89 (90); (1891) P. R. 83; 4 L. B. R. 52 (53).

See also (1912) 40 I. A. 31, where an unregistered letter evidencing the mode of dealing with rents and profits between mortgagor and mortgagee was held inadmissible in evidence.]

[- 13 C. L. R. 114]
APPELLATE CIVIL.

[526] The 18th December, 1882.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE PICOT.

Dassorathy Huri Chunder Mahapattra.....Plaintiff

versus

Rama Krishna Jana and others.....Defendants.*

Landlord and Tenant - Cuttack - Surborakari tenures—Alienation without consent of landlord - Forfeiture - Alienation by one of several co-sharers - Changing case made in plaint - Second appeal.

The alienation of a surborakari tenure in Cuttack, and *a fortiori* the alienation of any portion of such tenure, is invalid without the consent of the landlord.

Assuming that the sale of such a tenure would entitle the landlord to re-enter as upon a forfeiture, the sale of a portion thereof by one of several co-sharers would not work a forfeiture of the whole tenure.

A plaintiff was not allowed to alter his case in second appeal.

THIS was a suit for the recovery of possession of land. The plaintiff was the zamindar. The first seven defendants—called the Jana defendants—were holders under him of a surborakari tenure; the eighth defendant, Gopinath Misser, was the heir of a purchaser from some of the Jana defendants. The plaintiff stated that the Jana defendants had partitioned the surborakari tenure between them; that afterwards the owners of some of the several shares purported to sell them to the father of the eighth defendant; and he charged that by such partition and sale and by each of them, the defendants had in law lost all their rights and interests in the holding, and were liable to be ejected.

The Jana defendants, who severed in their defences, pleaded that they had a right to partition the lands between themselves as they thought fit, and to sell any of such portions when partitioned. They also pleaded limitation.

The Court of First Instance gave the plaintiff a decree which was modified on appeal to the lower Appellate Court. The Judge said :

“Of late years, at least, the Courts of Orissa have always held the sur- [527] borakari tenure to be indivisible and inalienable without the zamindar's consent. Respondent quoted two rulings quite in point—*Puddolochun Mundle v. Lakhun Burrooah* (2 S. D. A., 1860, p. 109), and *Doorjodhun Doss v. Chooya Daje* (1 W. R., 322). The ruling quoted on the other side—*Suddanundo Maiti v. Norrattam Maiti* (8 B. L. R., 280) -is not a weighty one. The question whether surborakarais were capable of being alienated or not was not raised in the lower Court in that case, and no evidence was given. A surborakari is not a mokuddami, and no one in Orissa confounds the two. Mr. Ricketts clearly distinguishes between the two. Merely because the allowance made to the surborakar is called malikana, I cannot conclude that he is malik; the word malikana has a secondary meaning much more often used than its primary one. It is very clear the plaintiff never sanctioned either the division or the alienation; had he done so, separately obtained receipts would have been

* Appeal from Appellate Decree, Nos. 2025 and 2233 of 1881, against the decree of A. W. Cochran, Esq., Officiating Judge of Cuttack dated the 5th September 1881, modifying the decree of W. Wright, Esq., Subordinate Judge of that district, dated the 31st December 1880.

forthcoming. I hold his suit is within time, even though I do not agree with the lower Court that the Janas should be ejected. He was not bound to recognize the division or the alienation in any way till his rights were affected. This suit has come out of the rent case of 1874.

"The order of the lower Court as to khas possession I cannot confirm. The Jana defendants may have acted vexatiously, but it has not been shown that they acted contrary to law, or did really anything more than persist in fighting the zamindar on the points at issue here now. They had perhaps some reason to think they could alienate. I certainly cannot say that they have plainly and certainly acted vexatiously. Appellant quoted *Kashenath Punee v. Lakhmonee Pershad* (19 W. R., 99), and *Suddye Purira v. Boistub Purira* (12 B. L. R., 84 : 15 W. R., 261). Both are in point. I modify the lower Court's order, and, while allowing the Janas to remain in possession, set aside the alienation, and declare that the division of the tenure is not legal without the landlord's consent."

THE plaintiff appealed to the High Court on the grounds that he was entitled, on the facts found by the District Judge, to a decree for possession; that on the question of forfeiture, the Judge had mistaken the nature of a *surhorakari* tenure; and that had he taken a correct view of the nature of the tenure he would have held that the defendants had forfeited their rights therein.

Gopinath Misser also appealed against that portion of the decree setting aside the sale to his father.

Baboo Nil Madhub Sen for the Appellant.

[528] Mr. Tridale and Baboo Obhoy Churn Bose for the Respondents.

The **Judgment** of the Court (PRINSEP and PIGOT, JJ.) was delivered by

Prinsep, J.—We think that the conclusion arrived at by the lower Appellate Court is correct.

Any acts of one or more of several joint tenants which possibly might operate as a forfeiture of tenancy, would not entitle the landlord to exact that penalty as against all the tenants; moreover the plaintiff zamindar's case has throughout been that the tenure cannot be split up by any arrangement among the tenants as between themselves, and that he is not bound to, and will not acknowledge the validity of, any such arrangement by which separate specific rights are created.

We cannot now allow him in second appeal to alter his case and to claim a forfeiture on any specific shares of the joint tenancy so as to entitle him to recover khas possession of those shares. The landlord's appeal must therefore be dismissed.

The appeal of the assignee of the rights of some of the sharers must also be dismissed, as it has been found on the authority of reported cases that the alienation of a tenure of this description (a *surhorakari* tenure) in Cuttack, and *a fortiori* any portion of it, is invalid without the consent of the landlord.

[9 Cal. 528 : 12 C. L. R. 287]

APPELLATE CIVIL.

The 27th February, 1883.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE MITTER.

Hem Chunder Soor.....Plaintiff

versus

Kally Churn Das.....Defendant.*

*Evidence Act (I of 1872), s. 92 Mortgage—Sale—Conduct of parties
Oral evidence when admissible to prove that an apparent sale
is a mortgage—Admissibility of parol evidence
to vary a written contract.*

The defendant, in answer to a suit by the plaintiff for possession of certain land alleged that the kobala, which purported to be an out-and-out sale in favour of the plaintiff, and on which the plaintiff based his title to the property, was intended by the parties to operate only as a mortgage; and to prove such allegations tendered evidence of the circumstances under [529] which the kobala was executed, and of the conduct of the parties to show that the document had all along been treated as a mortgage and intended to operate as such.

Held, that such evidence was admissible.

Held also that s. 92 of the Indian Evidence Act made no alteration in the law as laid down in *Kashi Nath Chatterjee v. Chandi Charan Banerjee* (B. L. R., Sup. Vol., 383; S.C., 5 W. R., 62), but is in accordance with what was decided in that case. *Baksu Lakshman v.*

*Appeal under s. 15 of the Letters Patent against the decree of Mr. Justice FIELD, dated the 21st July 1882, in appeal from Appellate Decree No. 1953 of 1881.

[Sec. 92.—When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their repre-

sentatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:

Proviso (1). Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law.

Proviso (2). The existence of any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso (3).—The existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

Proviso (4).—The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5).—Any usage or custom by which incidents, not expressly mentioned in any contract, are usually annexed to contracts of that description, may be proved: Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

Proviso (6).—Any fact may be proved which shows in what manner the language of a document is related to existing facts.]

Govinda Kanji (I. L. R., 4 Bom. 594) followed; *Ram Doyal Bajpie v. Hera Lal Paray* (3 C. L. R., 386); and *Daimoddee Paik v. Kaim Taridar* (I. L. R., 5 Cal., 300; s.c., 4 C. L. R., 419) dissented from.

THIS was an appeal under the provisions of s. 15 of the Letters Patent against the decree of Mr. Justice FIELD.

The plaintiff sued to recover possession of 2½ bigas of land under a kobala dated the 18th Aughran 1285 (3rd December 1878) executed in his favour by the defendant. The defendant, while admitting the execution of the kobala, pleaded that it was only a mortgage transaction, and that the mortgage debt had been paid. The only question for trial was whether the transaction was an out-and-out sale, or only a mortgage.

The document on the face of it purported to be an out-and-out sale, but at the hearing of the case before the Court of First Instance the defendant offered to adduce evidence to prove that there was a contemporaneous verbal agreement that the property would be reconveyed on repayment of the consideration money. This was objected to under s. 92 of the Evidence Act.

The Munsif held that, though evidence was not admissible to vary the terms of the kobala, still it was open to the plaintiff to show by the surrounding circumstances that the transaction, though called an absolute sale, had all along been treated by the parties as a conditional one; and he held that this view was supported by the Full Bench decision in *Kashi Nath Chatterjee v. Chandi Charan Banerjee* (B. L. R., Sup. Vol., 383; s.c., 5 W. R., 62), and that the law had not been altered by s. 92 of the Evidence Act—*Ram Doyal Sen v. Radha* [530] *Nath Sen* (25 W. R., 167). He, therefore, allowed the defendant to adduce evidence with regard to such circumstances, and found as a fact that the defendant had all along remained in possession of the land; that the value of the land was far in excess of the sum mentioned in the kobala which was only Rs. 18; that that amount had been tendered by the defendant to the plaintiff but had been refused, and that the defendant had accordingly deposited it in the Judge's Court within a few months of the date of the transaction; that the defendant's homestead lands were comprised in the kobala, and that there was no provision in the deed for his remaining in possession, and that shortly after the date of the transaction the defendant had erected a house, value Rs. 25, on the land. He further found that the custom of executing a kobala for a conditional sale was still in existence in the districts. On these grounds he decided the issue in favour of the defendant, and dismissed the suit with costs.

The plaintiff then appealed against the decree on the ground that the Court below had erred in admitting the evidence objected to, and on appeal relied on the cases of *Ram Doyal Bajpie v. Hera Lal Paray* (3 C. L. R., 386) and *Daimoddee Paik v. Kaim Taridar* (I. L. R., 5 Cal., 300; s.c., 4 C. L. R., 419) as showing that the Court below had erred in admitting the evidence alluded to. The Subordinate Judge, however, considered that s. 92 of the Evidence Act had made no difference in the law, and following the decision in *Baksu Lakshman v. Govinda Kanji* (I. L. R., 4 Bom., 594) held that the decision of the lower Court was correct, and accordingly dismissed the appeal with costs. The plaintiff then specially appealed to the High Court, and the appeal was heard by Mr. Justice FIELD who delivered the following judgment:—

The only ground of appeal urged in this case is that the Courts below have erred in law in admitting evidence of a contemporaneous oral agreement varying the terms of the Kobala. I think it quite clear that the Courts below did not admit evidence of a contemporaneous oral agreement varying the terms of the kobala.

[531] What they did admit was evidence of conduct subsequent to the kobala, showing that the parties had waived the arrangement incorporated in the kobala, and had, by mutual agreement evidenced by conduct, treated the transaction as a mortgage. The very fact that the plaintiff did not get possession upon the execution of the kobala was pregnant evidence to show that the parties never treated the transaction as an out-and-out sale. The Munsif says in his judgment: "Though evidence was not receivable to vary the terms of the kobala, I was of opinion that it was open to the defendant to show by surrounding circumstances that the transaction, though called an absolute sale, had all along been treated as a conditional one only." The Subordinate Judge, though not using equally precise language, has confirmed this judgment of the Munsif. I see no reason to interfere, and I dismiss the appeal with costs.

The Plaintiff then preferred this appeal under s. 15 of the Letters Patent.

Baboo Saroda Churn Mitter appeared on behalf of the Appellant.

Baboo Troilukhyo Nath Mitter for the Respondent.

The **Judgment** of the Court (GARTH, C.J., and MITTER, J.) was as follows: --

Garth, C. J. In this case the plaintiff (appellant) sued for possession of 2½ bigas of land, which he claimed to have purchased absolutely from the respondent under a kobala, dated the 18th Aghran 1285 (3rd December 1878).

The respondent admitted the kobala, but contended that the transaction between the plaintiff and himself was a mortgage only.

In support of this view, the defendant relied partly upon oral evidence of the transaction, and partly upon the conduct of the parties, more especially the fact that the plaintiff had never taken possession, although the kobala was dated the 3rd December 1878, and this suit was not brought until the year 1880.

He also relied upon the further fact, that the sum of Rs. 18, [532] which was admitted to be the consideration for the kobala, was scarcely one-fourth the value of the property.

The plaintiff all along objected to the reception of these facts in evidence upon the ground that the defendant was precluded by s. 92 of the Evidence Act from bringing forward any evidence to vary or contradict the terms of the kobala.

The lower Courts, however, have admitted the evidence, and have gone into all the circumstances of the case; both holding that, although parol evidence, as a rule is not admissible to contradict or vary the terms of a written agreement, yet that, in a case of this kind, the Court is bound to look to the surrounding circumstances, and to the acts and conduct of the parties, for the purpose of ascertaining whether that which appears upon the face of the deed to be an absolute sale, had been treated by the parties and intended by them as a conditional sale only. In support of this position, both Courts relied upon the Full Bench case of *Kashi Nath Chatterjee v. Chandi Charan Bannerjee* (B. L. R. Sup. Vol. 383; s.c., 5 W. R. 68).

The learned Judge in this Court, although putting the case upon a somewhat different ground, has confirmed the judgment of the lower Courts.

It has now been argued before us that, although the Full Bench case above referred to established the law in the year 1866, s. 92 of the Evidence Act, which was passed in 1872, must be considered as having overruled the Full Bench decision; and that the cases of *Ram Doyal Bajpie v. Hera Lal Paray*

(3 C. L. R., 386), and *Daimoddee Paik v. Kaim Taridar* (I. L. R. 5 Cal., 300; s.c., 4 C. L. R., 419) have decided that s. 92 of the Evidence Act has so altered the law.

If I could see any ground for supposing that the Full Bench case is not law at the present day, or that s. 92 of the Evidence Act either made, or intended to make, any alteration in the rule of evidence which prevailed here before the Act was passed, and which was recognized as law in the Full Bench case, I should consider that our proper course was to refer the question to another Full Bench; but when I look to the language used by Sir BARNES [533] PEACOCK in that case, it seems to me that s. 92 of the Evidence Act lays down in terms the same rule as Sir BARNES PEACOCK then stated to be the law.

And the principle upon which the judgment in the Full Bench case proceeded is one which, in my opinion, is perfectly consistent with that rule.

It is a principle which has constantly been acted upon by Courts of Equity in England, as well as by the Courts of this country; and notably by the Bombay High Court in the cases of *Hasha Khand v. Jesha Premaje* (unreported), and of *Baksu Lakshman v. Govinda Kanji* (I. L. R., 4 Bom., 594).

In the latter case there will be found an excellent judgment of Mr. Justice MELVILL, in which he very clearly explains this principle of equity, and the mode and the circumstances under which it may be applied.

I quite agree with that learned Judge, that the true ground upon which the equitable jurisdiction of the Court proceeds generally in cases of this kind, is that of fraud, and this (as Mr. Justice MELVILL observes) is very clearly stated by L. J. TURNER in *Lincoln v. Wright* (4 De G. and Jones, 16).

That was a case in its circumstances very similar to the present. Wright had brought an action of ejectment against Lincoln to recover certain land, which the latter had conveyed to him by a deed, which appeared on the face of it to be an absolute conveyance. Lincoln then brought a suit in equity to restrain the ejectment, on the ground that the transaction was in reality a mortgage; and he relied in support of that contention, partly upon a parol agreement, and partly upon the acts and conduct of the parties. L. J. TURNER says: "The principle of the Court is, that the Statute of Frauds was not made to cover fraud. If the real agreement in this case was that, as between the plaintiff and Wright, the transaction should be a mortgage transaction, it is in the eyes of this Court a fraud to insist on the conveyance as being absolute; and parol evidence must be admissible to prove the fraud."

The main difference between that case and the present is, that there the question arose upon a bill filed in equity to restrain the [534] ejectment, whereas here it arises in the form of an equitable defence to the ejectment suit.

Another very ordinary form in which the same principle is recognized and acted upon, is in suits to alter or reform deeds of conveyance, upon the ground that they were not drawn up in accordance with the true intention of the parties. Suppose, for example, that the present defendant on hearing that the plaintiff was about to treat the kobala as an absolute sale, had brought a suit to have the deed reformed in accordance with what he contends to have been the true arrangement between the parties, the only way in which he could establish his claim in such a suit would be by showing what the real transaction was, and how the circumstances of the case and the conduct of the parties were in accordance with his view of the matter. The ground of such a suit would be fraud or mistake; and that fraud or mistake might be

set up as well by way of defence to a suit like the present, as in a substantive suit to alter or reform the conveyance.

It is remarkable that in the Full Bench case of *Kashi Nath Chatterjee v. Chandi Charan Banerjee* (B. L. R., Sup. Vol., 383; s.c. 5 W. R., 68), already referred to, the two facts which were mainly relied upon as showing that the transaction was a mortgage instead of a sale, are the same which are relied upon in this case, namely: (1st) that possession was not given to the purchaser at the time of sale, and that he never sought to obtain possession until long afterwards; and (2nd) that the consideration mentioned in the deed was a very small sum, as compared with the selling value of the property.

I think, therefore, that we are bound by the authority of the Full Bench case to confirm the judgment of the Court below; and it seems to me that we are not constrained, by any of the authorities to which our attention has been called, to refer the question to a Full Bench.

As my learned brother agrees with me in this view, the Appeal will be dismissed with costs.

Appeal dismissed.

NOTES.

[EVIDENCE ACT, SEC. 92 EVIDENCE OF CONDUCT ETC.]

Oral evidence of intention to show a sale-deed to be only a mortgage-deed, was held inadmissible: *Balkishen v. Legge* (22 All. 149, P. C.; 10 I. A. 31, P. C. "It is no more permissible in India than it is in this country to contradict or vary the express and unambiguous terms of a written instrument by reference to preliminary negotiations or previous conversations." The Indian Evidence Act is clear on the point."

As regards the admissibility of evidence of *contemporaneous* conduct there is much difference of conduct: 28 Cal. 256 and 287; 25 Cal. 603; 11 C. L. J. 39 at 42; 10 C. L. J. 27; 12 C. L. J. 439; 6 C. L. J. 208; *contra* 7 Bom. L. R. 667; 25 Mad. 7; but see 33 All. 340 P. C. reversing 27 All. 612 (sale-deed allowed to be shown to be gift); 33 Cal. 773 (*benami*).

See also (1901) P. R. 72; 16 Mad. 80; 13 Mad. 194; 9 Cal. 898; 10 Cal. 764; 25 Cal. 603.]

[12 C. L. R. 465]

[536] APPELLATE CIVIL.

The 23rd February, 1883.

PRESENT :

MR. JUSTICE McDONELL AND MR. JUSTICE TOTTENHAM.

Beer Chunder Manikkya and others.....Defendants

versus

Raj Coomar Nobodeep Chunder Deb Burmono.....Plaintiff.*

Jurisdiction—Rajah of Tipperah—Sovereign Prince—Suit against Sovereign Prince with respect to land owned by him, and situate in British India—

Maintenance Charge on immoveable property—Benefits to arise out of land General Clauses Consolidation Act (1 of 1868),

s. 2 cl. 5 Civil Procedure Code (Act X of 1877), Chap. XXVIII, s. 433.

The Raja of Hill Tipperah is a Sovereign Prince within the meaning of Chapter XXVIII of Act X of 1877, and cannot be sued personally in the Courts of British India except under the conditions specified in s. 433 of that Act.

* Appeals from Original Decrees, Nos. 104 and 137 of 1881, against the decree of R. Towers, Esq., Judge of Tipperah, dated the 24th January 1881.

The fact of a defendant not subject to the jurisdiction of a Court having waived his privilege in previous suits brought against him does not give the Court jurisdiction to entertain a suit against him in which he pleads that he is not subject to such jurisdiction.

A suit for maintenance which seeks to have the maintenance made a charge on immoveable property is not a suit for immoveable property within the meaning of clause c, s. 433, Act X of 1877, nor is it a suit for "benefits to arise out of land" within the meaning of the definition of the words "immoveable property" contained in Act I of 1868, s. 2, cl. 5.

A claim for maintenance is not a charge upon immoveable property.

A member of the royal family of Hill Tipperah brought a suit against the Rajah to have it declared that with respect to certain land situate within British India, and forming portion of the possessions of the Rajah, he was entitled to the post of juboraj, and to succeed to such land on the death of the Rajah, and also claimed maintenance, and sought to have it declared that such maintenance should be a charge on the revenues of the land situate in British India.†

Held, that the British Courts had no jurisdiction to entertain the suit, it not being one for immoveable property.

By a *kulachar* or family custom prevalent in Independent or Hill Tipperah the reigning Rajah for the time being provides for the succession to the throne after his death by nominating a *juboraj* (or young rajah), and *barra thakoor*. According to such custom, on the death of the Rajah the *juboraj* succeeds as [536] of right to the throne, and *barra thakoor* becomes *juboraj*. In default of such appointment the next heir of the deceased Rajah succeeds.

On the 1st August 1862 Ishan Chunder Manikkya Bahadoor, the then reigning Rajah of Tipperah, died leaving three sons, Brojendro Chunder, Nobodeep Chunder (the plaintiff in the present suit) and Rohini Chunder. The throne was then taken possession of by the defendant Beer Chunder Manikkya, one of the defendants, a brother of Ishan Chunder Manikkya who alleged that by a *roobokari*, dated the 31st of July 1862, the late Rajah had appointed him *juboraj*, and had also appointed Brojendro Chunder *barra thakoor*, and the plaintiff *kurta*. In September 1862 the British Government recognised Beer Chunder as the *de facto* Rajah of Tipperah. In 1863 Brojendro Chunder died. In 1869, after the final decision of a suit with reference to the succession to the *guddee*, Beer Chunder was recognised by the British Government as the *de jure* Rajah, and was formally installed as Rajah in the spring of 1870. In 1870 Beer Chunder appointed his son Radha Kishore to the office of *juboraj*, and in 1878 he also appointed Samerendra Chunder to the office of *barra thakoor*. In 1874 the plaintiff came of age, and brought a suit against Beer Chunder in the District Court of British Tipperah, alleging that the above *roobokari* was a forgery, claiming possession of a *zamindari* named Chuckla Rowshanabad in British territory, and to set aside the appointment of Radha Kishore as *juboraj*. This *zamindari* had for many years been owned by the reigning Rajah of Tipperah, and the question of the succession to the Rajah had been frequently considered, and decided, in suits brought in British Courts with reference to this *zamindari*.

Claims for maintenance from the proceeds of his *zamindari* had also been made by members of the royal family of Tipperah and, as a matter of fact, the maintenance of the members of the royal family was usually, if not invariably, provided for from the revenues of this *zamindari*. This suit was ultimately dismissed on appeal by the High Court (25 W. R., 404), that Court deciding that Beer [537] Chunder had been validly appointed *juboraj*. The plaintiff having applied for permission under s. 433 of the Civil Procedure Code

† Leave had been obtained to bring the suit.

to sue the Maharajah in the Civil Court of Tipperah for maintenance, and for a declaration of his right to the possession, on the death of the Maharajah, of his zamindari situated in British India, obtained the sanction of the Lieutenant-Governor of Bengal by a Resolution, dated the 25th February 1878, to institute a suit for that purpose, so far as related to those zamindari. He accordingly instituted the present suit to obtain a declaration that he was entitled to take possession of the zamindari on the death of Beer Chunder, and to have his maintenance fixed at Rs. 5,000 a month, and declared a charge on the zamindari, as well as to obtain arrears of maintenance. Subsequently to the institution of the suit, the Secretary to the Bengal Government, in reply to questions put by the District Judge of Tipperah on the 28th December 1878, wrote that for the portion of his estates which lies within British territory the Maharajah holds the position of a zamindar; that the succession to Hill Tipperah followed the succession to the zamindari; that the Maharajah was not an independent ruling chief within the meaning of s. 433, and that no leave was necessary for suits to be brought against him in the Civil Courts of Tipperah with respect to property held by him in British India.

The suit was in the first instance brought against Beer Chunder alone, but subsequently Radha Kishore and Samerendra Chunder were added as defendants.

The defendants pleaded, amongst other things, that inasmuch as the Rajah of Tipperah was an independent Sovereign Prince the British Courts had no jurisdiction; that the claim was barred by limitation; that the matter was *res judicata*; that the appointment of the plaintiff as kurta did not give him any right to succeed to the other posts; and that the maintenance of the plaintiff was not a charge upon the zamindari Chuckla Rowshanabad.

The lower Court gave a decree in favour of the plaintiff for the sum of Rs. 13,360, as arrears of maintenance from the 1st May 1878, at the rate of Rs. 600 a month, up to the date of the institution of the suit; and held that he was entitled to maintenance at the same rate for the future, and that it should be a [538] charge on the zamindari Chuckla Rowshanabad, but dismissed the remaining portion of the plaintiff's claim.

From this decision both parties appealed, and at the hearing of the appeal it was arranged that the question of jurisdiction should be first argued and decided.

The Advocate-General (The Hon. G. C. Paul), Mr. Branson, Mr. Pugh, Mr. Evans, Mr. Bell, Baboos Kally Mohun Dass, Doorga Mohun Dass, Bhoobun Mohun Dass, Kuloda Kunker Roy, Bussunt Coomar Bose, Sree Nath Banerjee, Joyosh Chunder Roy, Amar Nath Bose Sita Nath Roy, and Moonshree Serajul Islam appeared for the Appellants.

The Standing Counsel (Mr. Phillips) Mr. Trevelyan, Baboos Mohiny Mohun Roy, Gria Sunker Mojoomdar, Grish Chunder Chowdhry and Horendro Nath Mookerjee for the Respondent.

The Advocate-General.—Feudatories are as independent as Sovereign Princes (Act X of 1877, s. 433). This is not a suit for land, and whether maintenance be a charge on the land or not it cannot be enforced in British India. The case is the same as if the Rajah had contracted to give maintenance and been sued for breach of such contract. In the suit brought by Neelkisto against Beer Chunder for possession of the zamindari the then Advocate-General contended that the Tipperah royal family was joint, and that the oldest male member was manager; but it was held that the Raj descended entire to one member of the family, and in that suit the decision of the High Court was affirmed on appeal by the Privy Council:—*Neelkisto*

Deb Burmono v. Beer Chunder Thakoor (12 Moore's I. A., 523; s.c., 3, B. L. R., P. C., 13). Their Lordships in that decision say (p. 534) that the suit was brought to recover "a very valuable zamindari, being that part of the royal possession of the Rajah of Tipperah which lies within the jurisdiction of the British Crown. The Rajah of Tipperah, though in respect of these lands subject to the laws and Courts of British India, is, in fact, an independent prince with a considerable territory known as the Tipperah Hills, and as the title to the zamindari and to the Raj is the same, the dispute respecting the former involves a question of the right of the succession to the *musnad* or throne of the independent principality." Beer Chunder could [539] not have raised the question of jurisdiction in that suit, as that would have been a breach of faith. Independent Tipperah had recognized the paramount power of the Nawab of Moorshedabad and afterwards of the British Empire. In litigation from the year 1809 the British Government had refused to recognize any one as Rajah until the title was tried in British India, and consequently the Rajah was obliged to sue or to be sued in order to establish his title. He could not therefore plead he was a sovereign, because the Government would not recognize him, and the suit was for possession of British land; but he could have pleaded he was a Rajah, and that he could not be sued and he took that objection, but MACPHERSON and MORRIS, JJ., held in *Raj Kumar Nobodeep Chunder Deb Burmono v. Rajah Beer Chunder Manikkya Bahadoor* (25 W. R. 404) that the title to the throne followed the zamindari, and consequently that the Rajah would cease to be such by their decision against him as to the zamindari. But there was another decision to the contrary in the case of *Maharajah Beer Chunder Manikkya Bahadoor v. Ishan Chunder Thakoor* (3 C. L. R., 417).

The *Hutwa* case, *Beer Pertab Sahee v. Maharajah Rajender Pertab Sahee* (12 Moore's I. A. 1) is in point.

In this case the zamindari is part of the royal possessions of the Rajah of Tipperah and follows the Raj. The Privy Council seem to think that being *de facto* Rajah is enough—*Neelkisto Deb Burmono v. Beer Chunder Thakoor* (25 W. R., 404). If the King of France were to hold lands in England the Courts there could not try his right to be King of France—*Lachmi Narain v. Rajah Partab Sing* (I. L. R., 2 All., 1)—(see Mr. Evans' argument at p. 4.)

First, then, Beer Chunder could take objections to jurisdiction, for he is an independent sovereign, and this suit does not concern land (Vattell's Law of Nations, edn. 1797, Bk. 1, ch. 1; Wheaton's International Law, pp. 58 and 69). Moreover, the Government has deputed a Political Agent to Tipperah, a course which shews that the Rajah is independent, and that he is so is also admitted by the plaintiff by the mere fact that he has applied to the Government for leave to institute this suit. The Court [540] cannot decide as to who is entitled to the Raj after a Rajah's death, and if it had jurisdiction it should not make such a declaration.

The case of *Urjun Manick Thakoor v. Ramgunga Deo* (2 Sel. Rep. (n. ed.) 177) shews that the barra thakoor is not entitled to be juboraj. The appointment of juboraj is a sovereign act. If Chuckla Rowshanabad was sold for arrears of Government revenue the purchaser could not appoint a juboraj. The subject-matter of a suit is that which you seek to recover. Here it is not land, but (1) a declaration, and (2) maintenance, and that does not make the suit one for immoveable property and does not bring it within the provisions of s. 433 of Act X of 1877 which section does not comprise interests in immoveable property. By International Law if a king sues he subjects himself to a cross

suit. Clause 3of s. 433 applies to cases when the proceeding is *in rem* where it would be immaterial whether the real owner was a party or not as in an ejectment suit in England. Where the property itself is proceeded against the dignity of the Rajah is not affected, as a suit for land could always be brought against an agent.

With respect to the claim for maintenance it is said to be a charge, but it is no more a charge than debts or the expenses of investing a boy with the Brahminical thread are. He must establish his right before he can get a charge—*Tareeny Churn Bonnerjee v. Maitland* (11 Moore's I. A., 317). Debts are a first charge on an inheritance—*Greender Chunder Ghosh v. Mackintosh* (I. L. R. 4 Cal., 897). It makes no difference to a charge for debts whether the debtor is dead or alive. A Hindu widow cannot claim a charge for maintenance against her brother-in-law—*Massammul Bheeloo v. Phool Chund* [3 Sel. Rep. (n. ed.) 298] ; *Lakshman Ram Chandra v. Sarasvatibai* (12 Bom. H. C., 69) ; *Bhyrub Chandra Ghosh v. Nabo Chunder Guho* (5 W. R., 111). The decision of WHITE and MORRIS, JJ., in *Beer Chunder Manikkya v. Chandressur Mohadebva* (judgment delivered 9th July 1879) does not touch the question. The Courts here are Courts of limited jurisdiction. In the Hutwa case—*Beer Pertab Sahoe v. Moharajah Rajendra Persad Sahoe* (12 Moore's I. A. 1) the property was joint. In *Ramgunga* [541] *Deo v. Doorgamonee Juboraj* [1 Sel. Rep. (n. ed.) 361] nothing was said as to a charge. See also *Neelkisto Deb Burmono v. Beer Chunder Thakoor* (12 Moore's I. A., 523 ; s.c., 3, B. L. R. P. C. 13).

As to the position of Tipperah, (see Aitchison's Treaties, Vol. I. Ed. 1876) Aitchison uses "appointed" in the sense of "recognized." See also Hunter, pp. 469 and 515.

A Political Agent is appointed only for Independent States. Rowshanabad was part of the royal possession of Tipperah. A portion of the old Raj was lost to the Rajahs of Tipperah, and when it came under the British Government and the settlement of the zamindari was effected with the Rajah or the land became subject to the Courts of this country, but it cannot be separated from the Raj. The only title decided by the Civil Courts is that of Rajah. The zamindari is part of the Raj, although the Rajah cannot exercise civil jurisdiction over it. The Rajah is not concerned to dispute the existence of a paramount power which has the right to decide questions of disputed succession. When the title is once confirmed no further decision can be given as to the title. The Governor-General in Council would not be bound to follow the decision of the Courts—*Duke of Brunswick v. The King of Hanover* (6 Beav. 1 ; s.c., 2 H. L. C. 1) ; Westlake's International Law, pp. 56, 62, 67, 69, 78 and 119 : the Succession Regulation of 1800.

How is the defendant subject to the jurisdiction of this Court as to his being declared juboraj ? If he was a resident within the jurisdiction he could not on that ground be sued as to the appointment of juboraj—*The East India Company v. Syed Ally* (7 Moore's I. A., 555). The plaintiff cannot get relief because he must first get the appointment of juboraj set aside, which appointment was a sovereign act. The fact that there is land in the jurisdiction makes no difference—*The Charkieh* (L. R., 4 Ad. & E., 59 cf., p. 97 ; s.c., 42 L. J. P. and M. 17) ; *The Parlement Belge* (L. R. 5 P. D., 197) ; *Smith v. Weyuelin* (L. R. 8 Eq. 198 cf., p. 206). If the land is public land of the estate you cannot reach it at all—*Doss v. Secretary of State for India in Council* (L. R., 19 Eq., 509) ; *The City of Berne v. Bank of England* (9 Ves., 347) ; *Lachmi* [542] *Narain v. Rajah Partap Singh* (I. L. R., 2 All., 1) ; *Ladkucarbai v. Ghoelshri Sarsungji Pratabsangi* (7. Bom. H. C. O. C. 150).

As to maintenance any declaration in *Ramgunga Deo v. Doorgamonee Juboraj* [1 Sel. Rep. (n. ed.) 361], as to the rights of the other members of the family would be an *obiter dictum*, for the first Court had ordered that the property should be divided amongst the heirs. We do not deny that the Rajah in possession is liable to maintain the other members of the family, but the amount of maintenance is a matter entirely within his discretion. Regulation X of 1800 has nothing to do with the zamindari, and Regulation XI of 1793 does not apply—*Gunesb Dutt Singh v. Moharajah Moheshkur Sing* (6 Moore's I. A., 164); *Beer Pertab Sahee v. Maharajah Rajendra Pertab Sahee* (12 Moore's I. A., 1). The Raj comes to the sole heir, so the plaintiff cannot have a charge on the property not having any interest in it. There is no case to shew that maintenance is a charge (*cf.* Mayne's Hindu Law, ss. 374 and 388), and if it were a charge it would bind everybody. A widow's maintenance is not a charge—*Srimati Bhagabati Dassi v. Kanai Lal Mitra* (8 B.L.R., 225); *Lakshman Ramchundra v. Sarasvatibai* (12 Bom. H.C., 69); *Adhiramnee Narain Coomary v. Shona Malee Pat Mahadai* (I. L. R., 1 Cal., 365); *Bhyrub Chunder Ghose v. Nubo Chunder Guho* (5 W. R., 111); Mayne's Hindu Law, ss. 384 and 386; Strange's Hindu Law, Vol. I, p. 166. As to the definition of the word "charge" see *Tareeny Churn Bonnerjee v. Matland* (11 Moore's I. A., 317). The Advocate-General during the course of his argument cited the case of *Lakshman Ramchundra Joshi v. Satya Bhamabai* (I. L. R., 2 Bom., 494) with reference to the question of maintenance, and also referred to Seton on Decrees, pp. 642, 825 and 1128; *Greender Chunder Ghose v. Mackintosh* (I. L. R., 4 Cal., 897); *The Secretary of State v. Kamachee Boye Sahabu* (7 Moore's I. A., 476).

Mr. Branson on the same side.—In no case before MACPHERSON, J.'s decision in *Raj Coomar Nobodeep Chunder Deb Burmoo v. Rajah* [543] *Beer Chunder Manikkya Bahadoor* (25 W. R., 401) had the Rajah been recognized before suit. The Privy Council not only abstained from saying that they had jurisdiction, but expressly stated that they treated the case as one between subject and subject. MACPHERSON, J., says that there has been a submission to the jurisdiction, and that the decision of the Courts carried with it the succession to the Raj, but in all the instances given the Rajah had not been recognised as *de jure* Rajah, and that decision established the fact that the zamindari belonged to the Rajah of Tipperah.

The plaintiff himself admits that the Rajah is a foreign prince, by the fact that he has applied for permission to sue under s. 433. As to maintenance see *Khettramoni Dasi v. Kashinath Das* (2 B.L.R., A.C. 15, *see* p. 42). A widow has a right to have her maintenance ascertained, but it cannot be charged until it has been so ascertained, and then it is only chargeable, in case there is danger to the plaintiff of losing the maintenance by the alienation of the property—*Bhagabati Dasi v. Kanailal Mitra* (8 B. L. R., 225). Can this Court ascertain maintenance paid to the other members of the royal family? Before any decree can be made and the amount fixed, an account must be taken of the property of the Rajah, and this Court cannot call on a foreign prince to submit to an account.

Mr. Pugh for Radha Kishore was proceeding to address the Court, when objection was taken that only two counsel could be heard for the appellants. The Court held that two counsel were entitled to be heard on behalf of each appellant.

Mr. Pugh.—A suit to declare a trust upon land is not a suit for land—*Bagram v. Moses* (1 Hyde, 284); *Kellie v. Fraser* (I. L. R., 2 Cal., 445); *Delhi and London Bank v. Wordi* (I. L. R., 1 Cal., 249).

Debts are not a charge on the property, but they are prior to maintenance.

Mr. Phillips (for the respondent)—The Courts of a country have jurisdiction in respect of all the territory of the country to whomsoever it may belong by private title, or in other words, the private right cannot oust the jurisdiction of the Court. The [544] zamindari, Chuckla Rowshanabad, is in British Tipperah, and within the jurisdiction of the Court of that district, and it cannot be withdrawn from that jurisdiction, on the ground that it belongs to a foreign sovereign. No part of British territory can be the public property of a foreign sovereign, and exempt from British laws. To hold otherwise would be to hold that there may be portions of the territory in which the laws of the country, to which it belongs, do not prevail, and that there might be an *imperium in imperio*—Wheaton, Int. Law, p. 160, ch. II; paras. 1, 2, 3, (164), s. 4; Westlake Int. Law, pp. 56, 62, 67 to 69, 78; Woolsey, Int. Law, p. 119. We do not dispute that the title to the zamindari goes with the Raj. It is said that the Hutwa case—*Beer Pertap Sahee v. Maharajah Rajendra Pertab Sahee* (12 Moore's I. A., 1) is analogous to this case, and that it was held there that the property be restored as belonging to the Raj.

That is true as to the course of succession, but the question there was, whether there had been a confiscation, and, if so, on what terms the property had been re-granted (*see* pp. 24, 33 and 35 of the report in Moore). The immunity of sovereigns to suits does not extend to immoveable property—*The Charkieh* (L. R., 4 Ad. & E., 59; s.c., 42, L. J. P. & M., 17); and a foreign sovereign cannot withdraw immoveable property from the jurisdiction of the Court, because no process need issue against the sovereign; and a sovereign acquiring lands acquires no immunity with regard to such lands. In that case it was held that the Khedive was not an independent power, and the Maharajah is certainly not inferior to the Khedive. The case is important as shewing that with regard to immoveable property there never was any question as to jurisdiction. The case of the *Parlement Belge* (L. R. 5 P. D. 197) lays down no rule as to immoveable property; it only refers to moveable property. [*The Advocate-General*.—Is it contended that if a sovereign held land he could be sued and called upon to answer interrogatories?] We contend that he could be sued in the same way as any private person; the cases quoted only refer to moveable property. In Wheaton, Int. Law, p. 160, the general principle is laid down that the State is supreme over all and within [545] its jurisdiction. The question here is whether the Rajah is not obliged to maintain the members of his family out of his revenues, and this must be decided according to the laws of British India. [McDONELL, J.—If the suit is one for immoveable property it can be reached under s. 433.] That is so. In the case of the *Duke of Brunswick v. The King of Hanover* (2 H. L. C., 1 *cf.*, p. 24, 26) it was held by Lord Brougham that if the foreign sovereign entered into a contract with respect to land, specific performance might be enforced by the Court, and that would be a personal suit against the sovereign. Here the process could be served on the agent in possession of the zamindari, so the personal dignity of the Rajah would not be affected. In that case also the instrument upon which the suit was brought was an instrument executed by virtue of a sovereign power.

In *Taylor v. Best* (14 C. B., 521; *cf.* p. 522) it is laid down that jurisdiction may be founded on the sovereign submitting himself to the jurisdiction, and JERVIS, J., says that where the Civil Law prevails land may be made the foundation of jurisdiction, so may goods unconnected with the office. In the *Magdalen's Steam Navigation Co. v. Martin* (2 E. & E., 94), there was no jurisdiction, as the defendant had no real property in England. If he had had real property, the Court seems to imply that he could have been sued. In *Lachmi Narain v. Rajah Partap Singh* (I. L. R., 2 All., 1) the land was outside British

India, and the question was whether the land was within the jurisdiction, not whether the Nawab of Rampur was subject to the jurisdiction. It is assumed that if the land were within British India, a suit would lie, and so that case is in our favour. In *Ladkwarbai v. Ghoel Shri Sursangji Pratabsangji* (7 Bom. H. C. O. C. 150), the British Government exercised no controlling or paramount power. They merely stopped execution of the decree, but they did not set it aside. In *Smith v. Wequelin* (L. R., 8 Eq., 198), there was no question of sovereign right; the Court merely decided that it had no jurisdiction. All the cases are in my favour to this extent that land within the jurisdiction gives jurisdiction.

The present case is governed by Act X of 1877, ss. 431, 432, 433.* [546] The Executive Government have to determine who are sovereign princes, and Government have declared that this prince is not a sovereign prince. The consent of Government has been signified to this suit being brought by the letter from the Secretary to the Bengal Government, and under Act X of 1877, s. 2, the word Government includes a local Government. The High Court cannot recognize a sovereign prince until he has been recognised by the Government.

The Rajahs of Tipperah have repeatedly sued and been sued in the British Courts, and with respect to the matters of the Raj itself. They have executed bonds and been sued upon contracts. They have had pecuniary transactions with British subjects by holding themselves out as subject to British Courts, and they have also been sued upon contracts for maintenance, and so with regard to a Rajah who uses the Courts as a subject, it was only natural that the Government should refuse him the immunities of a sovereign.

There have been suits from the year 1880 down to the present time for the Raj, and it is now too late to raise the question of jurisdiction. The Rajah

*[Sec. 431 :—A foreign state may sue in the Courts of British

India, provided that—
When a foreign state India, provided that—
may sue.

- (a) It has been recognized by Her Majesty or the Governor-General in Council, and
- (b) the object of the suit is to enforce the private rights of the head or of the subjects of the foreign State.

The Court shall take judicial notice of the fact that a foreign state has not been recognized by Her Majesty or by the Governor-General in Council.

Sec. 432 :—Persons specially appointed by order of Government at the request of any

Persons specially appointed by Government to prosecute or defend for Princes or Chiefs. Sovereign Prince or ruling Chief, whether in Subordinate alliance with the British Government or otherwise, and whether residing within or without British India, to prosecute or defend any suit on his behalf, shall be deemed to be the recognized agents by whom appearances, acts and applications under this Code may be made or done on behalf of such Prince or Chief.

Sec. 433 :—Any such Prince or Chief, and any Ambassador or Envoy of a foreign State may, with the consent of Government certified by the signature

Suits against Sovereign Princes, etc. of one of its Secretaries (but not without such consent) be sued in any competent Court not subordinate to a District Court; such consent shall not be given unless—

- (a) the Prince, Chief, Ambassador or Envoy has instituted a suit in such Court against the person desiring to sue him, or
- (b) the Prince, Chief, Ambassador or Envoy by himself or another trades within the local limits of the jurisdiction of such Court; or
- (c) the subject-matter of the suit is immoveable property situate within the said local limits and in the possession of the Prince, Chief, Ambassador or Envoy.

Sovereign Princes, etc., exempt from arrest.

When their property may be attached.

No such Prince, Chief, Ambassador or Envoy shall be arrested under this Code; and no decree shall be executed against the property of any such Prince, Chief, Ambassador or Envoy unless with consent of Government certified as aforesaid.]

has previous to this suit been sued for maintenance and no objection to jurisdiction was taken until in the suit before MACPHERSON, J.

In *Maharajah Beer Chunder Manikkya Bahadoor v. Ishan Chunder Thakoor* (3 C. L. R., 417), the point of jurisdiction was not decided. The Court decided that the grant was invalid, as it was governed by the law of Tipperah, and, therefore, resumable. The grant was made out of the revenues of Tipperah, and the contract was made in Tipperah. The Court could have no jurisdiction unless part of the cause of action arose in British India. [McDONELL, J. Mr. Cockerell's letter does not seem to have been accurately worded, as there is no dispute as to his being a sovereign chief of Hill Tipperah.] It is not a case of independence; it is a question of immunity from suit. [*The Advocate-General*.—The letter was written in the Judicial Department, and was clearly a judicial and not a political opinion.] It was a declaration of the Rajah's status, and showed that he was not entitled to any immunities. He is spoken of as an absolute prince, and has power of life and [547] death, but that does not shew that he is entitled to immunities from suits. The fact of his being a zamindar in British Territory and a subject, so far as the zamindari goes, distinguishes the case from that of European princes.

The British Courts are the Courts of the paramount power, and there is no instance in which it has been held that a feudatory could not be sued in the Courts of the paramount power.

Supposing, however, the Rajah has immunity, the suit will lie because it is one for land, the subject-matter being to obtain a charge on the immoveable property. It is only auxiliary to the claim for maintenance that a declaration as to the jukorajship is asked for, the reason being that by his exclusion from that office the plaintiff is entitled to a greater amount of maintenance; but if the Court thinks it can't make such declaration, the decree can exclude it.

We contend that the custom of the family is that the Rajah shall maintain the family of the deceased Rajah from the income of the zamindari. Plaintiff seeks to charge the zamindari with maintenance, therefore it is a suit for immoveable property. By s. 2, cl. 5, Act I of 1868, immoveable property includes benefit to arise out of immoveable property. We do not contend that the plaintiff has an actual charge, as it will be sufficient if he prays for a charge to be declared on the property, as the suit is then for a benefit to arise out of the property. We claim a charge and that gives jurisdiction to enquire. If there is no charge there is an end of the case. The other side relies on the case of the Hindu widow, but the Hindu widow is not in the same footing as the son, and even against the heir a widow's maintenance is a charge on the estate. Here there is a charge.

In *Ram Gunga Deo v. Doorgamoonee Jukoraj* [1 Sel. Rep. (n. ed.) 270], maintenance was a charge on the assets. In *Bhyrob Chunder Ghose v. Nub Chunder Guho* (5 W. R., 111), all that is decided is that the right of maintenance can't be attached. Under certain circumstances the claim to maintenance might ripen into a charge.—*Nilkant Chatterjee v. Peari Mohun Dass* (3 B. L. R., O. C., 7).

[548] A charge for maintenance until declared is only an equitable right and creates no interest in the land. In those Courts it is sufficient to have an equitable interest, although this would be of no avail against a *bond fide* purchaser—*Srimati Bhagabati Dasi v. Kanailal Mitter* (8 B. L. R., 225); *Mangali Debi v. Dinonath Bose* (4 B. L. R., O. C., 72). These cases shew that the widow has something more than an equitable interest. [McDONELL J.—Does not *Adhiranee Narain Coomary v. Shona Malee Pat Mahadai* (I. L. R., 1 Cal., 365), shew that the claim for maintenance is a liability and not a charge?] It

would only be a liability, if it was not charged by the decree on the property ; claims which have not ripened into charges cannot be binding on the property — *Lakhsman Ram Chandra Joshi v. Satyabhamabai* (I. L. R., 2 Bom., 494), merely decides that a purchaser for payment of a debt has a superior title to the widow's claim for maintenance. A widow if entitled to no share is entitled to a charge on the property if the heirs neglect to pay her maintenance (Mayne, p. 386), *Mussumut Khukroo Misra v. Jhoomuck Lall Dass* (15 W. R., 263) : and a charge for maintenance binds a person into whose hands the property comes — *Goluck Chauder Bose v. Rance Ohilla Dayee* (25 W. R., 100).

Mr. Philips during the course of his argument also cited the following cases on the subject of maintenance : *Mussumut Gola Koonwar v. The Collector of Benares* (4 Moore's I. A., 246) ; *Himmatsing Becharsing v. Ganpatsing* (12 Bom. H. C. 94) ; *Chhoturya Run Mardun Syn v. Sahub Parhulad Syn* (9 Moore's I. A. 82) ; *Mattasawmy Jagavera Yettappanacker v. Venkataswara Yettaya* (12 Moore's I. A., 203) ; *Rahi Gorind Valad Teja* (I. L. R., 1 Bom. 97) ; *Viramuthi Udayan v. Singaravelu* (I. L. R., 1 Mad. 306) ; *Anund Lal Sing Deo v. Maharajah Dheraj Gurrood Narain Deo* (5 Moore's I. A., 82) ; *Nilmoney Singh Deo v. Hingoo Lal Singh Deo* (I. L. R., 5 Cal., 256) ; *Beer Pertab Sahoe Maharajah Rajendra Pertab Sahoe* (12 Moore's I. A., pp. 18, 40) ; and concluded by laying down his propositions as follows :—

(1) According to International Law immovable property [549] draws with it no immunity from jurisdiction, but founds a jurisdiction against a sovereign prince.

(2) Under certain circumstances moveable property similarly founds jurisdiction.

(3) According to principles of International Law, the Rajah of Tipperah can be in no better position than the Khedive, and cannot be exempt from suits in the Courts of the paramount power.

(4) That it is unnecessary to refer to International Law, as the subject has been dealt with by the Legislature, and the defendant must prove he is a sovereign prince within the meaning of s. 433, Civil Procedure Code, and that the immunity from jurisdiction has been expressly or impliedly conceded to him by the Government. That Mr. Cockerell's letter precludes discussion on that point, but that if the question is still open for discussing the treatment of the defendant by Government, in insisting upon his trying his title to the Raj in British Courts, clearly shews that there was no intention on the part of the Government to grant him any immunity or treat him differently from an ordinary zamindar within British territory.

(5) That the conduct of the Rajah in suing and allowing himself to be sued in British Courts and never objecting, till 1878, to the jurisdiction, and in holding himself out as being subject to the jurisdiction, renders it improbable that Government would grant him any immunity.

(6) That the present suit is a suit for immoveable property within the meaning of s. 433 of the Code, and cl. 5, s. 2, of Act 1 of 1868, the object of the suit being to secure the maintenance as a charge on the zemindary.

(7) The plaintiff is entitled to maintenance, as he is excluded from inheritance for State convenience, and there can be no reason why he should be excluded from maintenance.

(8) There is evidence to show that the maintenance has always been paid out of the estate situated in British India, and we claim only as a member of the family of the late zamindar of Rowshanabad.

The Advocate-General, in reply, cited the case of *Elphin-[550]stone v. Bedree Chund* (1 Knapp., 329, see note); and was dealing with Mr. Phillips' arguments when he was stopped by the Court.

The **Judgment** of the Court (McDONELL and TOTTENHAM, JJ.), was delivered by

McDonell, J.—This is an appeal from a decree of the District Judge of Tipperah, by which the plaintiff, respondent, was declared to be entitled to maintenance from the Maharajah of Hill Tipperah at the rate of Rs. 600 per mensem and to arrears of the same from the 1st of May 1878 to the date of institution of the suit; and the decree further provided that the amount should be realized from the defendant's zamindari in British Tipperah.

The plaintiff, respondent, is Raj Coomar Nobodeep Chunder, a son of the late Maharajah of Hill Tipperah, and appointed by him to the office of kurta in the year 1862. Upon the death of this Maharajah, Ishan Chunder, he was succeeded by the present Maharajah Beer Chunder, who had been duly appointed "juboraj" by his predecessor and elder brother. In July 1874, the plaintiff made an attempt to oust him altogether. He brought a suit to recover possession of various properties held by the Maharajah in British India, upon the ground that he was the rightful heir to his father's rank and estates, and that the appointment of Beer Chunder as juboraj had been accomplished by fraud and collusion. His suit was dismissed both in the District Court and in this Court on appeal, upon the finding that Beer Chunder had been duly appointed to be juboraj, and as such had lawfully succeeded to the zamindari in British India as well as to the throne of Hill Tipperah.

Having been thus defeated in this Court on the 14th of August 1876, the plaintiff instituted this suit in March 1880. His prayer was twofold: (1), that the Court would, determining his rank, declare him entitled to take possession of the zamindari of Rowshanabad and other properties upon the death of the present Maharajah; and (2), that his maintenance be fixed at Rs. 5,000 per mensem, and be created a charge upon the said zamindari, arrears at that rate with interest being awarded to him from Assar 1278 to Maugh 1286 B. S. (June 1871 to January 1880).

[551] The rank claimed by him is specified in para. 4 of the plaint. It is that of juboraj, to which he claims to have ascended from the office of kurta through the succession of Beer Chunder to the throne, and by the death of his own brother, Brojendro Chunder, who, having been appointed barra thakoor by his father, became, the plaintiff alleges, juboraj upon the elevation of Beer Chunder; plaintiff claims thus to have become from kurta, barra thakoor and from barra thakoor, juboraj. And in para. 7 of the plaint it is alleged that the claim of the members of the Rajah's family to maintenance is a charge upon the zamindari of Chuckla, Rowshanabad and others.

With reference to the plaintiff's first prayer, to be declared juboraj, it should be mentioned that the defendant, Maharajah Beer Chunder, after being in the latter part of 1276 (1869) formally recognized and installed by the British Government, appointed in 1277 (August 1870), two of his sons to be juboraj and barra thakoor respectively, these appointments being, as he contended, vacant by the recent death of Brojendro Chunder.

The first prayer, therefore, of the present plaint practically asks to avoid the appointment of the present Maharajah's son as juboraj.

The suit was instituted only against the Maharajah, but by direction of the Court his two sons, whom he had appointed juboraj and barra thakoor, were added as defendants, and they join in this appeal.

The lower Court dismissed the first portion of the claim on the ground that it was barred by ss. 13 and 43 of the Code of Civil Procedure, and it found that the plaintiff's position as kurta gave him no right of succession to the higher positions of barra thakoor and juboraj. It, however, gave plaintiff the decree for maintenance against which, as we have above stated, the present appeal is directed.

In making this decree the Court overruled an objection taken from the first that the suit cannot be tried at all in the Courts of British India, and this question of jurisdiction is the main one with which we have to deal in this appeal.

This aspect of the case has been at great length and most completely put before us by the learned Counsel on either side, to [552] whom the Court owes acknowledgments for the able manner in which they have assisted it in arriving at a conclusion. That conclusion is that our Courts have no jurisdiction to deal with either branch of the suit, and that consequently the lower Court ought to have dismissed it altogether.

It is hardly necessary to determine, for it does not seem to be questioned in this suit, that Hill Tipperah is a Sovereign State, *Vide* Vattel's Law of Nations, Book I, Chapter I. in that it governs itself without dependence on any foreign power. It makes and administers its own laws, and the Maharajah admittedly exercises the power of life and death within his own territory.

Aitchison, in his collection of Treaties, Vol. I, p. 78, says: Independent Tipperah is not held by gift from the British Government or its predecessors, or under any title derived from it or them, never having been subjected by the Mogul.

Its acknowledgment of the British Government as the paramount power, and the nuzzar paid on the recognition by that Government of succeeding Maharajahs do not take from it the status which by the law of Nations it is entitled to hold—see Wheaton's International Law, pp. 58 and 69.

It is not contended by Mr. *Phillips* for the plaintiff, respondent, that our Courts would have any jurisdiction in a suit affecting the Raj itself, or the Maharajah in his character as such. He contends that because the zamindari Rowshanabad is within British Tipperah, and because the plaint is so framed as to rest upon this zamindari, the Court has jurisdiction over the subject-matter of the suit, and over the Maharajah, defendant, in his character as zamindar.

The *Advocate-General*, on the other hand, has contended that the Maharajah being a Sovereign Prince is not personally subject to the jurisdiction of our Courts in any suit whatever.

We are of opinion that whatever may be the merits of this contention, it is certain that the suit now before us is not of which our Courts can take cognizance.

As regards the first portion of the prayer of the suit, *viz.*, that the Court, determining the plaintiff's rank, declare him entitled to take possession of the zamindari on the death of the present Maharajah, we observe that this asks the Court to pronounce the plaintiff to be juboraj or heir apparent to the Raj; for it is only [553] as such that he could be entitled to succeed to the zamindari, and that is the rank which he specifically claims in the plaint. It is clear, however, that our Courts have no jurisdiction to decide who is juboraj of the foreign State of Hill Tipperah. It has been sometimes said that the title to the Raj follows the title to the zamindari or *vice versa*; but

this we consider is a mistake, for there are not two titles to the two estates, but the title to both is one and the same. The origin of the mistake is probably this, that the British Government has, in cases of disputed succession, abstained from recognising a new Maharajah, until the Courts have determined who is entitled to the zamindari. But it is equally the fact that the Courts have determined the right to the zamindari by ascertaining who was really the jutoraj or heir to the Raj.

We further observe that for our Courts to entertain the plaintiff's suit and declare him jutoraj, would, if operative at all, have the effect of annulling the Maharajah's appointment of his own son as jutoraj ; but this appointment was an act of sovereignty performed by the Maharajah in his own territory, and as such it clearly cannot be questioned or set aside by the Courts of British India. Under no circumstances do we think that this claim could be entertained by our Courts.

The lower Court has dismissed this part of the claim on other grounds, as assuming that it had jurisdiction to entertain it. The plaintiff has also appealed against the decree in this respect, but our conclusion that there is no jurisdiction at all makes it unnecessary to consider the plaintiff's appeal.

Next, as regards the claim for maintenance, we might perhaps dispose of that too by holding that the grant of maintenance, or the withholding of it is an act of sovereignty exercised by the Maharajah with which our Courts have nothing to do ; but Mr. *Phillips* for the plaintiff, respondent, while contending that he is entitled to maintenance both against the defendant as Maharajah, and as against him as zamindar of Rowshanabad, admits that we have jurisdiction only in respect of his claim as a son of the late zamindar of Rowshanabad. We have, therefore, to consider whether we have even so much jurisdiction.

The learned *Advocate-General's* proposition is that, the defendant Maharajah being a foreign Sovereign Prince recognised by [554] the Government of British India, he cannot be sued personally in our Courts, except under the provisions of Chap. XXVIII of the Code of Civil Procedure. He cited numerous authorities to shew that the principles of International Law protected sovereigns recognised by any State from the jurisdiction of the Courts of such State. We understood Mr. *Phillips* to contend on the contrary that such immunity does not attach to a Sovereign Prince unless it be expressly conferred upon him.

In the present case, however, we think that we need not look further than to the Code of Civil Procedure. Sections 431, 432, 433 contain the provisions enacted in regard to suits by or against foreign princes. If the Maharajah defendant is such a prince or Chief as to come within the purview of these sections, then a suit can be entertained against him in our Courts only on the conditions contained in s. 433. Mr. *Phillips* contended that the onus lay upon the Maharajah of proving that he is such a prince as is contemplated by s. 433, and he submitted that any such claim had been expressly negatived by the Government in the letter of the Secretary to the Government of Bengal, dated 25th December 1878, and printed at page 18 of the paper book. In this letter it is stated that the Maharajah is not an independent ruling chief within the meaning of s. 433 of the Civil Procedure Code.

It seems to us, however, that it is for the Courts, and not for the Government, to say whether or not any particular chief or prince comes within the purview of that section. We look upon this passage as nothing more than an expression of opinion conveyed to the Judge of Tipperah, and we must add that we think it the expression of an erroneous opinion. For it has been

shewn to us that Hill Tipperah is a Sovereign State, and that the Maharajah, defendant, has been formally recognised by the British Government in India. We are, therefore, bound to hold that he is a ruling chief, and that he cannot be tried in the Courts of British India, excepting under the conditions specified in s. 433.

We may add that the same opinion was judicially expressed by a Division Bench of this Court (MITTER and MACLEAN, JJ.) on [555] the 19th of June 1878, or six months before the date of the letter in question in Regular Appeal No. 22 of 1877—*Maharajah Beer Chunder Manickya Bahadoor v. Isham Chunder Thakoor* (3 C. L. R., 417).

The plaintiff himself recognized this status of the defendant, for he applied for, and obtained permission from, the Government of Bengal to bring this suit—see copy of Resolution printed at p. 17 of the paper book.

Plaintiff must then shew that his suit falls within one of the clauses *a*, *b*, *c*, of the section. It is admitted that clauses *a* and *b* are not applicable to this case. Unless therefore clause *c* applies, that is, unless the subject-matter of the suit is immoveable property, the suit cannot be maintained at all. At first sight we should certainly not be inclined to say that a suit for a declaration of the plaintiff's status and for maintenance had for its subject-matter "immoveable property," and this would be another reason for rejecting the first portion of the suit.

As regards maintenance, however, Mr. *Phillips* referred us to the definition given of "immoveable" property in the General Clauses Act (I of 1868), which includes "benefits to arise out of land," and he ingeniously suggested that the maintenance claimed by plaintiff since he asks that it be made a charge upon the zamindari, is, in fact, immoveable property.

But we think it is impossible to contend that the plaintiff's claim to maintenance, assuming it to be a valid one, constitutes of itself a charge upon any particular property of the Maharajah. It is not pretended that were the zamindari of Rowshanabad to be sold for arrears of revenue the plaintiff would have a lien upon it, as against the purchaser, for the maintenance which he considers that he has a right to claim from the Maharajah. Of course, if the Court could give him a decree, it might order the amount decreed to be a specific charge upon the zamindari, and thus the claim might be said to be one which might ripen into a charge. But in the abstract a claim for maintenance is no more a charge on property than the expenses of marriage, or other religious ceremonies. Debts due by a deceased person stand higher than other claims upon his estate, and yet debts are no charge upon specific property unless expressly made so by bond or by a decree. [556] It is not necessary to refer particularly to the long list of cases and authorities cited with reference to this part of the case. Mr. *Mayne* gives the effect of them in his chapter on maintenance. The result of the whole is that we are satisfied that the present suit cannot be said to be one for immoveable property, and that consequently there is nothing in s. 433 which gives us jurisdiction to entertain it.

Before concluding, we should perhaps notice an argument that it is too late for the Maharajah to contend against the jurisdiction of our Courts, inasmuch as he has frequently sued and been sued in them attorning to their jurisdiction. One case is relied upon by the plaintiff in which a Division Bench of this Court (WHITE and MORRIS, JJ.) refused to allow the Maharajah to take the plea of no jurisdiction. But this was because he had not taken it in the lower Court, and only for that reason; and some of the suits in which he attorned were brought before the Maharajah had been recognized *de jure* by our Government, and when therefore no such plea on his part could have been

entertained in regard to claims in British Tipperah.

Further, it is a mistake to suppose that because the Maharajah chooses to waive his privilege in one suit he is thereby precluded from pleading it in any other. We hold, therefore, that the argument based upon previous conduct has no weight in respect of the question raised in this suit.

This being so, we must decree this appeal, and reverse the decree of the lower Court, so far as it is adverse to the defendant.

The suit is, therefore, dismissed with costs of both Courts. The defendants Nos. 1 and 2 are strictly entitled to separate costs, but under the circumstances we give but one set of costs.

This decision renders it necessary that the plaintiff's appeal No. 137 be dismissed with costs.

Appeal No. 104 allowed, and Appeal No. 137 dismissed.

NOTES.

[FOREIGN SOVEREIGN AND BRITISH COURTS—

The leading case is that of *Mighell v. Sultan of Johore* (1891) 1 Q. B. C. A. 149. The rule has been stated by Dicey in his *Conflict of Laws* (1908), second edition, pp. 195 *et seq.*

"The Court has (subject to the exceptions hereinafter mentioned) no jurisdiction to entertain an action or other proceeding against (1) any foreign sovereign; (2) any ambassador or other diplomatic agent representing a foreign sovereign and accredited to the Crown; (3) any person belonging to the suite of such ambassador or diplomatic agent. An action or proceeding against the property of any of the persons enumerated in this Rule is for the purpose of this rule, an action or proceeding against such person." The exceptions are (1) those arising by waiver and voluntary submission to jurisdiction, and (2) in the case of the members of the suit, persons engaged in trade. The C. P. C., 1908, sec. 86, contains rules on the subject the terms whereof should be fulfilled for the suit being entertained:—2 C. L. J. 163; 29 All. 379.

In 35 Cal. 777; 12 C. W. N. 777; 8 C. L. J. 1, the question arose with reference to the succession (prospectively only, it arose) of some one in Tipperah family to a piece of property in British territory. The case was thrown out on the same ground as in this case and the case of 12 M. L. A. 523 was distinguished on the ground of jurisdiction arising by voluntary submission. Mr. Justice DOSS held the suit was maintainable, but the case of *The Charkieh* (1873) L. R. 4 A. & E. 59 (120) on which he relied cannot be taken as an authority in the light of *The Parlement Belge* (1880) 5 P. D. (C. A.) 187; *The Constitution* (1879) P. D. 39. There is no distinction between 'The State' or 'the Durbar' and the Ruling Chief:—(1912) 123 M. L. J. 605; see also (1870) P. R. 51 (wife of the Rajah); (1875) P. R. 93; 10 P. L. R. 130; (1886) P. R. 51; 7 L. C. 67; 12 C. L. R. 473. The cases of 21 Bom. 351, 40 P. R. 1903 illustrate the case of jurisdiction arising by waiver.]

[557] APPELLATE CIVIL

The 31st July, 1883.

PRESENT :

MR. JUSTICE WILSON AND MR. JUSTICE MACPHERSON.

Ichamoyee Chowdhranee and others.....Defendants

versus

Prosunno Nath Chowdhri and others.....Plaintiffs.

Arbitration—Award—Application to have an award filed in Court—Private arbitration—Civil Procedure Code (Act X of 1877), ss. 525, 526.

Where an application is made under s. 525 of the Code of Civil Procedure to have an award filed in Court, and it appears to the Court, on cause shown why the award should not be filed, that there is a reasonable dispute between the parties on any of the grounds mentioned in ss. 520 or 521, the application should be dismissed.

Under s. 525† of the Code of Civil Procedure, sufficient cause may be shown by affidavit or verified petition.

Sree Ram Chowdhry v. Denobundhoo Chowdhry (1. L. R., 7 Cal., 490), and *Sashti Charan Chatterjee v. Tarak Chandra Chatterjee* (8 B. L. R., 315) referred to.

THIS was a rule to show cause why a decision of the Subordinate Judge of Pubna, in the matter of the filing of a private award under s. 525 of the Code of Civil Procedure, and dated the 30th of January 1882, should not be set aside by the High Court. The material portions of the Subordinate Judge's judgment are as follows :—

This is a suit or application under s. 525 of Act X of 1877 brought by the plaintiffs to enforce a private award made by the arbitrators Probat Chundra Sen and others, appointed under an agreement dated 25th September 1877, said to have been entered into between Ananda Nath Chowdhoree, the husband of the plaintiff No. 1 and the father of the plaintiff No. 2, and Sham Soonder Chowdhoree, the husband of the defendant Ichamoyee Chowdhranee. It was alleged that after the death of the said Sham Soonder Chowdhoree the present defendant gave her consent to the arbitration proceedings, and after the award was made by the arbitrators she acted upon it by receiving money due to her under the terms of the said award. Hence this suit. The written statement of the defendant is to the effect—(1), that the present suit is barred by limitation, inasmuch as the legal representatives of the deceased Ananda Nath Chowdhoree have not been joined as plaintiffs within the specified time; (2), that the present suit cannot proceed on an award stamped insufficiently; (3), [558] that the ekrar deed executed by Sham Soonder Chowdhoree is not binding upon his heirs, and also that the arbitrators had no authority to proceed upon the said ekrar after the death of Sham Soonder Chowdhoree; (4), that Ichamoyee Chowdhranee did not give her consent to the arbitration, and she had no power under the will of her husband to do so, and if she has given any consent that consent is not legally admissible in evidence; (5), that the

* Rule No. 463 of 1882 against the order of Baboo Jeebun Kristo Chatterjee, Subordinate Judge of Pubna and Bogra, dated the 30th January 1882.

† [Sec. 525 :—When any matter has been referred to arbitration without the intervention of a Court of Justice, and an award has been made thereon, any person interested in the award may apply to the Court of the lowest grade having jurisdiction over the matter to which the award relates, that the award be filed in Court.

The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants.

The Court shall direct notice to be given to the parties to the arbitration other than the applicant requiring them to show cause, within a time specified why the award should not be filed.]

award in question cannot be filed inasmuch as it had been made a long time after the ekhar deed, which does not mention any specified time; (6), that deceased Ananda Nath Chowdhoree acted in contravention of the ekhar deed before the arbitration began, therefore the award cannot be enforced against the defendant; (7) that the private award cannot be filed in this Court under the following grounds: [These grounds were twelve in number, and were to the effect that the arbitrators had partitioned lands which they ought not to have partitioned, and had not partitioned lands which they ought to have partitioned; that they had not carried out the provisions of the agreement in some respects, and had exceeded their powers in others; that they had examined witnesses in the absence of the defendant without giving notice; that they had been partial to the plaintiff and had given a decision against the weight of the evidence taken before them; and that the conduct of the other party in the arbitration, had been fraudulent.] The Subordinate Judge then went on to say:

The points to be determined in this case are: (1st), whether the plaintiffs are entitled to bring this suit without joining all the persons named in the will and without coming in as executor or executrix; (2nd), whether the present suit is barred by the provisions of s. 366* of Act X of 1877; (3rd), whether the ekhar deed executed by the deceased Sham Soonder will be binding against his heirs; 4th, whether the private award was made according to the provisions of s. 520 and 521 † and in equity; if so, are the plaintiffs entitled to file it in the Court? [The Subordinate Judge then discussed the evidence and came to a finding on all the issues in favour of the plaintiff.] He then went on to say:—

Under these circumstances I come to the clear conclusion that the award in question is valid in law as well as in equity, and it was acted upon by receiving the property mentioned in it by both the parties, and it can be filed in the Court of Justice.

Mr. *Evans*, Baboo *Mohini Mohun Roy* and Baboo *Issen Chunder Chucker-butty* for the Petitioners.

Mr. *Bell* and Baboo *Grija Sunker Mozoomdar* opposed the application.

The following **Judgments** were delivered by the Court (WILSON and MACPHERSON, JJ.)

[559] **Wilson, J.**—This was a rule granted under s. 622 of the Procedure Code, to show cause why an order of the Subordinate Judge of Pubna, directing an award to be filed, should not be set aside. The rule was granted upon two grounds, the first and most important of which is, in my opinion, sufficient to dispose of the case, *viz.*, “that considering the cause shown against the award the order ought not to have been made.”

* [Sec. 366. If no such application be made to the Court by any person claiming to be

Abatement where no application by representative of deceased plaintiff.

the legal representative of the deceased plaintiff, the Court may pass an order that the suit shall abate, and award to the defendant the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff;

Or the Court may, if it think proper, on the application of the defendant, and upon such terms as to costs or otherwise as it thinks fit, pass such other order as it thinks fit for bringing in the legal representative of the deceased plaintiff, or for proceeding with the suit in order to a final determination of the matter in dispute, or for both those purposes.

Explanation.—A certificate of heirship, or a certificate to collect debts does not of itself constitute the person holding it the legal representative of the deceased. But when the person holding any such certificate obtains thereby property belonging to the deceased, he may be treated as a legal representative liable in respect of such property.]

† [Sec. 521. —An award remitted under section 520 becomes void on the refusal of the arbitrators or umpire to reconsider it. But no award shall be set aside except on one of the following grounds (namely) —

(a) corruption or misconduct of the arbitrator or umpire;

(b) either party having been guilty of fraudulent concealment of any matter which he ought to have disclosed, or of wilfully misleading or deceiving the arbitrator or umpire;

(c) the award having been made after the issue of an order by the Court superseding the arbitration and restoring the suit;

and no award shall be valid unless made within the period allowed by the Court.]

The question turns upon the construction of ss. 525 and 526 of the Procedure Code, Section 525 says: "When any matter has been referred to arbitration without the intervention of a Court of Justice, and an award has been made thereon, any person interested in the award may apply to the Court of the lowest grade having jurisdiction over the matter to which the award relates, that the award be filed in Court. The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants. The Court shall direct notice to be given to the parties to the arbitration, other than the applicant, requiring them to show cause within a time specified, why the award should not be filed."

Section 529 says: "If no ground, such as is mentioned or referred to in s. 520 or 521, be shewn against the award, the Court shall order it to be filed, and such award shall then take effect as an award made under the provisions of this chapter."

In the present case differences having arisen between two brothers Ananda Nath Chowdhree and Sham Soonder Chowdhree, they entered into an agreement of reference by which they submitted thirteen specified matters to arbitration. This was on the 25th September 1877.

On the 3rd of October 1878, Sham Soonder died, leaving the present applicant his widow and executrix, and five infant sons, and she obtained probate of the will.

After Sham Soonder's death the arbitrators proceeded with the reference; and on the 30th of May 1880 they made their award. Ananda Nath applied to the Subordinate Judge to file the award under s. 525 and then died. His widow, as next friend of his minor sons, and his major son were substituted for him in the proceedings.

The present applicant presented a written statement in which [560] she contended that the award was bad on the ground that the agreement of submission did not bind the representatives of Sham Soonder; and also on grounds that, if true, showed that the award had left undecided certain of the matters referred, and had dealt with matters not referred, and was bad on the face of it, objections within the scope of s. 520. The Subordinate Judge overruled all the objections, and ordered the award to be filed. We have to say whether that order should be set aside or not.

If the words in s. 526, "no ground, such as is mentioned or referred to in s. 520 or 521, be shewn against the award," mean, 'be established to the satisfaction of the Court,' then so far as such objections are concerned, we cannot say that the Subordinate Judge was wrong in filing the award; but I think the terms of the section are complied with, and grounds are shewn, when it is shown by written statement or affidavit or other verified statement, that the award is impugned as invalid for any of the reasons contained in ss. 520 and 521, and that the Court is then bound to hold its hand, and leave the parties to their remedy by suit. This appears to me the more natural construction of the section, and it is certainly the one most in accordance with justice and convenience. I am not at all inclined to strain the language of the Statute when the effect would be to deprive the parties of their ordinary right to have their controversies (other than those which they have agreed to refer) tried by suit with a right of appeal, and compel them to submit to a summary decision without appeal.

This question has not, so far as I am aware, been actually decided; but it has on several occasions been considered by Division Benches of this Court, and the opinions expressed have been in accordance with the views I have

expressed. In *Sashti Charan Chatterjee v. Tarak Chandra Chatterjee* (8 B. L. R., 315), NORMAN, J., at page 324, LOCH, J., at page 328, and PAUL, J., at page 332 clearly express this view. In the recent case of *Sree Ram Chowdhry v. Deno Bundhoo Chowdhry* (I. L. R., 7 Cal., 490), PONTIFEX, J., at p. 492, distinctly states the law in the same way.

[561] It was pointed out in argument before us that this conclusion might introduce a different rule in the case of awards made wholly out of Court from that which must apply in the case of arbitration arising out of suits or in which the submission has been filed. It may be so; but the language used in dealing with the two cases is entirely different.

There is an additional objection to the present order, because the applicant, when before the Subordinate Judge, denied altogether that the submission was binding upon her, and s. 525 seems to me to have no application to a case in which the submission or its binding effect is in dispute.

The order of the Subordinate Judge will therefore be set aside.

Macpherson, J. -I concur in holding that the order of the Subordinate Judge should be set aside. One of the material contentions before the Subordinate Judge was that the award was not binding on Ichamoyee, the applicant before us, as she was no party to the agreement of submission to arbitration executed by her husband as one of the contracting parties, and there was nothing in the agreement to bind his representatives. Further, it was contended that she had never given any such consent to the arbitration, which commenced after her husband's death, as to make the award binding on her. The Subordinate Judge, after taking evidence, held that she had consented, and that the award was binding on her, and then after disposing of many other objections to the proceedings of the arbitrators he passed an order that the award should be filed under the provisions of s. 526. The agreement related to many matters which were to be the subject of arbitration, and included the taking of accounts and determination thereon whether any balance remained due from one party to the other. Though the agreement was executed nearly a year prior to the death of her husband, no action appears to have been taken by the arbitrators till about nine months after his death. Whether there were or were not sufficient grounds to justify the Subordinate Judge in holding that the agreement was binding on her by consent or otherwise, is a matter which we need not consider, as I think he had no power to determine the question, and in doing so exceeded the jurisdiction which he could exercise under [562] ss. 525 and 526. The power of a Court acting under these sections seems to be very limited.

They neither contemplate nor authorize a decision on disputed matters outside the award itself and the action of the arbitration as bearing on it. The construction put by this Court on the corresponding section of Act VIII of 1859, was in effect that if the Court decided disputed questions bearing on the authority of arbitrators to make an award, the decision was one from which an appeal would lie. In other words, the Court had decided a question which it was not intended it should decide finally. Act X of 1877 took away the right of appeal, and s. 526 indicated more clearly than the corresponding section of Act VIII of 1859, the grounds which might possibly be the subject of inquiry, and narrowed rather than extended the power of the Court. On this ground I would set aside the order of the Subordinate Judge. I also concur in holding that when a Court, in dealing with an application under s. 525, finds there is a *bona fide* and a reasonable dispute on any of the grounds mentioned in ss. 520, 521, it ought to hold its hand, and would be justified by the words of the section in doing so; but I hesitate to say

that when such grounds of objections are set forth in a verified petition or affidavit, the Court is to make no inquiry, or that if it does decide on evidence that no grounds exist, the decision is one with which we could interfere under s. 622.

Order set aside.

NOTES.

[FILING AWARD—OBJECTIONS—COURT'S POWER TO GO INTO THEM—

The C. P. C., 1908, Sch. II, r. 21 sets at rest the previous conflict of decisions in cases like this one and 9 Cal. 575. Sub-clause 1 thereof enacts that, "*Where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon and where no ground such as is mentioned or referred to in paragraph 14 or paragraph 15 is proved, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award.*"

Doubts were entertained under the former Code, as to whether the Courts can determine on the validity of the objections. The Legislature has explicitly overruled the interpretation of WILSON, J. at p. 560. the High Courts also took a similar view, dissenting from this case:—9 Cal. 575; 11 Cal. 166; 21 Cal. 213 F. B.; 16 Cal. 482; 6 Bom. 663; 7 Bom. 316; 20 Bom. 208; 8 All. 340; 16 All. 231; 4 Mad. 319. The contrary opinion was also held in 9 Cal. 557; 7 Cal. 490; 17 Bom. 674; 9 Bom. 254; 20 Bom. 596.

As regards the power of the High Court to determine whether there had been a valid submission, while in this case (9 Cal. at 561) and 21 Cal. 213, it was held that the Court had no such power, in the following cases it was held that the Court had such power:—25 Cal. 757 F.B.; 10 C. W. N. 601 2 C.L.J. 153; 20 Mad. 89; 17 All. 21; 28 All. 621; (1901) P. R. 84; 29 Bom. 621.]

[7 Ind. Jur. 528 : 12 C.L.R. 204]

[563] FULL BENCH REFERENCE.

The 28th February, 1883.

PRESENT :

SIR RICHARD GARTH, KNIGHT, CHIEF JUSTICE, MR. JUSTICE MITTER,
MR. JUSTICE McDONELL, MR. JUSTICE PRINSEP AND
MR. JUSTICE WILSON.

Digumber Roy Chowdhry and others.....Defendants

versus

Moti Lal Bundopadhy.....Plaintiff.*

Hindu Law—Inheritance—Bengal School of Hindu law—Sapinda—Brother's daughter's son.

According to the Bengal school of Hindu law a brother's daughter's son is a *sapinda*, and is, therefore, a preferable heir to the great-great-great-grandfather's great-great-great-grandson.

THIS case was referred to a Full Bench by Mr. Justice McDONELL and Mr. Justice FIELD, two of the Judges of the Court, on the 7th June 1882, with the following opinion:—

Field, J.—The question raised in this appeal is whether a brother's daughter's son is a preferable heir to the great-great-great-grandfather's great-great-great-grandson. That the brother's daughter's son is an heir depends upon the principle which was laid down and defined in the Full Bench case of *Gura Gobind Shah Mandal v. Anund Lal Ghose Mazumdar* (5 B. I. R., 15; s. c.,

* Full Bench Reference made by Mr. Justice MC DONELL and Mr. Justice FIELD, dated the 7th June 1882, in Appeal from Appellate Decree, No. 2445 of 1880.

13 W. R., F. B., 49). In that particular case it was the father's brother's daughter's son who was declared an heir, but the principle is the same in the case of a brother's daughter's son. That case merely decided that such a son is an heir. It left undetermined the further question—what precise position is such an heir to occupy in the category of heirs. In the judgment of Mr. Justice DWARKA NATH MITTER at pages 45 and 46, this question was expressly stated to be left undetermined. On the present occasion it becomes necessary to decide this question. The doctrine of spiritual welfare must, as the law is now settled, determine the order in which any person entitled to succeed is to rank in the category of heirs. Now, in the present case referring to the genealogical tree to be found at page 10 of the paper-book, [564] Byddo Nath is the late owner. The plaintiff Moti Lal Banerjee offers a *pinda* or undivided oblation to Anund Chunder, Ram Sunker and Basdeb Roy. The deceased Byddo Nath participates in two of these *pindas*, that is, those offered to Ram Sunker and Basdeb. The defendants offer *pindas* to three persons, Ram Prosad (or Ram Kumar), Ram Sunker and Nund Kishore. They offer a *lepa* or divided offering to Bissessur Roy, Ram Bullubh Roy and Ram Bullubh Roy's father. The deceased Byddo Nath participates in two *lepas*, viz., those offered to Ram Bullubh Roy and Ram Bullubh Roy's father. The question then is reduced to this: "Is the efficacy of two *pindas* offered by a cognate superior to that of two *lepas* offered by an agnate?" It appears to us that this question ought to be answered in the affirmative; and in support of this view we may refer to paragraphs 425, 426, and 432 of Mr. Mayne's work on Hindu Law. In the last paragraph Mr. Mayne says: "The result of these rules in Bengal is, that not only do all the *bandhus* come in before any of the *sakulyas* or *samanodakas*, but that the *bandhus* themselves are sifted in and out among the agnates, heirs in the female line frequently taking before very near *sapindas* in the direct male line, on the principle of superior religious efficacy. In fact, if the test of religious efficacy is once admitted, no other arrangement would be logically possible." To the same purport are para. 5, s. 1, chap. XI of the Dayabhaga; and the passages to be found at pages 763, 771, 772 and 830 of the Principles of the Hindu Law of Inheritance by Baboo Raj Cumar Sarvadhicari, and the page 276 of the second edition of Baboo Shyama Churn Sircar's work on Hindu law. We think that these passages establish, first, that the plaintiff in this case is a *sapinda* of the deceased Byddo Nath; and, secondly, that no *sapinda* even a *sapinda* whose *sapindaship* depends upon cognate relationship, is an inferior heir to any *sakulya*. We do not overlook the fact that a *pinda* offered by a cognate is of secondary importance as compared with a *pinda* offered by an agnate; but we think it clear that a *pinda* offered by a cognate is of superior efficacy to any *lepa* or divided offering by an agnate. The case of *Kashee Mohun Roy v. Raj Gobind* [565] *Chuckerbutty* (24 W. R., 229) is opposed to the view which we take. In that case the plaintiff Raj Gobind Chuckerbutty offered one *pinda* or undivided offering in which the deceased Bharut participated, viz., that which was offered to the common ancestor Ram Sunker. The defendant Kripa Nath Bagchi offered one *lepa* or divided offering to the same Ram Sunker Bagchi. In that case, therefore, the question really was whether a *pinda* offered by a cognate was of superior efficacy to a *lepa* or divided offering offered by an agnate. That case differs from the present case merely in this, that in the case which we have to decide the parties stand in different degrees of propinquity; and the number of both divided and undivided offerings is double. The decision in the case of *Kashee Mohun Roy v. Raj Gobind Chuckerbutty* (24 W. R., 229) was not based altogether upon the principle of spiritual efficacy; and it would no doubt be possible to draw a distinction between that case and the

present case on the ground that in that case the relationship of the contending parties to the deceased was different from the similar relationship of the parties in the present case : and that, therefore, much of the reasoning upon which the decision in that case was based would not be applicable to the case which we have to decide. We think, however, that the true test is that of spiritual efficacy ; and, tried by this test, the cases are exactly analogous. As the question is one of some doubt and is of considerable importance to the Hindu community, we think that it will be better to refer it to a Full Bench. We therefore refer the following question to a Full Bench : "Is a cognate *sapinda* a preferable heir to an agnate *sakulya*."

Baboo *Rash Behary Ghose*, Baboo *Golap Chunder Sircar*, Baboo *Hem Chunder Banerjee*, Baboo *Bipro Dass Mookerjee* and Baboo *Umakali Mookerjee*, for the Appellants.

When the Appellants' case was opened, Mr. Justice MITTER said : "Is not the question settled by Dayabhaga, XI, 6, 20?"

Baboo *Rash Behary Ghose*—See Sarvadhicari's Principles of Inheritance, p. 857—"The spiritual benefit conferred by the plaintiff is of superior efficacy—Dayabhaga, XI, 1, 4 ; XI, 2, 27.

[566] Baboo *Golap Chunder Sircar* on the same side :—Dayabhaga, XI, 6, 20, does not include a brother's daughter's son, for he does not offer three oblations in which the deceased participates, Dayatattwa, XI, 78 ; Dayabhaga, XI, 6, 9. Fifth in descent being excluded, the brother's daughter's son is excluded. Srikrishna's Dayakrama Sangraha has not been followed—*Gobind Proshad Talookdar v. Mohesh Chunder Surma Ghuttuck* (15 B. L. R., 35 ; s.c., 23 W. R., 117). See also Dayabhaga, XI, 230 ; XI, 6, 29, 33.

Baboo *Guru Dass Banerji* and Baboo *Saroda Prosunno Roy* for the Respondent.

The Judgment of the Full Bench was delivered by

Mitter, J.—We are of opinion that according to the Hindu law current in the Lower Provinces of Bengal a brother's daughter's son is a preferable heir to the great-great-grandfather's great-great-grandson.

In the Full Bench decision in *Guru Gobind Shaha Mandal v. Anund Lal Ghose Mazumdar* (5 B. L. R., 15 ; s.c., 13 W. R., F. B., 49), Mr. Justice DWARKANATH MITTER was of opinion that a cognate of this description is a *sapinda*, as defined in the Dayabhaga. A brother's daughter's son offers two *pindas* or undivided oblations to the father and the grand father of the deceased in which he participates. Whereas the great-great-grandfather's great-great-grandson is not connected with the deceased through the medium of undivided oblations. He is a *sakulya* or an agnate, connected with the deceased through the medium of divided oblations. Therefore, the competition in this case is between a cognate who is a *sapinda* and an agnate who is a *sakulya*. According to the Dayabhaga, it does not admit of any doubt, that a *sapinda*, though a cognate, is a preferable heir to a *sakulya* agnate. The following passages of the Dayabhaga are clear upon this point :—

"The order of succession then must be understood in this manner : On failure of the father's daughter's son or other person who is a giver of three oblations (presented to the father, etc.), which the deceased shares or which he was bound to offer, [567] the succession devolves in the next place on the maternal uncle and others, (namely, his son and grandson)"—Chap. XV, s. 6, para. 20.

But on failure of kin in this degree, the distant kinsman (*sakulya*) is successor. For Manu says : "Then, on failure of such kindred the distant

kinsman shall be the heir, or the spiritual preceptor or the pupil." The distant kinsman (*sakulya*) is one who shares a divided oblation (s. I, § 37) as the grandson's grandson or other descendant within three degrees reckoned from him, or as the offspring of the grandfather's grandfather or other remote ancestor," paragraph 21.

But it has been contended that the question referred to the Full Bench in the case cited above being whether a father's brother's daughter's son is entitled to be recognized as an heir according to the Hindu law current in the Bengal school, it is binding upon us upon that question only ; that we are not concluded by the grounds upon which it was based ; and that we are competent to reconsider them. But this contention is not sound. The Full Bench decided that a father's brother's daughter's son is an heir *because he is a sapinda*. If we are to follow this decision, we must hold that a father's brother's daughter's son or any other cognate conferring similar spiritual benefits upon the deceased is a *sapinda*. It is to be further borne in mind that the heritable rights of such cognates either must be based upon their *sapinda* relationship, or they would not be in the line of heirs at all.

"If the right of the father's son, and of the maternal uncle and the rest," says the author of the *Dayabhaga* in para. 28, s. 6, Chap. XI, "be not considered as intended by the text, 'To three must libations of water be made, etc.,' they would have no right of succession since they have not a place among distant kinsmen and others whose order of succession is specified."

Therefore, unless we decline to follow the Full Bench decision in *Guru Gobind Shaha Mandal v. Anund Lal Ghose Mazumdar* (5 B. L. R., 15 ; s.c., 13 W. R., F. B., 49) we must hold that a brother's daughter's son is a *sapinda*, and therefore a preferable heir to the great-great-great-grandfather's great-great-great-grandson.

[568] The learned Judges who have referred this question to a Full Bench are also of this opinion. The reference was made in consequence of a contrary ruling in *Kashee Mohun Roy v. Raj Gobind Chuckerbutty* (24 W. R., 229). It appears to us that in that case the learned Judges held that a *sakulya* relative was a preferable heir to a cognate *sapinda*. That decision is therefore clearly opposed to the rule of law laid down by the author of the *Dayabhaga* in the passages cited above.

The result is that this appeal fails. It is accordingly dismissed with costs.

Appeal dismissed.

NOTES.

[DAYABHAGA LAW—SAPINDAS.—

Although entitled as *sapinda* to take before the *sakulya* as laid down in this case, the brother's daughter's son being a cognate *sapinda* takes after agnate *sapindas* : 15 Cal. 780.

There is also the further rule that *sapindas ex parte paterna* are to be preferred to *sapindas ex parte materna* :—26 Cal. 285 re-affirmed in (1913) 18 C. W. N. 477.

See also (1912) 16 C. L. J. 342 where it was held that the preference of the cognate *sapinda* to the *sakulya* was too long settled to be now disturbed.]

[9 Cal. 568]

APPELLATE CIVIL.

The 24th January, 1883.

PRESENT :

MR. JUSTICE CUNNINGHAM AND MR. JUSTICE MACLEAN.

Mohun Chunder Kurmokar and another.....Decree-holders
versus

Mohes Chunder Kurmokar and others.....Judgment-debtors.*

*Limitation—Act XV of 1877, sch. II, art. 179—Execution of decree—
Partition—Joint decree—Decree for partition.*

A consent decree for partition made between three parties contained a provision that if the plaintiffs should not have the property partitioned within two months from the date thereof, any one of the other parties to the suit might obtain partition by executing the decree. One of the parties sued out execution and obtained partition and possession of his own share. More than three years after the date of the decree, but less than three years from the date of the application just mentioned, another of the parties applied for partition under the decree.

Held, that the application was not barred by limitation under the provisions of the Limitation Act, Act XV of 1877, Sch. II, Art. 179, cl. 3, exp. 1.

THE facts of this case are stated as follows in the judgment appealed from: "The parties in this case were originally [569] plaintiffs and defendants in a partition suit, which was decided in accordance with the terms of a compromise on the 30th of January 1877. The decree showed that each of three sets into which the owners of the whole property were divided, was entitled to one-third of the property in suit, and it was decreed that if the plaintiffs did not have the partition of the lands carried out within the two months, any one of the parties, whether plaintiff or defendant, might 'execute the decree and take possession after partition.' The owners of one-third accordingly executing the decree obtained their share: then some four years after the date of the decree, another set, the respondents 1 and 2, applied for separation of their share: thereupon certain of the defendants pleaded that this second application was barred by limitation, the execution by one set of the owners not being a proceeding which kept alive the decree of all. The Munsif found that the application for execution of the first set of proprietors prevented the decree being barred. The reason given by him is that the decree was one which should be executed with reference to all the shares on the application of one of the parties, but, inasmuch as one set of proprietors had already succeeded in obtaining a separation of their one-third share, the Munsif seems to have understood that his interpretation of the decree could not be acted on so long as the previous execution proceedings were not impugned, and he thereupon passed an order which was clearly *ultra vires*, namely, that the entire property should now be partitioned amongst all the shareholders. The present applicants for execution advanced no such claim as that the lands already separated should again be united with the lands of the other two shares and a fresh partition carried out; but manifestly the first execution proceedings were an obstacle which would have to be surmounted somehow before the present application could be granted. As the matter stood

* Appeal from Appellate Order No. 316 of 1881, against the order of F. W. D. Peterson, Esq., Judge of Jessore, dated the 12th July 1882, reversing the order of Baboo Monmoth Nath Chatterjee; First Munsiff of Baghat, dated the 20th May 1882.

the successful execution of a fraction of the decree was for all practical purposes equivalent to three decrees, and, if so, the execution of a separate portion of the decree by those entitled to that portion could not keep alive the decree with reference to the other portion in which the first applicants for execution had no interest." The Subordinate Judge then cited and distinguished the case of [570] *Sheikh Khoodshed Hossein v. Nubee Fatima* (I. L. R., 3 Cal. 551), and allowed the appeal with costs.

Thereupon an appeal was preferred to the High Court, on the ground that the Subordinate Judge was wrong in holding that the decree was barred by limitation.

Bahoo *Taruk Nath Palit* and Baboo *Baikant Nath Doss* for the Appellants.
Baboo *Troglukha Nath Mittra* for the Respondents.

The **Judgment** of the Court (CUNNINGHAM and MACLEAN, JJ.) was delivered by

Cunningham, J.—In this case there was a decree on compromise on the 30th January 1877, by which the parties were declared to be entitled to a partition, and it was ordered that, if the plaintiffs did not have the partition of the lands carried out within two months, any one of the parties, plaintiffs or defendants, might execute the decree and take possession after partition. The partition was not carried out forthwith, and an application was made by some of the plaintiffs to have the partition effected, and on that application, without dividing the entire property, one-third portion was separated. On the 15th March 1882 the present applicants applied for partition of the rest of the properties, that is, of the remaining two-thirds which were not partitioned. The question we have now to decide is, whether that application being made more than three years after the decree of the 30th January 1877 is kept alive by the application of some of the plaintiffs in January 1880. The lower Appellate Court has considered that it is not, inasmuch as the decree must be regarded as practically a separate decree in the interest of each of the parties. We are unable to concur in that view; we think on the whole that the proper view to be taken of the decree is that it was a joint decree, within the meaning of the second part of the explanation to Article 179 of the second schedule of the Limitation Act. We consider, therefore, that the application is not barred by limitation.

The Munsif in passing orders on the application directed that the whole of the property should be partitioned, thus re-opening the [571] proceedings of January 1880. We concur with the lower Court in thinking that in doing this he was going beyond what the applicants had asked for. We think that the proper order to pass in the case is that the execution should now issue as prayed by the applicants. The present appeal must be admitted with costs.

Appeal allowed.

NOTES.

[See also (1897) 22nd Bom. 998 (1001).]

[9 Cal. 571 : 11 C.L.R. 386]
APPELLATE CIVIL.

The 26th July, 1882.

PRESENT :

MR. JUSTICE FIELD AND MR. JUSTICE NORRIS.

Uma Sunkur Sirkar.....Defendant

versus

Tarini Chunder Singh.....Plaintiff.*

*Kabuliat, Construction of—Abatement of rent for land acquired
by Government for public purposes.*

In a suit for rent by a zamindar against a patnidar, the latter claimed abatement of the rent on the ground that part of the land included in the patni tenure had been acquired by the Government for public purposes.

The kabuliat executed by the patnidar contained a provision to the effect that, if any of the land settled should be taken up by Government for public purposes, the zamindar and the patnidar should divide and take in equal shares the compensation money, and a further provision to the effect that the patnidar should "make no objection on the score of diluvion or any other cause to pay the rent fixed or reserved by this kabuliat."

Held, that the patnidar was entitled to abatement of the rent.

IN this suit the plaintiff (zamindar) sued the defendant (patnidar) for rent calculated at the full rate fixed by the patni settlement. The defendant's claim for abatement having been rejected by both the lower Courts, the defendant appealed to the High Court.

Baboo Kashi Kant Sen for the Appellant.

Baboo Bhowany Churn Dutt for the Respondent.

The following **Judgments** were delivered :—

Field, J.—The question in this case is concerned with the construction of a patni kabuliat.

Some land included in the patni was taken up by Government [572] for public purposes, and the patnidar now claims abatement of rent from the zamindar in respect of the land so taken. The contention of the zamindar is that the patnidar is, by an express covenant contained in the patni kabuliat, debarred from making any such claim for abatement. The patni kabuliat first contains an agreement to the following effect: that if land be taken up by Government for a railway, a ferry fund or other purposes, the zamindar and the patnidar shall divide the compensation paid by Government in respect of such land, each receiving one moiety. There is then a further clause which may be roughly translated as follows:— "I shall make no objection on the score of diluvion or any other cause to pay the rent fixed or reserved by this kabuliat." I propose to construe this second clause first; and the question which I have to decide is, whether the taking of land for public purposes by Government is a cause of the same kind as diluvion. If this question is to be answered in the affirmative, then this particular clause in the kabuliat precludes the patnidar from claiming abatement of rent. It appears to me that the taking of land by Government for a public purpose is not a cause of the same nature as diluvion; and for this reason. When land is washed away by the action of the river,

Appeal from Appellate Decree No. 478 of 1881 against the decree of Baboo Amrito Lall Chatterjee, Subordinate Judge of Nuddea, dated the 29th December 1880, affirming the decree of Baboo Bahari Lal Banerjee, Second Munsif of Kooshtoa, dated the 1st August 1879.

the thing itself out of which the rent issues is destroyed, certainly for a time, although it is quite possible that by the action of the same river there may be a re-formation. But in the case of a re-formation the custom of this country is, that where abatement has been allowed for diluvion, enhancement is claimable for alluvion. When land is taken up by Government, the thing itself out of which the rent issues is not destroyed; it continues to exist and the Government pays what must be taken to be the market value of the land at the particular time. It, therefore, appears to me that it is impossible to say that the taking of land by Government for public purposes is a cause *ejusdem generis* (of the same kind) with diluvion. This disposes of the second clause.

I now proceed to deal with the first clause. As to the meaning of this clause there can be no possible doubt. The parties agreed that the zamindar should receive one moiety of the compensation, and the patnidar the other moiety. There is no express covenant as to whether there shall be an abatement of rent or not. [573] We have then to consider whether it is equitable that the zamindar having received a portion of the compensation money, in other words, having received to a certain extent the value of the annuity which he has reserved out of the land demised by the patni lease, should be entitled to continue to receive the whole of that annuity without diminution. It appears to me that this would not be equitable; and that where the zamindar receives a portion of the compensation money, it is reasonable that he should grant an abatement in the patni rent to the patnidar. I take it that the stipulation in the patni kabuliat was intended morely to be a solution of a question which constantly arises in compensation cases, and which it is extremely difficult to decide without a measurement of the whole area of the patni tenure; in other words, that it was intended to settle, as between the zamindar and the patnidar, the principle upon which the compensation for land taken up by Government for public purposes should be apportioned between the parties. In many cases the patnidar's interest is of more value than the zamindar's interest, and there are probably few cases in which the zamindari interest would exceed the value of the patni interest. I take it therefore that this stipulation, that the parties should divide the compensation money in equal moieties, is an agreement between them merely as to the apportionment of the compensation, and that it was not intended to lay down any rule between these parties as to abatement of rent, which must be taken to be left to the general law of the country; and I think that as the patindar has suffered a diminution of the area of the thing demised to him, he is entitled to an abatement of the patni rent payable by him. The case must therefore go back to the Court of First Instance in order that that Court may decide what is a reasonable abatement under the circumstances. The costs of all Courts will abide the result.

Norris, J.—I am of the same opinion. In construing this document it cannot reasonably be held that the taking of part of the land by the Government for the purposes of a railway is *ejusdem generis* with land abating or increasing by reason of diluvion and alluvion, or, in other words, by the act of God; and I am strengthened in coming to this conclusion when it is manifest that there [574] was present before the minds of the parties, at the time the patni settlement was granted by the plaintiff, the fact that Government was likely to take a portion of the land included in the settlement for the purposes of a railway; and if the parties intended that there should be no abatement of rent when Government exercised their powers, in addition to making an express provision for the distribution of the compensation money, they would have further stated that there would be no abatement of rent. I am of opinion that the

true construction of this document is that the parties intended by an arrangement between themselves, to arrive at a conclusion, as to how the compensation money paid by Government should be divided between the parties. The relation of zamindar and patnidar may be taken as that of lessor and lessee. The lessee in 99 cases out of 100 has a beneficial occupation, and in so far as he has the beneficial occupation, he is entitled, when turned out of a part of his holding, to be compensated for the loss he suffers by reason of such eviction. The zamindar also, who answers to the lessor or free-holder, is entitled to be paid for the land actually taken, and instead of calling into play some abstruse method of calculation, the parties agreed as to the proportions in which the lessee should be compensated for the loss of his leasehold interest in the land, and the zamindar for his freehold interest. After the question of compensation has been determined, there still remains the question of the quantum of abatement in the rent which the lessor should allow the lessee. In England a machinery is provided. In the Lands Clauses Act there exists a machinery for the settlement of the abatement. It is a matter of calculation, and if the parties cannot agree, provision is made for the settlement of the amount by justice. No such machinery exists in this country, and I am therefore of opinion that the case must be remanded as directed by my learned brother.

Appeal allowed and case remanded.

[575] APPELLATE CIVIL.

The 17th January, 1883.

PRESENT:

MR. JUSTICE MITTER AND MR. JUSTICE O'KINEALY.

In the matter of the Petition of Dutto Singh and others.*

Dutto Singh and others

versus

Dosad Bahadur Singh.

Arbitration—Award—Time to file an award—Limitation—Limitation Act (XV of 1877), sch. II, cl. 176—Civil Procedure Code, 1877, ss. 525—Powers of Court—Cause shown against filing award, validity of—Powers of arbitrators—Review of award.

Where an award was made and signed by the arbitrators on the 5th of August 1881, but was not delivered to the parties till the 13th of September following, *semble*, that an application to file the award, made on the 25th of February 1882, under the provisions of s. 525 of the Code of Civil Procedure, was not barred by limitation. It is clearly the intention of the Legislature that a party to an arbitration should have six months to enforce the award under s. 525 of the Code of Civil Procedure, from the time when he is in a position to enforce it.

* Rules Nos. 1038 and 1202 of 1882, against the order of Maulvi Mahomed Nooral Hosain, Munsiff of Tajpore, dated the 30th June 1882.

Under ss. 525 and 526 of the Code of Civil Procedure, the Court has full power to enter into the question of the sufficiency of the cause shown against the filing in Court of an award.

Dandekar v. Dandekars (I. L. R., 6 Bom., 663) followed; *Ichamoyee Chowdhranee v. Prosunno Nath Chowdhri* (*ante*, p. 557) dissented from.

After an award has been made and handed to the parties the functions of the arbitrators cease. They have no power afterwards to deal with an application for review of their decision.

IN this case it appeared that Dutto Singh and others (hereafter spoken of as Dutto Singh) agreed to refer to arbitration certain disputes which they had with Dosad Bahadur Singh and others (hereafter spoken of as Dosad Bahadur Singh). The arbitrators made their award on the 5th of August 1881 in favour of Dosad Bahadur Singh, in consequence of which the opposite party applied to the arbitrators for a review of their decision on the 16th of August 1881. Pending the consideration of this application by the arbitrators, and on the 28th of November 1881 Dosad Bahadur Singh applied to the Court of the Munsiff of Tajpore in Tirhoot under s. 525 of the Civil Procedure Code to have the award filed in Court. Dutto Singh having been called upon to show cause, objected that the arbitrators had not yet passed any [576] order on his application for review, and on this ground the application to have the award filed in Court was dismissed on the 9th of January 1882.

On the 17th of January 1882, the arbitrators rejected Dutto Singh's application for review, and on the 25th of February 1882, Dosad Bahadur Singh made another application to have the award filed in Court. Dutto Singh showed cause on the ground, amongst others, that the application for review had been improperly rejected. On the 30th of June 1882, the Munsiff remitted the case to the arbitrators on the ground that the application for review had been improperly rejected.

Rule No. 1033 of 1882.—On the 22nd of August 1882, Dutto Singh applied to the High Court for a rule calling upon Dosad Bahadur Singh to show cause why the Munsiff's order of the 30th of June should not be set aside on the following grounds: (1) that the application to have the award filed in Court was barred by limitation; (2) that the Munsiff had no jurisdiction to make the order objected to; (3) that the arbitrators having been guilty of misconduct in making the award, and in refusing the application made to them to reconsider it, the Munsiff should have refused to interfere in any way and should have simply refused to file the award; (4) that the award should have been set aside under the provisions of s. 526 of the Civil Procedure Code, or the parties left to a civil suit.

Rule 1202 of 1882.—After the previous rule had been issued Dosad Bahadur Singh applied to the High Court for a rule calling upon Dutto Singh to show cause why the Munsiff should not be ordered to file the award.

Both rules were heard together.

Mr. *Twidale* showed cause against Rule No. 1033, and supported Rule 1202.

Mr. *C. Gregory* showed cause against Rule 1202, and supported Rule No. 1033.

The **Judgment** of the Court (MITTER and O'KINEALY, JJ.) was delivered by

Mitter, J.—These two rules arise out of a proceeding held in the Munsiff's Court of Tajpore under the provisions of [577] ss. 525 and 526 of the Civil Procedure Code. It appears that certain matters in dispute between the parties to these two rules were referred to arbitration without the intervention of a Court of Justice. The arbitrators made their award on the 5th of August 1881; but it

was not handed over to the parties till the 13th September following. The petitioners in rule No. 1033 being dissatisfied with the award, in the meantime filed, on the 16th of August, a petition of review before the arbitrators.

While this petition of review was pending, the petitioners in Rule No. 1202 under s. 525 of the Civil Procedure Code, applied to the Munsiff of Tajpore, who had jurisdiction over the matter, to have the award filed in Court. On notice being given to the petitioners in Rule No. 1033, who were the parties to the arbitration other than the applicants under s. 525, they raised various objections, some of which undoubtedly come within the provisions of ss. 520 and 521 of the Civil Procedure Code; but the Court without determining any of them refused the application on the 9th January 1882 solely on the ground that an application for review was then pending before the arbitrators.

On the 7th January 1882, the application for review was rejected. The petitioners in Rule No. 1202 again applied to the Court on the 5th February 1882 to have the award filed in Court under s. 525. Again the parties other than the applicants, on notice being given, urged various objections, which were disposed of by the Court on the 30th June 1882.

One of the objections urged against the award being filed in Court was that the application dated the 25th February 1882 was out of time, under Art. 176* of the Limitation Act, which lays down that an application under s. 525 of the Civil Procedure Code should be made within six months from the date of the award. The Court overruled this objection on the ground that the six months should be counted from the date when the award became final, and that the award did not become final till the application for review was disposed of.

Another objection against the award was that the arbitrators were guilty of corruption. The Court overruled it, finding that this charge was not established.

But the Court, being of opinion that the application for [578] review had not been duly considered by all the arbitrators, remitted the award to them to deal with the application for review according to certain directions contained in the judgment. The petitioners in Rule No. 1202 contend that the order remitting the award is erroneous; that the Court, having regard to its finding upon the other objections, should have ordered the award to be filed in Court. The petitioners in the other rule contend that the decision of the lower Court on the question of limitation is erroneous; and that it having come to the conclusion that the proceedings of the arbitrators were not regular should have rejected the application at once.

The first question that we have to decide is, whether the application of the 25th February 1882 was barred under the provisions of Art. 176 of the Limitation Act. The order of the lower Court in this case is not appealable,

* [Art. 176 :—

Description of application.	Period of limitation.	Time from which period begins to run.
Under the Code of Civil Procedure, section 516 or 525, that an award be filed in Court.	Six months ...	The date of the award.]

and the rules were obtained under the provisions of s. 622 of the Civil Procedure Code. Supposing that the decision of the lower Court on the question of limitation is erroneous in law, it might be doubtful whether it would bring the case within the purview of s. 622 of the Civil Procedure Code. However, if it were necessary for us to decide this question, we would follow the opinion expressed by COUCH, C.J., in *Sreenath Chatterjee v. Koylash Chunder Chatterjee* (21 W. R., 248) "that the word 'date' does not mean the day written in the award, as when it was made, but the time when it is given to the parties, when it becomes an award and is handed over to them, so that they may be able to give effect to it." An award may be made and dated the day it is written and signed by the arbitrators. It may then remain in the hands of the arbitrators for more than six months. In a case like this it would be unreasonable to hold that the six months should count from the "date" written in the award.

It is clearly the intention of the Legislature that a party to an arbitration should have six months to enforce the award under s. 525 of the Civil Procedure Code from the time when he is in a position to enforce it.

It has been next urged in support of Rule No. 1033 that when objections were taken to the filing of the award in Court, [579] and when some of these objections, came within ss. 520 and 521 of the Civil Procedure Code, the lower Court should have dismissed the application under s. 526. It has been contended before us that a Court under ss. 525 and 526 cannot enter into the question of the validity of the cause shown against the filing in Court of an award; that whenever any of the grounds mentioned or referred to in s. 520 or s. 521 are alleged, the Court must refuse the application holding that sufficient cause has been shown why the award should not be filed within the meaning of s. 525 and 526. In support of this contention the case of *Ichamoyee Chowdhralee v. Prosunno Nath Chowdhri* (ante, p. 557), has been relied upon. The learned Judges who decided that case gave different reasons for their decision. No doubt the judgment of WILSON, J., fully supports this contention; but with great deference to his opinion we are unable to agree in that view. In *Dandekar v. Dandekars* (I. L. R., 6 Bom., 663), a contrary view of the ss. 525 and 526 has been taken. We do not think it necessary to go into the reasons of our decision upon this point, as we do not find that we can add anything to those given in the Bombay decision cited above. This objection must also therefore fail.

In Rule No. 1202 it has been urged that the lower Court is in error in remitting the award to the arbitrators to reconsider the application for review against it. We are of opinion that this contention is valid. After the award was made and handed over to the parties, the functions of the arbitrators ceased. They had no power afterwards to deal with any application for review.

Therefore, the ground upon which the first application was disposed of by the lower Court was erroneous. We, therefore, set aside both the orders of the 9th January and 30th June 1882, and send back the record to the lower Court to deal with the objections taken to the filing of the award according to law. We allow no costs in either of the Rules.

Orders set aside.

NOTES.

[After the award, the arbitrators become *functus officio*—33 Cal. 498; 28 All. 388; 38 Cal. 421. As regards rectification of clerical mistakes, etc., see the C.P.C. 1908, sch. II; r. 12; but this extends only to references through Courts: (1911) 14 I.C. 978.

As regards the competency of Courts to enter into and dispose of, objections to the award, see the Notes to 9 Cal. 557 *supra*.]

[==12 C.L.R. 215 : 7 Ind. Jur. 532]

[580] FULL BENCH REFERENCE.

The 28th February, 1883.

PRESENT :

SIR RICHARD GARTH, KNIGHT, CHIEF JUSTICE, MR. JUSTICE MITTER,
MR. JUSTICE McDONELL, MR. JUSTICE PRINSEP, AND
MR. JUSTICE WILSON.

Janoki Nath Mukhopadhyas.....Plaintiff

versus

Mothuranath Mukhopadhyas and others.....Defendants.*

*Hindu law—Bengal school of Hindu law—Widow's estate—Joint widows—
Partition—Alienation—Purchaser from Hindu widow.*

Where a Hindu governed by the Bengal school of Hindu law dies intestate leaving two widows his only heirs him surviving, either of those widows may sell her interest in her deceased husband's property, and the purchaser thereof is entitled to enforce a partition as against the other widow.

The partition if decreed should be effected in such a way as would not be detrimental to the future interests of the reversioners.

THE facts of the case are thus stated in the judgment of the Court of First Instance: "The plaintiff alleges that he has purchased the half share of a piece of land and a house standing thereupon, belonging to one Rajnarain Mukerji, an inhabitant of Santipur, who died intestate in August 1872, leaving two widows, Prosunomoyi and Brojo Sunduri, as his only heirs-at-law. Plaintiff's purchase was made from Brojo Sunduri, the younger widow, who sold her interest ostensibly for the purpose of providing her maintenance. The purchase-deed is dated the 10th of August 1878. This suit has been brought by the plaintiff for the enforcement of partition of the disputed premises against the senior widow as well as against four kinsmen of the deceased (his cousin's sons) who have been in possession thereof since the death of Rajnarain. The senior widow has not appeared in this case. The suit is defended only by the defendant No. 4, one of the four kinsmen mentioned above." The Munsiff dismissed the suit on the ground that the plaintiff's vendor had no power to convey her interest to the plaintiff, and that neither she nor the plaintiff as her representative was entitled to enforce partition of the joint estate as against the other widow. This decision was upheld on [581] appeal to the District Judge, and again upheld on second appeal to a single Judge of the High Court.

The arguments on which these decisions were based were to the effect that by Mitakshara law widows take a single estate, and that there can be no alienation by one without the consent of the other—*Bhugwandeon Dobey v. Myna Bacc*, (11 Moore's I. A., 487) ; *Gajapathi Nilamani v. Gajapathi Rashamani*, (I. L. R., 1 Mad., 290 ; L. R. 4 I. A., 212), unless on the ground of legal necessity ; and that the same principle was applicable to the Bengal school of Hindu law—*Amrito Lal Bose v. Rajonee Kant Mitter* (L. R., 2 I. A., 113 ; 15 B. L. R., 10) ; *Maniram Kolita v. Keri Kolitani*, (I. L. R., 5 Cal., 776). The

* Full Bench Reference made by Sir RICHARD GARTH, Knight, Chief Justice, and Mr. Justice MITTER, in Appeal under s. 15 of the Letters Patent in Appeal from Appellate Decree, No. 522 of 1882.

plaintiff appealed to a Division Bench of the High Court (GARTH, C. J., and MITTER, J.) who referred the question to a Full Bench with the following opinion :—

This is a suit for possession after partition of two plots of land and the building upon them. One of those plots exclusively belonged to one Rajnarain Mukerji, who held a half share in the other, the defendants Nos. 2, 3, 4 and 5 being entitled to the other half. Rajnarain died leaving him surviving two widows, Prosunnomoyi Dabi and Brojo Sunduri Dabi. The plaintiff's case is that he has purchased Brojo Sunduri's interest in the property in dispute under a conveyance executed by her.

The Courts below dismissed the suit upon two grounds :—

First, that the interest of Brojo Sunduri in her husband's property was not alienable ; and, *secondly*, that neither Brojo Sunduri nor the plaintiff can legally enforce a partition of her husband's estate, so as to separate her share from that of the other widow.

The learned Judge in this Court has confirmed the decision of the lower Courts upon both these grounds. It has been argued before us that the learned Judge in this Court is not right in holding that the questions raised in the case are concluded by decisions of the Privy Council. We think that there is considerable force in this contention, and as those questions are of general importance, we think it desirable to obtain an authoritative ruling [582] of a Full Bench upon them. We, therefore, refer the following questions for the decision of a Full Bench :—

First.—Whether under the Hindu law in force in Bengal, Brojo Sunduri's alienation of her interest in her husband's estate is valid ?

Second.—Whether the plaintiff or Brojo Sunduri is entitled to a partition of the property in suit ?

Baboo *Gurudas Banerji* for the Appellant.

Baboo *Srinath Das* for the Respondents.

The **Judgment** of the Full Bench was delivered by

Mitter, J.—We are of opinion that both these questions should be answered in the affirmative.

It is now settled law that the interest of a Hindu widow may be alienated by her, and that the alienation would be valid for her life. In cases of necessity, such as are mentioned in paras. 61 and 62, s. 1, chap. XI of the Dayabhaga, she may effect even an absolute alienation to enure after her death. If there were no provisions to the contrary, the right of alienation of the interest of one of two or more widows jointly inheriting their husband's estate would logically flow from these two propositions. So far as the doctrines of the Hindu law prevalent in the Lower Provinces of Bengal are concerned, there does not, in our opinion, exist any such contrary provision.

One of the cardinal points of difference between the Mitakshara and the Dayabhaga is, that according to the latter the right of alienation being a necessary incident of ownership, one of two or more joint owners can alienate his interest in the joint property without the consent of the coparceners.

The author of the Mitakshara relying upon certain texts of Vyasa, in para. 30, chap. 1, s. 1, lays down the rule of law that, "among unseparated kinsmen the consent of all is indispensably requisite, because no one is fully empowered to make an alienation since the estate is in common."

"But the texts of Vyasa," says Jimuta Vahana, "exhibiting a prohibition, Dyabhaga, p. 36. are intended to show a moral offence : since the family is dis [583] tressed by a sale, gift or other transfer, which argues a disposition in the person to make an ill use of his power as owner. They are not to invalidate the sale or other transfer.

"So likewise other texts (as this 'though immoveables or bipeds have been acquired by a man himself, a gift or sale of them *should not be made* by him, unless convening all the sons') must be interpreted in the same manner. For here the words 'should' 'be made' must necessarily be understood.

"Therefore, since it is denied that a gift or sale should be made, the precept infringed by making one ; but the gift or transfer is not null : for a fact cannot be altered by a hundred texts." (Dyabhaga, chap. II, paras. 27 to 30.)

It is clear, therefore, that according to the Dyabhaga, the right of alienation is in no way affected by the joint inheritance of two or more widows in their husband's estate.

As regards the second question, the right of enforcing partition is also clearly laid down in the *shastras*. The passage from the Mitakshara which bears upon this point is not fully translated as has been pointed out in page 451, Madras High Court Reports, Vol. III. It is to the following effect : "There (in that order) the first to inherit is the wife *patni*. *Patni* is she who is (so) made by marriage, and this from the Smriti or rule of Grammar 'Patyur-no yagna Sumyogai.' (The particle *ni* is added to *pati* to signify one who partakes in the holy sacrifice) singular number, because the class is denoted. Hence, if there be several, whether of the same or different castes they divide and take the property according to their shares."

In page 132 of the Viramitrodaya, the same rule of law is thus laid down : "First of all the *patni* or the lawfully-wedded wife takes the estate. The term *patni* itself signifies a woman espoused in the prescribed form of marriage, agreeably to the aphorism of Panini. 'The term *patni* (husband) is changed into *patni* (meaning the correlative) implying relation through a sacrifice.' The singular number (in the term *patni* in Yagisvara's text 1) implies the class ; hence if a person leaves more wives than one, then all of them, first those of the same class (with the husband), and after them those of a different class, shall take the husband's property dividing the same amongst themselves."

[584] In the Dyabhaga, there is no special provision of this nature in the chapter on the widow's succession ; but the right of partition is provided for in all cases of joint inheritance by the following passages : "First, the term partition of heritage (Dyabhaga) is expounded, and on that subject Nareda says : "Where a division of the paternal estate is instituted by sons, that becomes a topic of litigation called by the wise partition of heritage. What came from the father is 'paternal', and this signifies property arising from the father's demise. The expressions 'paternal' and 'by sons' both indicate any relation, for the term 'Partition of Heritage' is used for any division of the goods of any relation by any relatives." Chap. I, paras. 2 and 3.

"Since any one parcener is proprietor of his own wealth, partition at the choice even of a single person is thence deducible ; and concurrence of heirs, suggested as one case of partition, is recited explanatorily in the text the brethren being assembled, &c." Chap. I, para. 35.

Upon these passages it is quite clear that in the case of a joint succession of two or more widows to their husband's estate, the partition may be enforced at the instance of any one of them.

So far then as the original treatises go, they clearly recognize the right of alienation by one of two or more widows jointly succeeding to their husband's estate, and of enforcing partition of the joint heritage.

But it has been urged that these questions have been decided by the Judicial Committee of the Privy Council in a contrary way.

The first of the cases cited before us is *Bhugwandeem Dobey v. Myna Bae* (11 Moore's I. A. 487). The facts of that case are these: One Rae Dina Nath died, and his estate was inherited by his two widows, Myna Bae and Dula Bae. The latter died leaving her share of the heritage, which had been separated under an order made by a Judge in a summary suit pursuant to Act XIX of 1841, to her father and brother under a will executed by her before her death. The Judicial Committee of the Privy Council held (1) that under the Mitakshara law which governed the case, the will was invalid against the surviving widow who [585] was entitled to succeed to the property in suit by right of survivorship; (2) that there was no severance of the joint tenancy of the two widows; and (3) that there could not be a partition between them, *so as to affect the right of survivorship of either*. Their Lordships closed their judgment with the observation, that the case might have been decided upon the single ground that in a joint estate the alienation of the interest of one coparcener without the consent of the rest is invalid.

It will appear from this analysis of the decision, that it does not bear upon the questions before us. It was not decided there that there could be no partition between the widows binding between them during their lifetime; but what was held was, that any such partition would not affect the right of survivorship of either. This is all that was decided in that case upon the question of partition, and the decision in *Gajapathi Nelamani v. Gajapathi Rashamani* (I. L. R., 1 Mad. 290: I. R., 4 I. A., 212) following the first-mentioned case only reaffirmed that proposition. As regards the observations upon the question of the right of alienation, they are entirely based upon the Mitakshara law; but it has been already shown that upon this point the law, as laid down in the Mitakshara, is different from that of the Dyabhaga.

The last case cited is *Amrito Lal Bose v. Rajonee Kant Mitter* (L. R., 2 I. A., 113: 15 B. L. R., 10). This is a Bengal case, and all that it decides is, that between widows jointly succeeding to their husband's estate, as well as between daughters jointly inheriting their father's property, there is right of survivorship.

We are, therefore, of opinion that the contention that those decisions have laid down the law contrary to our opinion expressed above is not correct.

On the other hand, in *Srimati Paddamani Dasi v. Srimati Jagadamba Dasi* (6 B. L. R., 134) (which was a case of succession of two daughters), it was held that either of them was entitled to enforce partition, although such partition might not be binding on the reversioners.

[586] There remains to notice the case cited before us of *Kathaperumal v. Venkabal* (I. L. R., 2 Mad., 194); but with deference to the learned Judges who decided it, it seems to us that their decision was based upon a misapprehension of the Privy Council cases referred to above. The learned Judges were of opinion that according to those decisions there could not be *any* kind of partition between two widows jointly inheriting their husband's property. We have already shown that the judgments of the Privy Council do not go to that length.

We are, therefore, of opinion that the decisions of the lower Courts are erroneous. We accordingly reverse them, and remand the case to the Munsiff

to decide the remaining issues. We think it right to observe here that if a partition be ultimately decreed, it should be effected in such a way as would not be detrimental to the future interests of the reversioners.

NOTES.

[JOINT HOLDERS OF LIFE ESTATES—PARTITION—SURVIVORSHIP—

Such a co-sharer may alienate the property herself or the alienee may sue for partition :—12 All. 51 ; 8 C.W.N. 658 ; 31 Bom. 560—9 Bom. L.R. 1049 ; 11 Mad. 304 ; 33 All. 443. But the alienation does not affect the survivorship of the other :—1 Mad. 290 ; 31 Bom. 560 ; 8 C. W.N. 658. And in the partition proper arrangements can be made to safeguard the interest of the reversioner :—31 Cal. 214—8 C.W.N. 11.

The survivorship of the other may be affected by the arrangements as between them *inter se*, either express or implied :—22 Mad. 522 ; 33 Cal. 1076 ; 14 M.L.J. 139 ; 30 Mad. 3 (6). Similar principles have been applied to the case of daughters :—7 C. P. L. R. 153 (154).]

[9 Cal. 586]

APPELLATE CIVIL.

The 6th February, 1883.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE O'KINEALY.

Parbutty Dassi.....Plaintiff

versus

Purno Chunder Singh and others.....Defendants.*

*Evidence Act (I of 1872), s. 35.—Admission—Statement in decree—
Practice of Mofussil Courts.*

In a suit for possession of a fishery, the plaintiff sought to put in evidence an admission alleged to have been made in the year 1818 by the defendant's predecessor in title in a written statement in a former suit. The only evidence of the admission was that contained in the decree in the former suit, the ordinary part of which was prefaced with a short statement of the pleadings in the suit. Under the old practice of Mofussil Courts, it was the duty of the Court to enter in the decree an abstract of the pleadings in each case.

Held, that the statement in the decree was evidence of the admission under s. 35 of the Evidence Act (Act I of 1872).

Lekraj Kuar v. Mahpal Singh, (I. L. R., 5 Cal., 744) referred to.

[587] IN this case the plaintiff stated that her late husband purchased a patni mehal, lot Mowgram, at an auction sale for arrears of rent held under the provisions of Act VIII of 1819, on the 14th of May 1874 ; that as the heir and representative of her husband she was entitled to a four annas share of a julkur included in the said patni mehal ; and that from this julkur she had been dispossessed by the defendants. She prayed for a declaration of her right to possession, and that possession be awarded to her. The main issue was whether the julkur was in point of fact included within the patni mehal ; and in support of her

* Appeal from Appellate Decree, No. 105 of 1882, against the decree of Baboo Promotho Nath Mookerjee, Additional Subordinate Judge of East Burdwan, dated the 29th October 1881, reversing the decree of Baboo Janoki Nath Mookerji, Munsif of Cutwa, dated the 30th June 1880.

case the plaintiff tendered in evidence a "decree in suit No. 617 of 1818, instituted in the Civil Court of Birbhum by No. 2 defendant's predecessor, Boidya Nath Ghose, against the plaintiff's predecessors, patnidars, Enatulla and Ajmatulla Chowdhry, and No. 1 defendant's predecessor, Rashmoni Dasi." This document was drawn up in the manner formerly used in the mofussil, *i.e.*, it contained an abstract of the plaint and written statements of the parties, together with the judgment and the decree proper, and in the abstract given of Rashmoni's defence appeared an admission that the julkur claimed in the present suit belonged to plaintiff's mehal. In reference to this document the Court of First Instance said: "This decree is conclusive evidence between the parties; and even if it was not so, it is a very good piece of evidence as declaring the right of the parties at such a distant date." He then decreed the plaintiff's claim and the defendants appealed. On appeal, the Subordinate Judge said:—

The lower Court has given a decree to the plaintiff, solely relying on a decree No. 617 of 1818, but it does not appear to me to be legally admissible as evidence against the present defendants. In that case one Boidya Nath Ghose, former patnidar of lot Sitahati, was plaintiff, and Enatulla Chowdhry, predecessor in title of the present plaintiff, and Rashmoni Dasi, were defendants. It is said that Rashmoni Dasi then held the property which the defendants now own; hence Rashmoni must be considered to be predecessor in title of the defendants; but, assuming this to be true, it does not appear that the plaintiff's predecessor Enatulla and Rashmoni had any question decided between them in that suit. On the other hand, it appears that they were both in the same category of defendants, and made a common defence. Under such circumstances, the decree cannot be conclusive against the defendants, and under the late Full Bench ruling *Gujju Lall v. Patteh Lall* (I. L. R., 6 Cal., 171), it [588] is no evidence at all against them. It has been argued that the substance of Rashmoni's defence embodied in the decree should at least be accepted as an admission and should be binding on the defendants; but if the plaintiff wanted to use the defence as an admission, she ought to have produced the same in original, and any substance of it given in the decree cannot be accepted as legal evidence.

The Subordinate Judge then reversed the decision of the Court of First Instance. The plaintiff appealed to the High Court on the grounds that the decree of 1818 was binding on the parties, and that, even if not binding, the statement of Rashmoni's defence contained therein was evidence against the defendants in the present case.

Baboo Hem Chunder Banerjee and Baboo Umbica Churn Banerjee for the Appellant.

Baboo Mohiny Mohun Roy and Baboo Taruck Nath Palit for the Respondents.

The **Judgment** of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

Prinsep, J.—In this case the plaintiff, as representative of her late husband, claims to hold a three annas, eighteen and three-fourth gundahs share in a certain julkur called Noa Bawarkati as appertaining to a patni mehal purchased by her husband at a sale held under Regulation VIII of 1819.

The defendants deny that the disputed julkur appertains to the plaintiff's taluk, and assert that it appertains to Jote Gossain appertaining to Mouzah Narainpore.

The Moonshi decreed the suit. He based his judgment partly on a Civil Court Decree, No. 617 of 1818, and, interpreting it with the light of an Ameen's report in a former case, decided that the plaintiff was entitled to the property, and accordingly gave her a decree.

On appeal the Subordinate Judge decided that that decree could not be admitted in evidence between the parties to the present suit. He then went on

to say that even if one of the parties to that suit, namely Rashmoni, could be considered as the predecessor in title of the present defendants, her admission [589] entered in the decree was not admissible in evidence and could only be proved by production of the original. Further, he decided that the Ameen's report in the former case could not be treated as evidence in the present suit.

Against that decision the plaintiff has appealed to this Court, and it has been contended that the Subordinate Judge has committed an error in law in rejecting the decree and admission, and in not taking cognizance of certain other decrees on the record.

The present plaintiff is a purchaser of the taluk for arrears of rent. She therefore holds it free from all encumbrances created by previous talukdars and cannot be bound by any act of theirs. The decrees to which she refers could not be used as evidence against herself; and it seems to us clear that if they could not be used as evidence against her, she cannot use them as evidence against the defendants; but in regard to the point whether the plaintiff was bound to prove the admission by production of the original, we differ from the view taken by the Subordinate Judge. There can be no doubt that production of the original was impossible. If there was any original it was destroyed years and years ago. By s. 35 of the Evidence Act an entry in a public record stating a fact in issue, or relevant fact, and made by a public servant in the discharge of his official duty, is admissible in evidence. In this case the admission in the decrees is no doubt a relevant fact; and the only question for decision is whether it falls within the other portion of s. 35. At the time that these decrees were recorded it was the universal practice in Lower Bengal to write all proceedings on one side of a long roll of paper. This practice is referred to in Circular No. 131, dated 3rd May 1851. Previous to the issue of that Circular the Sudder Dewany of the Lower and Western Provinces issued a Circular on the 12th February 1847, from which it appears that it was the duty of the Court, and indeed had been the practice, to enter in the decree an abstract of all the pleadings. So far there seems no reason to doubt that these entries were made by the officers of the Court in discharge of their official duties. The question as to the effect of s. 35 of the Evidence [590] Act was lately before the Judicial Committee of the Privy Council in the case of *Lekraj Kuar v. Mohpal Singh* (I. L. R., 5 Cal. 744). In that case the question arose whether a statement made in a settlement rubokari, recorded in the province of Oudh, in which place officers were directed to be guided by the spirit of the Settlement Regulations, but were not bound by them, was admissible in evidence under this section. It was there argued that the precise information in the rubokari was not directed by any particular regulation, and that the settlement records were prepared and attested by subordinate officers and could not be accepted as in any way invalidating the records themselves. But their Lordships of the Privy Council in overruling those objections said as follows: "It is necessary to look at the precise terms of this section, and for the present purpose it may be read: 'an entry in any official record stating a fact in issue, or relevant fact, and made by a public servant in the discharge of his official duties, is itself a relevant fact.' There can be no doubt that the entries in question supposing them to bear the construction already given to them, state a relevant fact, if not the very fact, in issue, viz., the usage of the Bahrulin Chur. If so, then the entry having stated that relevant fact, the entry itself becomes by force of the section a relevant fact, that is to say, it may be given in evidence as a relevant fact, because, being made by a public officer, it contains an entry of a fact which is relevant." In the present case it is not contended, and indeed could not be contended, that the admission in these

decrees is not relevant. Following the words of their Lordships of the Judicial Committee we think that the admission made in these decrees could be proved by the production of the decrees; and that it is not necessary that the plaintiff should be placed in the position of doing what everybody knows is impossible for him to do, namely, to produce the original decrees.

In this view of the case we think that the Subordinate Judge was wrong in saying that so much of the decrees was not admissible as legal evidence. Whether the defendants are bound by the statements of Rashmoni depends on the question whether Rashmoni was their predecessor in title; and this point has not [591] been decided by the Subordinate Judge. If he holds that the defendants do not represent Rashmoni, neither the decrees nor the admission can be admissible against them. On the other hand if he holds that the defendants do represent Rashmoni, then, in our opinion, so much of the decrees as purports to give the statement of Rashmoni is admissible in the present case. The amount of weight to be given to such statement is a matter to be decided by the Court below.

The costs of this appeal to follow the result of the case.

Case remanded.

NOTES.

[STATEMENT IN DECREE—ADMISSION.

This case which was doubted in (1896) 1 C.W.N. 513 (516) and dissented from in (1887) 11 Mad. 116, was followed in (1891) 15 Mad. 19; 378; (1891) 18 Mad. 73; (1905) 3 C.L.J. 521 where it was explained; in this it was pointed out that sec. 13 of the Indian Evidence Act would also be applicable.

See also (1911) 21 M.L.J. 870; (1911) 2 M.W.N. 265; 10 M.L.T. 232 as regards terms of or recitals in *razinamah* not embodied in the decree.]

[9 Cal. 591 – 12 C.L.R. 27]

APPELLATE CIVIL.

The 12th September, 1882.

PRESENT:

MR. JUSTICE MITTER OFFG. CHIEF JUSTICE AND MR. JUSTICE MACLEAN.

The Secretary of State for India in Council...Defendant

versus

Rasbehary Mookerjee and others.....Plaintiffs.*

Sale for arrears of revenue—Revenue-paying estate—Sale of share of an estate—Recorded proprietors—Omission of names of proprietors—Irrregularity—Act XI of 1859, ss. 6, 33.

When a notification of sale of a share in a revenue-paying estate is issued under s. 6, Act XI of 1859, the circumstance that such notification does not contain the names of all the recorded proprietors of the share, but only the name of one of them, does not amount to an irregularity within the meaning of s. 33, Act XI of 1859.

THIS was a suit instituted by the plaintiffs to set aside a sale of a share of an estate of which they were part-owners, which was held by the Collector of Burdwan for arrears of Government revenue due on the share. The Secretary

* Appeal from Appellate Decree No. 791 of 1881 against the decree of Baboo Brojendro Coomar Seal, Additional Judge of East Burdwan, dated the 19th February 1881, reversing the decree of Baboo Bhoopaty Roy, Subordinate Judge of that district dated the 20th November 1880.

of State for India in Council, the purchaser at the auction sale and the remaining co-sharers of the plaintiff were made defendants. The material facts of the case are as follows :—

(1) That Aima Mungulpore, which bore a sudder jama of Rs. 58-14-5, was recorded in the towzi as estate No. 13-12. (2) That defendants Nos. 8 and 9 had a separate account opened for their share, the revenue payable by them being Rs. 20-12. [592] (3) That the remaining portion of the estate belonged to the plaintiffs and the defendants Nos. 3 to 7, whose names appear in the towzi as the recorded proprietors, and the sudder jumma payable by them was Rs. 38-2-5. It is this share of the estate which has been sold. (4) That the arrears for which the property was sold were only Rs. 5-3. (5) That the plaintiffs and defendant No. 7 had paid the revenue payable by them. The said amount of Rs. 5-3 was payable by defendants Nos. 3 to 6. (6) That the property sold was worth Rs. 4,000, but it fetched Rs. 1,350 only at the sale. It was alleged by the plaintiffs that the sale was made contrary to the provisions of the sale law, and that, therefore, they had sustained substantial injury. Of the irregularities complained of, the only one material for the purposes of this report, is the following, namely : “ That the notification under s. 6, Act XI of 1859 was defective, inasmuch as it did not give the names of the plaintiffs and of defendants Nos. 3 to 7, who were the recorded proprietors, but the name of one Tulebulla, a dead man, was shewn as the person from whom the arrear was due.”

In his judgment in the case the Subordinate Judge said :—

“ It will be observed that s. 6 of the Act does not require that the name of the defaulter should be inserted in the notification of sale. The notification shall specify the estate or share of an estate to be sold. There is valid reason why the law does not require the name of the defaulter to be specified in the notice. The sale conveys the estate or share of estate in arrear, and not the right, title and interest of the defaulter. The pleader for the plaintiffs referred to the form of the sale certificate, which states the name of the late proprietor, and argues that it was the intention of the Legislaturo to insert the name of the defaulter in the notification of sale. I do not subscribe to this argument. Section 6 of the Act, which lays down the procedure before sale, does not require that the name of the defaulter should be specified. Upon these grounds I do not find it was an omission causing an illegality to vitiate the sale.”

The decree-holder appealed to the District Court. The judgment of the learned Judge on this portion of the case is as follows :—

“ Then the question is whether, when the debt is due from A, if it is notified that it is due from B, is that or is that not an irregularity as contemplated by s. 33 of Act XI of 1859. Now s. 6 rules that the notification shall specify the estate. The Commissioner and the Subordinate Judge hold that when the number, the name of the property, [593] and the sudder jumma were correctly given, it does not matter whether the name of the recorded proprietor was correctly given or not. The question is, is that the law? There is no definition of ‘estate’ in Act XI of 1859, but there is one in Beng. Act VII of 1868, and s. 30 of that Act says : ‘ This act shall be read with and taken as part of Act XI,’ so that the word ‘estate’ in s. 6 of Act XI has been used in the sense in which it has been defined in s. 1 of Beng. Act VII of 1868. That definition runs as follows : The word ‘estate’ means any land, or share in land subject to the payment to Government of an annual sum in respect of which the name of a proprietor is entered on the

register, known as the general register of all revenue paying-estates, or in respect of which a separate account may, in pursuance of s. 10 or s. 11 of the said Act XI of 1859, have been opened.' That shows that there are the following elements in an estate: (1) land or share in land; (2) annual sum payable to Government; (3) name of the proprietor as entered in the general register of revenue-paying estates. It is not the land which is the estate. It is not the annual jumma. It is not the name of the recorded proprietor. But it is the combination of all three, which go to form the conception of an estate as used in s. 6 of Act XI of 1859. Even when Beng. Act VII of 1868 was not in force, there is ample evidence in Act XI itself to show that that was the meaning of an estate. There can be no doubt that the words 'estate' and 'share of an estate' have been used in s. 6 in the same sense in which they have been used in s. 28 of the said Act; that section refers to schedule A, which gives the form of the certificate. The said schedule, therefore, must be taken to be part of s. 28. That form shows what an estate is. It says 'the mehal specified below,' and what is the specification that it gives: '*Towzi number, name of mehal, name of the former proprietor, sudder jumma.*'" All these four elements constitute the estate. That it should be so will also be clear from a consideration of the very nature of the thing. Let us suppose that *A* and *B* hold an estate, each having an 8-anna share. *B* opens a separate account. It has to be recollected that under the provisions of s. 13, Act XI of 1859, notwithstanding the opening of separate accounts, the separate shares continue to constitute one integral estate. It is, therefore, that the Board of Revenue points out by their rule, which appears at page 158 of the Collection of Board's Rules of 1878, Vol. 1, 'that the separation of shares of an estate held in common or consisting of specific portions of land by the opening of a separate account under ss. 10 and 11, Act XI of 1859, causes no alteration of the revenue roll.' Thus when *B* has caused a separate account to be opened with respect to his 8-anna share both *A* and *B* will have the same number, the same name of the property and the same sudder jumma in the 8-anna share of each. Those elements could not indicate whose estate it is. The name *A* or *B* is the only distinctive feature. I hold, therefore, that the notification under s. 6 of Act XI [594] would be defective without the name of the recorded proprietor, but in the case now under consideration, if the statement of the plaintiffs is true, the notification was not only defective, but misleading. Here the name of the recorded proprietor was not admitted, but the name of a wrong man, who had no existence, was shown. Now the arrear due was Rs. 5-3 only; the property is worth at least Rs. 1,350. There is no suggestion that the property has been purchased for some one of the several co-sharers. The presumption under the circumstances, is, that Peari Mohun Mookerjee, or any one of the other sharers who had paid their share of the revenue, had not come to know that the sale notification had been issued. When it has not been alleged that the plaintiffs were aware of the issue of the sale notification, it is the more necessary to examine very critically whether everything required by law was duly done. Section 8 of Beng. Act VII of 1868 precludes us from inquiring whether the most effective mode of proclamation, viz., that directed to be made at the Cutcherry of the defaulter was made or not, but it is quite open to us to inquire whether the notification under s. 6 of Act XI was properly made or not. It is contended by the pleader for the purchaser that there is nothing on the record, to show what the notification was. Now the certificate granted is presumptive evidence of the contents of the notification so far as the description of the estate is concerned, nevertheless as the case must go before the first Court, and as the first Court decided the case without entering into the evidence, the point may be definitely

settled. I remand the case under s. 566* of the Civil Procedure Code, for a finding on each of the following issues:—*First*: ‘Did the notification under s. 6, Act XI of 1859, issued with respect to the property in dispute, correctly describe the name of the proprietor as it then stood in the register known as the general register of all revenue-paying estates.’ If that issue is found in favour of the plaintiffs, then, *secondly*, have the plaintiffs sustained substantial injury in consequence of such irregularity.

On the first of the above issues, it was found that at the time the notification of sale was issued, the recorded proprietors were Talehulla and eight others, and that the name of Talehulla alone appeared in the notification of sale; but the Judge of the Court of First Instance held that it was not proved “that owing to the omission in inserting the names of all the proprietors, the estate was sold for an inadequate price.” On appeal, the District Judge held that there being the defective notification and the substantial injury, he was justified in assuming that the injury was caused by the defective notification, there being no evidence to show it could be caused by anything else—*Goppee Nauth Dobey v. Roy* [595] *Luchmeeput Singh Bahadur* (I. L. R., 3 Cal., 542). The learned Judge then reversed the judgment of the Court below, and set aside the sale. The Secretary of State and the purchaser appealed to the High Court on the ground “that the Appellate Court clearly misunderstood the meaning of s. 6, Act XI of 1859, by holding that the sale notification was bad for not containing the names of all the recorded proprietors in it.”

Baboo Unnoda Persad Banerjee and Baboo Mohesh Chunder Chowdhry for the Appellant.

Baboo Rash Behary Ghose, Baboo Bipro Dass Mookerjee and Baboo Pran Nauth Pundit for the Respondents.

The **Judgment** of the Court (MITTER, J., Offg. C.J., and MACLEAN, J.) was delivered by

Mitter, J.—This is a suit to set aside a revenue sale of the share of an estate called Aima Mungulpore bearing Towzi No. 1312.

The ground upon which the lower Appellate Court has set aside the sale is that the sale notification under s. 6, Act XI of 1859, did not contain the names of all the recorded proprietors of this share, but only of one of them, Talehulla. Section 6 requires that a notification should be issued in the language of the district specifying the estates or shares of estates which are to be sold. The District Judge is of opinion that unless the names of all the recorded proprietors are given, an estate, or share of an estate, cannot be considered to be specified within the meaning of s. 6. We are unable to agree in this view of the law. The section distinctly says that it is the estate or the share of an estate which is to be specified. If it were the intention of the Legislature that the names of the recorded proprietors should be also inserted, the section would have contained a provision to that effect in distinct words.

In this case it is not shown that the share of the estate which was sold was not properly specified. All that has been established in the lower Court

* [Sec. 566:—If the Court against whose decree the appeal is made has omitted to frame

When Appellate Court may frame issues and refer them for trial to Court whose decree is appealed against.

or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, and the evidence upon the record is not sufficient to enable the Appellate Court to determine such issue or question, the Appellate Court may frame issues for trial and may refer the same for trial to the Court against whose decree the appeal is made, and in such case shall direct such

Court to take the additional evidence required, and such Court shall proceed to try such issue, and shall return to the Appellate Court its finding thereon together with the evidence.]

is that instead of the names of all the recorded proprietors being mentioned in the sale notification, the name of only one of them, namely Talebulla, was inserted. As the [596] section in question does not require the names of the recorded proprietors to be mentioned in the notification, the mistake of not inserting the names of all the recorded proprietors is not an irregularity within the meaning of that section.

We, therefore, reverse the decree of the lower Appellate Court and dismiss the plaintiff's suit with costs.

In Appeal No. 865, the purchaser is the appellant. We are of opinion that the purchaser might have joined the Government in preferring an appeal. We, therefore, direct that the plaintiffs will pay to the defendants, namely, the Secretary of State for India and the purchaser Purnu Chunder Singh, only one set of costs throughout the litigation.

Appeal allowed.

NOTES.

[See also (1886) 13 Cal. 208; (1903) 8 C.W.N. 337 (339).]

[9 Cal. 596 12 C.L.R. 223]

FULL BENCH REFERENCE.

The 28th February, 1883.

PRESENT :

SIR RICHARD GARTH, KNIGHT, CHIEF JUSTICE, MR. JUSTICE MITTER,
MR. JUSTICE McDONELL, MR. JUSTICE PRINSEP AND
MR. JUSTICE WILSON.

Tulsi Panday.....Defendant

versus

Buchu Lall.....Plaintiff.*

Bengal Act VIII of 1869, s. 102—Practice—Appeal—Second Appeal.

In a suit for arrears of rent and ejectment the right of appeal is taken away by s. 102, Beng. Act VIII of 1869, only when it is shown that the amount sued for and the value of the property claimed is less than Rs 100. Unless that fact appears, either from the finding of the District Judge or elsewhere upon the proceedings, the High Court has no right to draw any inference to that effect.

THIS was a suit for arrears of rent amounting to Rs. 16-1-3, and for ejectment. The defence was, amongst other things, that the defendant held more lands than the plaintiff admitted in his plaint; that the annual jumma of the defendant's land was Rs. 5-1 of which the plaintiff's share was Rs. 2-8-6; that the defendant had paid to the plaintiff the rent of 1284 F. S.; and that he had deposited in Court the rent for the years 1285 F. S. and 1286 F. S. The Court of First Instance gave the plaintiff a decree. On appeal, the defendant urged that the plaintiff, being a co-sharer, was not entitled to eject the defendant. The District Judge overruled the objections and dismissed the appeal. The

* Full Bench Reference made by Mr. Justice Mitter, Offg. Chief Justice, and Mr. Justice Norris, dated the 4th August 1882, in appeal from Appellate Decree No. 586 of 1882.

defendant ap-[597]pealed on the ground "that the plaintiff being only a part-owner of the lands in suit, his prayer for ejectment under section 52 of the Rent Act should have been rejected."

The case came before MITTER, J. (Offg. C. J.), and NORRIS, J., by whom it was referred to a Full Bench with the following remarks :—

Mitter, J.—This appeal arises out of a suit which was brought for the recovery of arrears of rent, and for ejectment of the defendant, appellant. It is admitted that the plaintiff is the owner of a fractional share of the estate within which the defendant's tenure is situated; it is also admitted that the plaintiff is entitled to maintain a separate suit for the rent of his share. One of the questions raised in the defence was, that the plaintiff being the owner only of a fractional share of the estate in which the defendant's tenure is situated, is not entitled to a decree for ejectment under s. 52 of the Rent Act. The lower Courts are of opinion that the plaintiff is entitled to a decree for ejectment.

We cannot agree with the lower Courts in this view of the law. The point in question has been set at rest by authority, and we will only refer to the last case on the subject—*Reasut Hossein v. Chorwar Singh* (I. L. R., 7 Cal., 470). The same view of the law was taken in another decision—*Alum Manjee v. Ashad Ali* (16 W. R., 138). We are therefore clearly of opinion that the decree for ejectment passed in this case cannot be sustained.

But the learned pleader for the respondent has taken a preliminary objection to the hearing of this appeal. The objection is based on the provisions of s. 102 of Beng. Act VIII of 1869. That section says: "Nothing in this Act contained shall be deemed to confer any power of appeal in any suit tried and decided by a District Judge originally or in appeal, if the amount sued for, or the value of the property claimed, does not exceed one hundred rupees." In this case the rent claimed was Rs. 16-1-3, but it does not appear what was the value of the defendant's interest in the land from which it was sought to eject him.

In our opinion, unless it can be shown that the value of that interest and also the amount of rent sued for do not exceed [598] Rs. 100, the right of second appeal is not taken away under that section; but this view of the law is in conflict with a decision of this Court in *Parbutty Churn Sen v. Shaik Monduri* (I. L. R., 5 Cal., 594). We, therefore, refer the following question to the decision of a Full Bench, whether, under the circumstances stated above, a second appeal lies to this Court?

Baboo Bussunto Coomar Bose for the Appellant.

Baboo Jogesh Chunder Roy for the Respondent.

The Judgment of the Full Bench on the point referred was delivered by

Garth, C. J.—It seems to us that the view taken by the learned Judges who referred this case is correct. *Prima facie* in a suit of this kind the appellant is entitled to a second appeal. The question is, whether that right is taken away by s. 102 of Beng. Act VIII of 1869? That section only applies where the amount sued for, or the value of the property claimed, does not exceed Rs. 100.

In this case there is nothing to show that the value of the property claimed does not exceed Rs. 100; and unless that fact does appear, either from the finding of the lower Court, or elsewhere upon the proceedings, it seems to us that we have no right (more especially as we are only empowered here to deal with points of law) to draw any inference to that effect.

We are, therefore, of opinion, that this Court has jurisdiction to entertain the appeal; and as the Division Bench has already decided that the lower Courts were wrong in decreeing the ejectment, we think that the judgment should be modified accordingly, and that the defendant should be allowed his costs of appeal in all the Courts, so far as they relate to that point.

Appeal allowed.

NOTES.

[See also (1887) 15 Cal. 40; (1897) 11 C.P.L.R. 144 (146).]

[7 Ind. Jur. 534]

[599] APPELLATE CIVIL.

The 4th January, 1883.

PRESENT:

MR. JUSTICE MACLEAN AND MR. JUSTICE O'KINEALY.

In the matter of the Petition of Imam Buksh.

Imam Buksh

versus

Thacko Bibee.*

Mahomedan Law—Minor—Guardian of property—Certificate of guardianship.

Under the Mahomedan law the brother of the mother of a female minor, whose parents are dead, is entitled, in preference to a mere stranger, to the guardianship of the property of the minor, unless it be shown that he is in some way unfit to take charge of such property.

THE facts of this case are thus stated in the judgment appealed from: "According to the evidence, and to the undisputed statement of the several parties, the minor, her father and mother having predeceased her, became the grantee under a *heba*, or deed of gift, from Nizamudin, her paternal grandfather, of a certain estate. On the death of that paternal grandfather, the applicant Imam Buksh came to Court under Act XL of 1858 for a certificate to administer the minor's estate. This application is opposed by the widow of Nizamudin, the co-wife of the minor's paternal grandmother. She, Thacko Bibee, repudiates the alleged hibbanamah, and claims to be herself sole heir to the estate of Nizamudin, to the exclusion of the minor, on the ground that the latter is excluded by the fact that her father, who would otherwise have been one of Nizamudin's heirs, predeceased him. The applicant Imam Buksh proposes that the female guardian of the minor's person shall be his wife. The Collector interposes, and objects to the application of Imam Buksh on the ground that he, being in the direct succession to the minor, is not a fit person to administer her estate, or to have charge through his wife, of her person, and the Collector has recommended a third person, a respectable Mahomedan lady, as both administratrix and guardian." The District Judge then appointed the lady recommended by the Collector, and dismissed the application of Imam Buksh. The latter appealed to the High [600] Court, on the ground that the learned

* Appeal from Original Order, No. 216 of 1882, against the order of J. P. Grant, Esq., Judge of the 24-Pergunnahs, dated the 12th May 1882.

Judge was wrong in giving the guardianship of the person and property of the minor to a stranger as against Imam Buksh, a near relative.

Mr. *Twidale* and *Moonshee Serajul Islam* for the Appellant.

Baboo *Unnoda Prosad Banerjee* and Baboo *Amarendro Nath Chatterjee* for the Respondents.

The **Judgment** of the Court (MACLEAN and O'KINEALY, JJ.) was delivered by

Maclean, J.—The appellant before us applied to the District Court of the 24-Pergunnahs for a certificate of administration, under Act XL of 1858, to the property of an infant, Chota Bari Bibee, granddaughter of one Nizamudin. The petitioner's position is that of a brother of the infant's deceased mother.

There appears to be some opposition on the part of one Thacko Bibee, widow of Nizamudin; but her case does not affect the question before us. She disputes the title of the infant to the property of Nizamudin. That question, of course, has to be decided elsewhere.

The Collector, we are informed, was the first who moved the Civil Court to appoint a guardian for the minor, and he also appears to have suggested to the Judge the appointment of a lady called Kulsoom Bibee, who is in no way connected with the minor by any relationship. The District Judge, adopting certain objections made by the Collector to the appointment of the appellant, has refused him a certificate, and granted one to the Collector's nominee, Kulsoom Bibee. Hence this appeal.

The law in this matter is perfectly clear, that is, if any person establishes a right by virtue of a will or deed to take charge of the property of a minor, that person shall have a certificate of administration. There being no person so entitled, or any person so entitled being unwilling to undertake the trust, it is in the discretion of the Court to entrust any near relative of the minor, who is willing to take up the trust, with the charge of the property. Failing the person who is entitled to a certificate, and failing any near relative who is willing and fit to undertake the trust, the Court may make other [601] provisions. Therefore, the only question we have to consider is, has it been shown that Imam Buksh, who is undoubtedly a near relative, is unfit to take charge of the property of the minor. The only ground of unfitness suggested is that he is in the direct succession to the minor. That is an objection which, of course, might apply in other cases, such as to a father who claims the custody or charge of the property of a son or daughter. That is not, in our opinion, a sufficient ground for refusing a certificate to the charge of the property. In fact, there may be cases in which some one interested in the succession is the very best person to defend the minor's interests. However, in the present case, we think that the alleged disqualification imputed to Imam Buksh is not sufficient to deprive him of the certificate he asks for. We have no doubt that the lady named by the Collector is in every way suitable, but we do not think that her claim should have precedence over that of the minor's mother's brother. We, therefore, direct that the certificates issued to Kulsoom Bibee be re-called, and a fresh certificate of administration issued to Imam Buksh.

With reference to the guardianship of the minor's person and maintenance, it is not necessary for us to make any order here as we are not in a position to state who should be the proper guardian of her person. We direct the District Judge to make the necessary orders.

The appellant is entitled to his costs, which he will recover from the Collector and Kulsoom Bibee.

Appeal allowed.

NOTES.

[Nearness of kin may be taken into consideration in appointing a guardian:—(1889) 18 All. 78; (1911) 38 Cal. 783. See also (1910) 33 All. 222.]

[602] APPELLATE CIVIL.

The 16th February, 1883.

PRESENT:

MR. JUSTICE McDONELL AND MR. JUSTICE TOTTENHAM.

Seru Mohun Bania..... Defendant

versus

Bhagohan Din Pandey.....Plaintiff.*

*Suit to obtain possession of land sold in execution of a decree—Possession,
Application for, by auction-purchaser—Execution proceedings—
Subsequent suit for possession of land
sold in execution of decree.*

In execution of a decree certain land belonging to the judgment-debtor was sold; subsequently the auction-purchaser, who had not got possession, re-sold the land to a third party and gave him the certificate. The latter then applied to the Court to be put into possession, but having failed in those proceedings, owing to some irregularity in the description of the boundaries of the property, he instituted a regular suit against the judgment-debtor to obtain possession. On a plea that such suit would not lie as the plaintiff could have got possession in the miscellaneous proceedings,

Held, that having regard to the provisions of Art. 138,† of Sch. II, of Act XV of 1877 and of s. 11 of Act XIV of 1882 such suit was maintainable.

THIS was a suit brought to obtain possession of one powa of land with some thatched huts on it. The plaintiff stated in his plaint that the land in question had previously belonged to the defendant, but that it had been sold, on the 21st December 1878, in execution of a decree passed against him in the Sudder Munsif's Court, and purchased at such sale by one Etbar Miyah, who subsequently duly obtained a certificate. Etbar Miyah subsequently sold the land and huts to the plaintiff under a Kohala, dated the 5th July 1879, and the plaintiff thereupon filed a petition for the purpose of getting possession of

* Appeal from Appellate Decree, No. 141 of 1882, against the decree of Captain M. A. Boyd, Deputy Commissioner of Cachar, dated the 9th November 1881, affirming the decree of Baboo Jugut Bundhoo Nag, Extra Assistant Commissioner of Silchar, dated the 14th January 1881.

† [Art. 138 :—

Description of suit	Period of limitation	Time from which period begins to run.
By a purchaser of land at a sale in execution of a decree, for possession of the purchased land, when the judgment-debtor was in possession at the date of the sale.	Twelve years ...	The date of the sale.]

the land from the defendant. In the proceedings held in consequence of that petition the plaintiff failed to get possession, and he now stated that the reason why he had so failed was that the peon could not put him in possession owing to the boundaries given in the purwana not corresponding with the actual boundaries of the land in question; consequently, the defendant having opposed him in taking possession he brought this suit to compel him to give up the land.

[603] The defendant in his written statement pleaded that in the miscellaneous proceedings held upon the plaintiff's petition, Ethar Miyah's purchase had been held to be irregular, and that the plaintiff's petition had been rejected on the ground that he could not obtain possession by virtue of that purchase; that the plaintiff had every means of obtaining possession in those proceedings; and that therefore the present suit would not lie. He also denied that the land now sought to be recovered was identical with that sold at the execution sale.

The first Court found that the land was the same as that referred to in the sale certificate, and that the suit would lie, and consequently gave the plaintiff a decree, and this was confirmed on appeal by the lower Appellate Court.

In that Court the defendant contended that the suit was barred under Art. 13, Sch. II, Act XV of 1877, and that the only remedy open to an auction-purchaser or his representative, which the plaintiff in this case was, was that provided by s. 318 of the Civil Procedure Code. The defendant now preferred a special appeal to the High Court.

Bahoo *Joy Gobind Shome* for the Appellant.

Bahoo *Surrendro Nath Matilal* for the Respondent.

The **Judgment** of the Court (MCDONELL and TOTTENHAM, JJ.) was delivered by

McDonell, J.—We fail to see any error of law in the decision of the lower Appellate Court. It has been distinctly found that the land now claimed was without doubt the land referred to in the sale certificate. The only point raised before us in second appeal, which requires consideration, is whether the suit is maintainable; but reading Art. 138 of the second schedule of the Limitation Act with s. 11 of the Civil Procedure Code, we hold that there is no reason why the present suit should not be maintained. The appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[The special remedy for delivery of possession conferred by the Civil Procedure Code is concurrent with the general right to sue for possession.

The latter suit can proceed without the summary remedy having been availed of:—14 Cal. 644; 31 Mad. 177; *contra* 12 Cal. 169. The bar of limitation with respect to the summary remedy does not affect the general right:—29 All. 463; 4 A. L. J. 434 (1907) A. W. N. 113; 31 All. 82; 6 A. L. J. 71. See also 11 Cal. 93; 10 Mad. 53; 15 Mad. 331 (339); 30 All. 72; (1908) A. W. N. 12; 5 A. L. J. 20.]

[13 C L. R. 142]
[604] ORIGINAL CIVIL.

The 20th February, 1883.

PRESENT :

MR. JUSTICE NORRIS.

The Oriental Bank Corporation and others
versus
Gobind Lall Seal and others.

Practice - Leave to sue—Suit by one creditor on behalf of others—Civil Procedure Code (Act X of 1877), s. 30.

A suit by one or more creditors on behalf of other creditors cannot be entertained without the leave of the Court being obtained for its institution. Such leave cannot be granted at the hearing.

THIS was a suit instituted by the Oriental Bank Corporation and the Delhi and London Bank "on behalf of themselves and all other, the unsatisfied creditors of one Heera Lall Seal, deceased," for the construction of a certain indenture of settlement, dated the 21st February 1848, by which one Mutty Lall Seal, the father of Heera Lall Seal, purported to settle certain property in trust for the members of his family, and for a declaration that Heera Lall Seal, who died intestate on the 17th March 1876, was at the time of his death entitled to a one-fifth share in the property comprised therein, and that his representatives were at the time of the institution of the present suit entitled to such property. On the 15th of May 1876 a suit was instituted for the administration of Heera Lall Seal's estate. A decree for an account was made, and on the account being taken it appeared that there were not assets sufficient to enable all the creditors to be paid in full. The present suit was made supplemental to the administration suit. No leave had been granted by the Court at the institution of the suit to the plaintiff Banks to sue on behalf of the other creditors.

The defendant Gobind Lall Seal in his written statement pleaded that no leave to sue had been granted.

Mr. Pugh, Mr. Hill, Mr. Banerjee, Mr. Allen and Mr. Stokoe for the Plaintiffs.

Mr. Palit and Mr. Sale for the Defendant Gobind Lall Seal.

The Advocate-General (Mr. G. C. Paul), Mr. Kennedy, Mr. Branson, Mr. Phillips, Mr. Evans, Mr. T. A. Apcar, Mr. Gasper, [806] Mr. Trevelyan, Mr. Stephen, and Mr. O'Kinealy for other Defendants.

Mr. Palit took the preliminary objection that the suit could not proceed as no leave to sue had been granted under s. 30 of Act X of 1877. He contended that such a suit as the present one was analogous to a suit under the Religious Endowments Act XX of 1863, under which it had been held that the leave of the Court was necessary in order to the institution of a suit regarding endowed property by some of the persons interested in it—*Dhurrum Singh v. Kissen Singh* (I. L. R., 7 Cal., 767); *Jan Ali v. Ram Nath Mundul* (I. L. R., 8 Cal., 32). He also referred to *Powell v. Wright* (7 Beav., 444).

Mr. Pugh, for the plaintiffs, contended that the cases under the Religious Endowment Act could not apply to a creditor's suit; that the word "parties"

in s. 30 meant not persons in the position of creditors, but persons without whose presence on the record the suit would be defective, Story on Eq. Pleading, p. 107 ; and that leave could be given *nunc pro tunc*.

Norris, J.—The facts of this case are shortly as follows :—One Heera Lall Seal died intestate on 17th March 1876, and his estate is now being administered by the Court. The accounts taken in the administration suit do not disclose assets sufficient to pay all the creditors in full, and this suit has been brought by the plaintiff Banks, in the nature of a supplemental suit to the original administration suit, with the view of obtaining a declaration that Heera Lall Seal was at the date of his death entitled to a one-fifth share in the property comprised in a certain Indenture of Settlement made by his father Mutty Lall Seal, and dated 21st February 1848, and that his (Heera Lall's) representatives in estate are now, as such and subject to the liquidation of Heera Lall's debts, entitled to the said one-fifth share, thus seeking to make available a very considerable estate for distribution amongst the general body of creditors.

The suit purports to be brought by the plaintiffs "on behalf of themselves and all the other unsatisfied creditors of Heera Lall Seal, deceased."

[606] It is contended by Mr. *Palit*, who appears for the first defendant, that the suit cannot be entertained, inasmuch as the provisions of s. 30 of the Civil Procedure Code have not been complied with.

That section reads thus : "Where there are numerous parties having the same interest in one suit, one or more of such parties may, *with the permission of the Court*, sue or be sued, or may defend in such suit, on behalf of all parties so interested, but the Court shall in such case give, at the plaintiff's expense, notice of the institution of such suit to all such parties either by personal service or (if from the number of parties or any other cause such service is not reasonably practicable) then by public advertisement, as the Court in each case may direct."

Mr. *Pugh* for the plaintiffs admits that no such permission has been obtained, and argues that it was unnecessary. "Parties," says Mr. *Pugh*, "does not mean persons in the position of creditors, but means only parties necessary to the suit, without whose presence on the record the suit would be defective."

I am unable to put so limited a construction upon the word "parties." I think it means "persons." It appears to me that the provisions of the section would be unintelligible unless the word received that meaning.

The section appears to be taken from Rule 9, Order XVI of the rules and orders made under the provisions of the Supreme Court of Judicature Act, 1875. That rule says : "Where there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued, or may be authorised by the Court to defend in such action, on behalf or for the benefit of all parties so interested." The result of this rule was to give legislative sanction to the practice which had long obtained in the Court of Chancery ; but there is this distinction between the rule and s. 30: the former contains no provision requiring the permission of the Court, nor any provision as to notice. The provision requiring the authority of the Court for such proceeding, and the clause "but the Court shall give, etc.," to "may direct" are important amendments and certainly necessary in this country, without them many a man [607] might be concluded by a suit of which he never may have heard (Broughton's Civil Procedure Code, 133).

Mr. *Palit* in support of his argument referred to the case of *Jan Ali v. Ram Nath Mundul* (1. L. R., 8 Cal., 32) decided by an Appellate Bench of this Court, and though I am not prepared to say that I should consider every judgment of an Appellate Bench binding upon me when sitting on the Original Side, yet every such judgment should receive respectful consideration and careful attention, and should be followed unless I am very clearly of opinion that the conclusion arrived at is an erroneous one.

In that case a deed of *wuqf* had been executed making an endowment of certain land, the profits whereof were to be appropriated to the maintenance of a mosque. The defendant No. 1 was appointed *Mutawalli* under the deed of *wuqf*; he borrowed Rs. 575 from defendant No. 2, giving, by way of security, a mortgage of part of the endowed property; he subsequently borrowed Rs. 650 from defendant No. 3, and concluded an *ijara* settlement with him; defendant No. 2 brought a suit upon the mortgage bond, obtained a decree, took out execution, and brought to sale the endowed property comprised in the mortgage which defendant No. 3 purchased. The plaintiffs, who were followers of the Mussulman religion living in the village where the mosque was situated, alleging a right and interest in protecting the masjid, filed a plaint asking for declarations that the property mortgaged to defendant No. 2 was *wuqf* property, that the auction-purchase thereof made by defendant No. 3 and the *ijara* and mortgage were invalid; and that another *mutawalli* might be appointed. PRINSEP, J., after dealing with various points, which it is not necessary here to notice, says at page 40: "We now come to deal with the other prayers in the plaint, which do not fall within the provisions of s. 14 of the Religious Endowments Act. These prayers are that the property mentioned in the schedule to the plaint may be declared to be *wuqf*; that the mortgage and the *ijara* and the sale under the mortgage may be set aside; and that a competent person may be appointed by the Court as *mutawalli*. Now, so far as regards these prayers we think that the plaintiffs were not authorized to institute this suit by reason of their having an interest created [608] by their being followers of the Moslem religion, and living in the vicinity of the mosque, and being in the habit of attending the masjid. That interest is common to them with all the Mahomedan residents in the vicinity, and we think that this is a case which falls within the provisions of s. 30 of the Code of Civil Procedure. It may be quite possible that if these plaintiffs had applied to the Court under the provisions of s. 30, they would have obtained permission to institute this suit, but not having obtained that permission, they certainly were not entitled to institute this suit."

I cannot see any distinction between the position of the plaintiffs in that case and that of the plaintiffs in this suit. "The other unsatisfied creditors of Heeralal deceased" appear to me to correspond with "all the Mahomedan residents in the vicinity" mentioned by PRINSEP, J.

I am therefore of opinion that Mr. *Palit's* objection is a valid one, and that the suit cannot proceed.

I have now to consider what I ought to do—whether to dismiss the suit or to yield to Mr. *Pugh's* application to grant permission for its institution *nunc pro tunc*, and to adjourn the hearing until the requisite notices have been given. I am anxious not to dismiss the suit after so much expense has been incurred, but I do not think I have the power to grant permission at this stage. I would do so if I thought I had the power. I must therefore dismiss

the suit with costs to be based on scale No. 2. Mr. Pugh applies for leave to bring a fresh suit on the same subject-matter which I readily grant.

Suit dismissed.

Attorneys for the Plaintiffs: Messrs. Barrow and Orr.

Attorneys for the Defendant: Baboo Nobin Chund Bural, Mr. Carruthers, Mr. Hart, Mr. Gillanders, Messrs. Beeby & Rutter, and Mr. Pittar.

NOTES.

[I. REPRESENTATIVE SUIT—PARTIES—

In accordance with this decision, the word 'persons' has been substituted, in the C. P. C. 1908, sch. I, O. 1; r. 8 for the word 'parties' in the previous Code.

II. LEAVE TO SUE—

The Calcutta High Court holds that the provisions are imperative, 21 Cal. 189; 11 Cal. 219; The other High Courts hold that the permission may be given subsequently:—21 Bom. 784; 22 All. 269; 33 All. 660; 25 Mad. 399; 23 Mad. 28.

III. BINDING AUTHORITY OF DECISION OF APPELLATE BENCH—

With reference to NORRIS J.'s observations at page 607, see also (1905) 10 C. W. N. 449 at p. 496.]

[12 C.L.R. 300]

[609] APPELLATE CIVIL.

The 14th December, 1882.

PRESENT:

MR. JUSTICE WILSON AND MR. JUSTICE FIELD.

Noyna Misser and another.....Plaintiffs
versus

Rupikun and others.....Defendants.*

Landlord and Tenant—Cultivation—Changing character of lands— Forfeiture—Mandatory injunction.

Where a tenant has been guilty of a breach of duty in the use of his land, such as making a tank in it, building on it improperly, or changing the character of the cultivation, such conduct does not necessarily operate as a forfeiture so as to render the tenant liable to ejectment.

The tenant of an agricultural holding planted his jote with mango trees to the knowledge, but without the consent, of his landlord, thus changing the character of the land. More than three years afterwards the landlord sued for a mandatory injunction to have the mango trees removed.

Held, that having stood by for more than three years and allowed the tenant to spend his labour and capital upon the land without taking any action in the matter, the landlord was not entitled to a mandatory injunction.

THIS was an action for a mandatory injunction and for ejectment. The plaintiffs stated that in 1281 F. S. (1874-1875) they lot to the defendants certain lands for the purpose of tillage and cultivation of crops; that the defendants, without the permission of the plaintiffs, enclosed the land and planted mango grafts thereon; "that the planting of the grafts has altered the nature of the

*Appeal from Appellate Decree, No. 2234 of 1881, against the decree of Baboo Koylash Chunder Mukerjee, Second Subordinate Judge of Tirhoot, dated the 29th June 1881, reversing the decree of Syed Abdul Karim, Munsif of Durbhunga, dated the 2nd October 1879.

land, and in future when the grafts will be fully grown and shady, the lands in the vicinity surrounding will suffer loss in their produce, and the plaintiffs will sustain injury." They then prayed for a mandatory injunction to have the trees uprooted and for possession of the land. The defendants denied that they had been served with any notice to quit—*Rajendronath Mukhopadhyaya v. Bassider Ruhman Khondkhar* (I. L. R., 2 Cal., 146); they alleged that the garden had [610] been planted more than twelve years previous to the institution of the suit; and they also insisted that any relief based on the footing of breach of contract was barred by the three years rule of limitation.

The Court of First Instance decreed the plaintiffs' claim in full, citing *Lal Sahoo v. Deo Narain Singh* (I. L. R., 3 Cal., 781). On appeal the Subordinate Judge disallowed the prayer for ejectment on the ground that no notice to quit had been given. He found that the mango trees had, to the knowledge of the plaintiffs, but without their consent, been planted more than three years before the institution of the suit; and he held that the plaintiffs' claim was barred by limitation, under the provisions of s. 27, Beng. Act VIII of 1869—*Kali Komul Mozumdar v. Shib Sahai Sukul* (3 B. L. R. ap. 47; 11 W. R., 452); *Mahi Sahu v. Forbes* (B. L. R., Sup. Vol. 500: 6 W. R., Act X Rul., 61). He, therefore, reversed the decision of the Munsif and dismissed the plaintiffs' suit with costs.

The plaintiffs appealed to the High Court on the grounds that: (1) no notice to quit was required; (2) that s. 27 of Beng. Act VIII of 1869 did not apply to the case; (3) that at any rate the injunction should have been granted.

Baboo *Abinash Chunder Banerjee* for the Appellants.

Baboo *Saligram Singh* for the Respondents.

The **Judgment** of the Court (WILSON and FIELD, JJ.) was delivered by

Wilson, J.—We think that this appeal should be dismissed. Two points have been discussed before us: First, whether the Judge in the lower Appellate Court was right or not in overruling so much of the decree of the Court of First Instance as granted to the plaintiffs a decree evicting the defendants. As to that we feel no hesitation; no authority has been cited to us, nor any reasoning satisfactory to our minds tending to show that where a tenant has been guilty of a breach of duty in the use of his land, such as making a tank in it, building on it improperly, or changing the character of the cultivation, this operates necessarily as a forfeiture and renders him liable to be evicted. On this point, therefore, we [611] fully agree with the lower Appellate Court. The second question is one of much greater difficulty, and that is whether the lower court, ought not at the same time to have given them a decree granting an injunction against the future use of the land by the defendants in the way objected to by the plaintiffs. Now it appears to us quite clear that the learned pleader for the plaintiffs (appellants) has established the proposition that what was done by the defendants was a wrong for which a remedy is to be found in law. A tenant has not the right to alter the character of the land which he holds in such a way as to permanently injure the interest of the landlord in that land; and on the finding in this case it must be taken that the tenants, the defendants in this case, have done so. A suit for damages would, therefore, undoubtedly lie, but this is not what is asked for in this case. What is asked for is an injunction to compel the defendants to uproot the trees they have planted upon the land. Now, a remedy by injunction is no doubt a useful, but it is at the same

time a very strong remedy, and one not ordinarily granted where any other remedy is fairly open to the applicant, or where the conduct of the the parties has been such as to make it a harsh remedy to give in a particular case. The Legislature have expressed their view upon the matter in s. 56 of the Specific Relief Act, which is one of those dealing specifically with injunctions, and among the conditions there laid down it is enacted that an injunction cannot be granted when equally "efficacious relief can certainly be obtained by any other usual mode of proceeding," and "when the conduct of the applicant or his agents has been such as to disentitle him to the assistance of the Court." Now, one way in which an applicant may disentitle himself to the assistance of the Court, is, if he has stood by for a considerable time and allowed the person, against whom he applies, to go on with his work, and lay out his money and labour upon the land without any objection, and only applies to the Court after allowing all this to go on for some time. We think it has been sufficiently found that that is what has taken place here. The plaintiffs allege in their plaint that the cause of action arose in Kartick 1286, when the plaintiffs were informed that the land had been used as complained of by the defendants. An issue was framed upon this point, the second [612] the issue on the merits, viz., "whether or not the plaintiffs had knowledge and cognizance of the planting of the grafts when they were so planted." Now what the lower Appellate Court while reversing so much of the decree of the Court of First Instance as declared the plaintiffs' title to evict, has found is this: the Subordinate Judge says, first:—

"The Munsiff, believing the plaintiffs and his putwary, has held that the mango trees were planted in 1285 and 1286 Fasli but I do not believe them. The Munsif has made a local enquiry and has himself found that the disputed trees are from 4½ cubits to 6 cubits in height, and I think that according to the natural law they must have been planted more than three years before the suit, if not before;" and he says: "I cannot agree with the Munsif in thinking that they were planted in 1285 and 1286;" and later on he says: "The plaintiffs state that their cause of action arose in Kartick 1286 Fasli, when they became aware of the wrongful acts of the defendants, but I do not believe that story, and it was obviously made to avoid limitation. It is contended that the uprooting of the trees may be done legally, although the prayer of ejectment be not granted; but I think that when the plaintiffs and their putwary acquiesced in the defendants' planting the trees and allowed their claim of ejectment to be barred, they should not be now allowed to have the trees uprooted. I do not believe, however, that the trees were planted with the zamindar's consent." This appears to us to amount to a finding that the plaintiffs, at the time when the trees were planted, were aware of the fact, and that they stood by for more than three years—how much more does not appear—and allowed the defendants to spend their labour and capital upon the land without taking any action in the matter. That appears to us to be a sufficient reason why no injunction should issue in the case. These are the only two points discussed before us. There is no claim for damages in the suit. For these reasons this appeal must be dismissed with costs.

Appeal dismissed.

NOTES.

[See also 10 Mad. 351; 16 Mad. 407; 22 Mad. 39; 9 M. L. J. 39; 4 All. 174; (1909) 10 C. L. J. 595.]

[613] ORIGINAL CIVIL.

The 2nd February, 1883.

PRESENT :

MR. JUSTICE NORRIS.

Ramnarain Kallia
versus
Monee Bibee and others
and
Ramnarain Kallia
versus
Gopal Doss Sing.

Evidence Act (I of 1872), s. 32, cl. 6—Horoscope.

In a suit to recover possession of immoveable property the plaintiff tendered in evidence horoscope which he said had been given to him by his mother and had been seen by members of his family and used on the occasion of his marriage. He was unable to say by whom the horoscope, or an endorsement on it, which purported to state what his name was, had been written. *Held*, that the horoscope was not admissible under s. 32, cl. 6 of the Evidence Act.

THESE two suits were instituted by the plaintiff to recover possession of certain immoveable property. The defence was, that the plaintiff was illegitimate. At the hearing the plaintiff tendered in evidence a horoscope. He stated that the horoscope had been given to him by his mother, Sibsoondery Dasee; that it had been used at the time of his marriage; and that it had been seen by certain members of his family. He was unable to say by whom the horoscope, or by whom an endorsement on it, which purported to state what his name was, had been written.

Mr. *Kennedy* (for the Plaintiff).—The horoscope was brought to the notice of the family, and acted on at the time of the plaintiff's marriage. This comes within the class of cases, where entries in family bibles, and so forth, are admitted in evidence in questions of pedigree, Evidence Act, s. 32, cl. 6. The statement is that he is the legitimate son of Sibsoondery. [NORRIS, J.—There is no evidence to show by whose instructions the horoscope was prepared; it might have been under the directions of the mother anxious to prove the legitimacy of her child.] So might an entry in a family bible. This document was seen by, and acted on by other members of the family, who had an interest in proving that the plaintiff was illegitimate, and it has come out of proper custody.

Mr. *Phillips* (for the Defendants).—The document does not come within s. 32, cl. 6 of the Evidence Act. "Other thing" must be of [614] the same kind, as a family pedigree, tombstone, or family portrait. It must be something which is palpable and open to all the world. This is not a document public to all the family. It is a private document. Entries in a family bible are open to all the family. The horoscope does not relate to family affairs. The documents which are admissible in questions of pedigree are admitted because of the security derived from the general knowledge of the family. The section is not intended to relieve a person who is alive from producing the best evidence.

Norris, J.—I am of opinion that this document is not admissible in evidence. It is tendered as being admissible under s. 32, cl. 6 of the Evidence Act. That sub-section makes a statement admissible when it "relates to the existence of any relationship by blood, marriage, or adoption between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait, or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised." The document tendered is not a statement relating "to the existence of any relationship by blood, marriage, or adoption, between persons deceased." It only purports on the face of it to be a statement of relationship between a deceased person and a living person. I do not think that s. 32 embraces such a case. It is not suggested that the document is a will or deed relating to the affairs of the family. It is tendered as a statement relating to the parentage of a person who is alive. Then it is said it is a statement in the nature of a family pedigree. But I am of opinion that it does not come within those words in the sub-section. But there is another objection to the admissibility of the document which is fatal. Section 32 says that "statements written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense, which, under the circumstances of the case, appears to the Court unreasonable," may be admitted in certain cases. On the plaintiff's evidence it appears that he does not know who wrote the horoscope, or the endorsement on it, and therefore cannot say whether the [615] writer "is dead, or cannot be found, or became incapable of giving evidence." I am therefore of opinion that the document is inadmissible."

Attorneys for the Plaintiff: Messrs. *Remfry and Remfry*.

Attorney for the Defendants: Mr. *F. O. Moses*.

NOTES.

[HOROSCOPES—

This was followed in 17 Cal. 849; but doubted in 17 Mad. 134 (139). See also 13 Bom. 7; 5 C. W. N. cxlviii.]

[9 Cal. 615 :—7 Ind. Jur. 602]

APPELLATE CIVIL.

The 16th February, 1883.

PRESENT:

MR. JUSTICE WILSON AND MR. JUSTICE FIELD.

Muthura Persad Singh and another.....Plaintiffs

versus

Luggun Koor and others.....Defendants. *

Interest—Penal clause in contract—Increased interest on default of payment—Contract Act IX of 1872 s. 74.

A mortgage bond contained a proviso that in case of default in payment of the principal sum, with interest at the rate of 1 per cent. per mensem on a certain day, interest should be paid at the rate of 2 per cent. per mensem from the date of the bond.

* Appeal from Appellate Decree, No. 2925 of 1881, against the Decree of Baboo Ram Persad Roy, Subordinate Judge of Shahabad, dated the 21st September 1881, modifying the decree of Baboo Lal Gopal Sen, second Munsif of Arrah, dated the 9th January 1880.

Held, that the stipulation to pay increased interest must be construed as a penal clause.

Baboo AUBINASH CHUNDER BANERJEE for the Appellants.

Baboo HURI MOHAN CHUCKERBUTTY and Baboo PRAN NATH PUNDIT for the Respondents.

THE facts of this case sufficiently appear from the **Judgment** of the Court (WILSON and FIELD, JJ.) which was delivered by

Wilson, J.—We think that the Subordinate Judge has decided this case rightly. He says: "I am of opinion that the stipulation made as to the payment of interest at the rate of Rs. 2 per cent. per mensem from the time of the execution of the bond, in case of default of repayment of the loan in time, was laid down in the deed as a check upon the debtor, and it should undoubtedly be held as a penal clause."

Several cases were cited to us in which full effect has been [616] given to an agreement, that if money is not paid at the due date it shall from that time bear an increased rate of interest—*Boolakkee Lall v. Radha Singh* (22 W. R., 223); *Mackintosh v. Wingrove* (I. L. R., 4 Cal., 137).

The former of these cases probably dealt with a document executed before the Contract Act; but however that may be such cases differ materially from the present. In them the agreement to pay an increased rate of interest from a future day may well be regarded as a substantive part of the contract, not as penalty for its breach; but, where, as here, an increased rate of interest from the date of the bond is made payable on default, we cannot regard it in any other light than as a sum named in the contract to be paid in case of breach within the meaning of s. 74* of the Contract Act.

The appeal will be dismissed with costs.

Appeal dismissed.

NOTES.

[ENHANCED INTEREST AFTER DATE OF DEFAULT—PENALTY—

The present sec. 74 of the Indian Contract Act inserted in 1899 does away with many difficulties previously felt.

It was thought that 10 Cal. 305 practically overruled this case, in cases like 14 Cal. 248; 9 All. 690; but the Full Bench in 19 Cal. 392 (399) did not hold so; see 3 C. P. L. R. 48.

See also 11 Mad. 294; 15 All. 232; 9 Cal. 689 *infra*.]

* [Sec. 74:—When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named.

Title to compensation for breach of contract in which a sum is named as payable in case of breach.

Exception:—When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law or under the orders of the Government of India or of any Local Government gives any bond for the performance of any public duty or act, in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation:—A person who enters into a contract with Government does not necessarily thereby undertake any public duty or promise to do an act in which the public are interested.]

[9 Cal. 616—12 C. L. R. 284]

APPELLATE CIVIL.

The 19th December, 1882.

PRESENT :

MR. JUSTICE WILSON AND MR. JUSTICE FIELD.

Ram Dass.....Plaintiff

versus

Birjnundun Das *alias* Laloo Baboo and another.....Defendants.*

*Limitation Act (IX of 1871), Sch. II, Art. 148—Suit for redemption of mortgage
—Acknowledgment of title of mortgagor or of his right to redeem.*

An acknowledgment to be within the meaning of Art. 148, | Sch. II, Act IX of 1871 must be an acknowledgment of a present existing title in the mortgagor.

An acknowledgment of the original making of the mortgage deed and of possession having been taken under it, coupled with the allegation of the subsequent execution of two other deeds practically superseding the mortgage and altering the relation of the parties, contained in a written statement filed previous to the expiry of the 60 years allowed, is not a sufficient acknowledgment within the meaning of that Article, so as to prevent limitation from operating.

IN this suit the plaintiff sought to redeem a mortgage of immoveable property which was executed on July 15th, 1815. The [617] suit was instituted on December 18th, 1879, and the first Court dismissed the suit on the ground of limitation. That decree was confirmed on appeal by the lower Appellate Court, and the plaintiff now preferred a special appeal to the High Court. The plaintiff relied upon an acknowledgment* made by the defendants in a written statement filed by them in a suit in the year 1872 as being sufficient to take

* Appeal from Appellate Decree, No. 181 of 1882, against the decree of Baboo Kali Prosunno Mookerjee, Subordinate Judge of Sarun, dated the 21st November 1881, affirming the decree of Baboo Dinesh Chunder Roy, Munsif of Chupra, dated the 6th July 1880.

† [Art. 148:—

Description of suit.	Period of limitation.	Time from which period begins to run.
Against a mortgagee to recover possession of immoveable property mortgaged.	Sixty years ...	The date of the mortgage, unless where an acknowledgment of the title of the mortgagor or of his right of redemption has, before the expiration of the prescribed period, been made in writing signed by the mortgagee or some person claiming under him, and, in such case, the date of the acknowledgment. Provided that all claims to redeem arising under instruments of mortgage of immoveable property situate in British Burmah, which have been executed before the first day of May 1863, shall be governed by the rules of limitation in force in that province immediately before the same day.]

the case out of the provisions of Art. 148,* Sch. II of Act IX of 1871 (the Limitation Act), and the sole question argued was, whether that acknowledgment was sufficient to prevent the suit from being barred.

Baboo *Aubinash Chunder Banerjee* for the Appellant.

Baboo *Taruck Nath Palit* for the Respondents.

The **Judgment** of the Court (WILSON and FIELD, JJ.) was delivered by

Wilson, J.—We entertain no doubt about this case, and we agree with the view taken by the Court below. The suit is a suit to redeem a mortgage, and the question is whether the suit is barred by limitation. There is no question that this depends upon the terms of the Limitation Act of 1871. Now, under Art. 148 of the second schedule to that Act, a suit must be brought within “sixty years from the date of the mortgage, unless where an acknowledgment of the title of the mortgagor or of his right of redemption has, before the expiration of the prescribed period, been made in writing, signed by the mortgagee, or some person claiming under him, and in such case, the date of the acknowledgment.” In this case, the sixty years elapsed while the Act of 1871 was the governing Act, and the suit is therefore barred unless there is a sufficient acknowledgment to save it from the operation of limitation. The acknowledgment relied upon is contained in the written statement filed by the present defendants in August 1872, within sixty years from the making of the mortgage in the suit by the present plaintiff or those under whom he claims, and the acknowledgment runs in these words: “The land in dispute, according to the deed of zuripeshgi, dated 15th July 1815, for Rs. 425, executed by Ramrutton Das, devolved into the possession of Baboo Gokool Chund. Baboo Gokool Chund [618] all along used to pay Rs. 2 as the right of the lessor. After the death of Ramrutton Das Gosain, Gopal Das, the *guddi nishin*, in consideration of Rs. 665 (including both) former and present (debts), executed a zuripeshgi deed, dated 21st October 1824, respecting the land under claim, as well as the garden named Khatri containing two beeghas of land, in favour of Baboo Gokool Chund, an ancestor of the defendants. Subsequently he executed an ekrarnama, dated 11th August 1831, in lieu of the sum of Rs. 901 (by virtue of) which Baboo Gokool Chund till his lifetime was, and after his demise the defendants are, all along in possession of the same.” Now that is an acknowledgment of the original making of the mortgage-deed and of possession being taken under it, but the statement goes on to allege the execution subsequently of two other deeds, practically superseding the mortgage and altering the relation of the parties. Under the terms of Art. 148 we do not think that this is a sufficient acknowledgment to save the case from limitation. We think that “acknowledgment” in that Article means acknowledgment of a present existing title in the mortgagor.

We were referred to the decision in the case of *Daia Chand v. Sarfraz* (I. L. R., 1 All., 117) as an authority against this view of the case. The question there was, whether a certain record of right signed by the parties in question did or did not amount to an acknowledgment. The document was no doubt very scanty in its terms, and the case was relied on as shewing that we ought to interpret the Act very liberally in deciding what constitutes an acknowledgment; but the difference between the two cases is clear. In that case, there was an acknowledgment of a title existing at the time of the acknowledgment, which is not the case in the appeal now under consideration. At page 122 in the Judgment of Justices TURNER and OLDFIELD it is said: “The terms of the law, an acknowledgment of the mortgagor’s title, or an acknowledgment of his right to redeem, were not, it may be presumed, intended to be mere tautology. An acknowledgment that a certain person, or

* [2. v. *supra* 9 Cal., 616]

his representative, is the proprietor of the estate is an acknowledgment of his title. An acknowledgment that the mortgage is a [619] subsisting mortgage would be an acknowledgment of his right to redeem if he established his title." Those Judges, therefore, regard the acknowledgment required as an acknowledgment of an existing right to redeem, or of an existing title in the mortgagor. Neither of these are to be found in the present case.

We, therefore, agree with the Court below that this suit is barred, and dismiss the appeal with costs.

Appeal dismissed.

NOTES.

[See also 16 Mad. 220 ; 15 I. C. 363.]

[9 Cal. 619 : 10 I. A. 19 : 13 C. L. R. 34 ; 7 Ind. Jur. 212 ; 4 Sar. P. C. J. 414]

PRIVY COUNCIL.

The 23rd November, 1882.

PRESENT :

LORD FITZGERALD, SIR B. PEACOCK, SIR R. COUCH, AND
SIR A. HOBHOUSE.

Maharajah of Burdwan.....Defendant

versus

Tarasundari Debi.....Plaintiff.

[On appeal from the High Court at Fort William in Bengal.]

Sale for arrears of rent—Regulation VIII of 1819, s. 8, cl. 2—Proof of publication of notice before sale of patni taluk for arrears of rent.

The due publication of the notices prescribed by Regulation VIII of 1819, s. 8, cl. 2 form an essential part of the foundation on which the summary power to sell a patni taluk for non-payment of rent is exercised by the zamindar, who, when instituting this proceeding is exclusively responsible for such publication being regularly conducted.

Although objection to the form of the receipt, and the absence of the receipt itself, need not be regarded, if the fact of the due publication of the notices having been made is not a matter of controversy (as held in *Sona Bebee v. Lalchand Chowdhry*, (9 W. R., 242) ; yet where that fact was in doubt owing to the evidence of its not having been secured according to the provisions of the Regulation—a result due to the neglect of those representing the zamindar,—the finding of the High Court that due publication had not been established by such proofs as were forthcoming, was maintained by the Judicial Committee.

APPEAL from a decree of the High Court (22nd March 1880) reversing a decree of the Judge of the District of East Burdwan (2nd May 1878).

The question raised on this appeal was whether or not before the sale of the respondent's patni taluk, for arrears of rent due [620] to the zamindar, there had been sufficient notification, according to Regulation VIII of 1819, s. 8, cl. 2 of the intended sale.

The patni tenure sold under that Regulation was lot Salmula in the East Burdwan district, formerly held by Brojomohun Banerji as patnidar. It was sold for default in payment of rent due to the zamindar for the half-year ending 1284 B. S., by public auction on the 8th Aughran 1284 (November 22nd, 1877) and was bought by Rash Behari Ghose, the highest bidder, for Rs. 2,000.

The present suit was afterwards instituted in the Court of the Judge of East Burdwan, alleging absence of the notice of the intended sale required by Regulation VIII of 1819 on Salmula. The defence was that the notice required had been duly published upon the land of the defaulter. At the hearing it appeared that notifications had been duly made at the Collector's kutchery, and in the Sadr kutchery of the zamindar; but the question was whether the notice required to be published on the land belonging to the defaulter had been duly given; and the judge, upon the evidence, found that it had, although the serving peon had not brought back the receipt required. On this point the Judge was of opinion that the sale was not void and useless merely on account of this omission, although the Regulation required the receipt to be taken and filed. In this respect he considered the provisions of the Regulation to be merely directory. The suit was accordingly dismissed. On appeal to the High Court, that judgment was reversed. The Judges of a Division Bench (WHITE, J., and MACLEAN, J.), there being no independent evidence that the peon had been entrusted with service of the notice in question, and none, except his own, to show that he even went to Salmula, found that the due publication of the notice had not been proved.

The facts, and the provisions of Regulation VIII of 1819 are stated in their Lordships' Judgment.

On this appeal—

Mr. T. H. Cowie, Q.C., and Mr. C. W. Arathoon appeared for the Appellant.

The Respondent did not appear.

[621] For the appellant it was argued that the weight of the evidence was in favour of the conclusion at which the District Judge had arrived. A substantial compliance with the requirements of Regulation VIII of 1819 had been shown. Reference was made to *Sona Beebee v. Lalchand Chowdhry* (9 W. R., 242), *Ram Sabuk Bose v. Monmohuni Dossee* (L. R., 2 I. A., 71; S.C. 14 B. L. R., 394; 23 W. R., 113), and *Pitambar Panda v. Damoodur Dass* (24 W. R., 129).

The Judgment of their Lordships was delivered by

Lord Fitzgerald.—This case comes before us *ex parte*. The suit was to set aside a sale of a patni taluk, which took place by auction for non-payment of rent, the allegation of the respondent, who was the plaintiff in the suit being that the sale was illegal in consequence of the non-observance of Regulation VIII of 1819. By that regulation it is provided, with reference to cases where sales are to take place in certain districts and under certain circumstances for non-payment of rent, "that before the first day of Baisakh of the following year from that of which the rent is due, the zamindar shall present a petition to the Civil Court of the district, and a similar one to the Collector containing a specification of any balances that may be due to him on account of the expired year, from all or any of the talukdars or other holders of an interest of the nature described in the preceding clause of this section." Having presented this petition both to the Civil Court and to the Collector, "the same shall then be stuck up in some conspicuous part of the kutchery with a notice that, if the amounts claimed be not paid before the first of Jeyt following, the tenures of the defaulters will on that day be sold by public sale in liquidation." Then it provides that "a similar notice shall be stuck up at the Sadr kutchery of the zamindar himself and a copy or extract of such part of the notice as may apply to the individual case shall be by him sent to be similarly published at the kutchery, or at the principal town or village upon the land of the defaulter." It is admitted that there was a compliance with the two earlier provisions, but the [622] question arises whether a copy or extract of the notice

applying to the individual case was sent by the zamindar to be published "at the kutchery of the principal town or village upon the land of the defaulter." The Regulation goes on: "The zamindar shall be exclusively answerable for the observation of the forms above prescribed, and the notice required to be sent into the mofussil shall be served by a single peon, who shall bring back the receipt of the defaulter or of his manager for the same; or in the event of inability to procure this, the signatures of three substantial persons residing in the neighbourhood, in attestation of the notice having been brought and published on the spot. If it shall appear from the tenor of the receipt or attestation in question that the notice has been published at any time previous to the 15th of the month of Baisakh, it shall be a sufficient warrant for the sale to proceed upon the day appointed. In case the people of the village should object or refuse to sign their names in attestation, the peon shall go to the kutchery of the nearest Munsif, or, if there should be no Munsif, to the nearest thana, and there make voluntary oath of the same having been duly published, a certificate to which effect shall be signed and sealed by the said officers and delivered to the peon." That is a very important Regulation and no doubt it was enacted for a certain and defined policy, and ought, as a rule, to be strictly observed. Their Lordships desire to point out that the due publication of the notices prescribed by the Regulation forms an essential portion of the foundation on which the summary power of sale is exercised, and makes the zamindar, who institutes the proceeding, exclusively responsible for its regularity. Their Lordships do not, however, intend at all to controvert a decision to which their attention was called, of Sir BARNES PEACOCK, when he filled the office of Chief Justice of the High Court of Bengal, to the effect that if the notice itself has been duly published, if it is not matter of controversy, if the fact was ascertained that it was published, then one would not regard any objection either to the form of the receipt or the absence of the receipt itself. That decision was alluded to in a case before this tribunal, in which their Lordships say they are disposed to agree with the judgment of the High Court confined as it is to cases where there is proof that the notice [623] was duly served. That, again, is where there is no controversy as to the fact of the service. It seems to their Lordships that the object of the Regulation was that due service or publication should not be left matter of controversy. The evidence should be secured immediately afterwards, and exist in writing, and be referred to by the proper officer as part of the foundation of the sale. Accordingly, if, immediately upon posting the notice, the peon posting it can find the defaulter or his manager, he is bound to ask for a receipt from the defaulter or his manager, signed under his hand, and if he gets such a receipt there is an end to all question as to the service. If he does not find the defaulter or his manager, or if that person will not sign a receipt, then he is to call in three substantial people of the village to attest the fact, which will be apparent to their eyes, that the notices in question have been published. If they object, as very likely villagers would object, to be parties to the proceedings for the enforcement of a sale, then he is obliged to go to the nearest Munsiff, and make a voluntary oath of the fact of service, which act is immediately recorded, and forms the foundation upon which the officer afterwards proceeds in carrying out his sale. Thus the evidence that the notice has been given is immediately preserved, and the fact is not left to be matter of controversy afterwards.

The issue in this case is as to whether the provisions of Regulation VIII of 1819 have been complied with. The case before us differs from that before the Chief Justice of Bengal, and equally from that case which was before this tribunal, in this, that the fact of service here is matter of controversy. We

should be obliged to assume, in order to arrive at a conclusion one way or the other, either that there was a conspiracy to cheat and deceive upon the part of the plaintiff Charoo and the two chowkidars who are represented to have assisted in the fraud, or that there was a conspiracy on the part of the peon sent to effect this publication, who, having, it is said, neglected his duty, conspired afterwards with a confederate to make a false statement and forge a receipt.

The Judge in the primary Court delivered his judgment in favour of the appellant. He had the advantage of seeing and [624] hearing the witnesses, and he has expressed his decision in vigorous language. But there was an appeal on the question of fact, and upon that question of fact two Judges of the High Court have concurred in thinking that the Judge of the Court below was wrong, and have come to the conclusion that the plaintiff and her witnesses have told the truth. It shows that not alone is the fact of publication in controversy, but that the matter is so involved that it is difficult to come to a safe conclusion upon it. Their Lordships do not propose to say upon this controverted question of publication on which side the weight of evidence lies.

Their Lordships will humbly advise Her Majesty to affirm the decision of the High Court, and upon this ground: The doubt or difficulty in the case is one that would not have existed save by the neglect of those representing the Maharajah. There is no evidence save the statement of the peon Khetu that the notice was ever entrusted to him; but supposing it was entrusted to him for publication, his duty, and that of the officers of the Maharajah, would have been clear and plain. He should have ascertained when he went to make the service that the person whom he represents to be Charoo, to whom he says he delivered the notice, was the defaulter or the agent of the defaulter. He should then have obtained his receipt, a receipt proper in form. If he could not obtain it he should have followed the course prescribed by the Regulation, and should at once have returned the documents to the proper officer of the Maharajah. It would then have been the duty of that officer to examine the receipt and see that it was in all respects complete and regular as part of the foundation of the title afterwards to be given by sale. Their Lordships have before them a copy of the supposed receipt, which appears to be enveloped in mystery from the time it was alleged to have been signed. The peon gives no history of it. What did he do with it? To whom did he give it? Where has it been? All that is left in obscurity, and no confirmatory proof is produced from amongst the servants of the Maharajah that the peon, having effected what he alleged to be service, brought in this receipt with him, and filed it in the Collectorate or with the proper officer of the district. What [625] is the document itself when we come to look at it? The professed signatures are at the top. The first is that of Brojomohun Banerji. That purports to be the name, not quite the correct name, of the registered proprietor of the taluk, who has been dead many years, and if this had been brought to and examined by the servants of the Maharajah, they must have soon that the dead man could not have signed it; there is no doubt that they knew that this registered proprietor was not alive. The next signature is that of Redoynath Banerji, who is put down as the karpurdaz, meaning the karpurdaz of the dead man, Brojomohun Banerji. This turns out to be a non-existing individual; there is no such person. Then we come to the attesting witnesses at the foot, and they are Goburdhun Chowkidar and Gopal Chowkidar, residents of Salmula. The inference from that would be that they were the chowkidars of Salmula. If there are such persons in existence, there are no such chowkidars at Salmula, and neither of the chowkidars of Salmula have been

produced on either one side or the other. This document or receipt so produced by the peon is by no means a compliance with the provision of Regulation VIII. Their Lordships think that the absence of that care and attention which ought to have been shown with reference to this document, and the absence of any contemporaneous inquiry whether there had or had not been a publication of this notice, as required by the regulation, has created the very difficulty which the Regulation was intended to prevent; and as the regulation makes the zamindar exclusively answerable for the observance of its provisions, their Lordships are of opinion that the issue as to the Regulation ought to be found in favour of the respondent; and will therefore humbly report to Her Majesty, as their opinion, that the decree of the High Court of Judicature ought to be affirmed, and this appeal dismissed with costs.

Appeal dismissed.

Solicitor for the Appellant: Mr. T. L. Wilson.

NOTES.

[COMPLIANCE WITH REQUIREMENTS AS TO NOTICE, ETC.—

The strict compliance with the conditions was again affirmed by the Privy Council in (1887) 11 Cal. 365 P. C. at 373; 14 I. A. 30, on appeal from 9 Cal. 931; this case related to the place of publication. See also 12 Cal. 67; 19 Cal. 703; 18 Cal. 363 (363) F. B. (time); (1898) 2 C. W. N. 459 (time). The onus of proof of compliance is on the landlord:—(1899) Cal. 308 (312); (1891) 19 Cal. 699 (703); (1903) 27 Mad. 94 (96); 13 M. L. J. 479.]

[- 7 Ind Jur. 603]

[626] APPELLATE CIVIL.

The 7th February, 1883.

PRESENT:

MR. JUSTICE CUNNINGHAM AND MR. JUSTICE MACLEAN.

In the matter of the petition of Ram Coomar Dey.

Ram Coomar Dey

versus

Shushoe Bhooshun Ghose and another.*

Sale in execution of decree—Civil Procedure Code (Act XIV of 1882), s. 313.

Section 313 of the Civil Procedure Code only applies to cases in which the judgment-debtor has no saleable interest in the property sold. It does not apply to cases where the judgment-debtor has no saleable interest in a portion only of the property.

THE facts of this case and the question raised in argument are stated in the following judgment of the lower Court:—"The auction-purchaser applies for the setting aside of the sale, on the ground that the judgment-debtor really owned an eight annas share of the property sold, and the sale professes to be of sixteen annas. The question is whether under s. 313 of the Civil Procedure Code the sale is liable to be set aside on that ground.

"I think the provisions of the section are clear, and under them a sale can be annulled only where the judgment-debtor had no saleable interest in

* Appeal from Original Order, No. 366 of 1882, against the order of Baboo Bulloram Mullick, Second Subordinate Judge of the 24-Pergunnahs, dated the 23rd September 1882.

the property sold. Here that is not the case. I am referred to s. 287, and the High Court Rules governing the settlement of the sale proclamation: these are undoubtedly authorities, and in the light of which the regularity of the publication of the sale proclamation should be determined.

"But regularity of a proclamation, or no regularity, does not in any way concern the purchaser, and it does not lie within his capability to raise a question of irregularity as vitiating the sale.

"I am told that in regard to the eight annas, in which judgment-debtor has no right, it might be designated as property in which no saleable interest belonged to him within the meaning of the [627] Statute, but it should be borne in mind that the property was not sold in halves, and the purchaser has no right to draw an imaginary line of separation between them. The sale will be confirmed, and the auction-purchaser's application should be disallowed with costs."

The purchaser appealed to the High Court.

Baboo *Amarendra Nath Chatterjee* for the Appellant.

Baboo *Rajendra Nath Bose* for the Respondents.

The **Judgment** of the Court (CUNNINGHAM and MACLEAN, JJ.) was delivered by

Cunningham, J.—We think that the construction put by the Court below upon s. 313 of the Code of Civil Procedure was correct, and that the case of *Naharmul Marwari v. Sadul Ali* (8 C. L. R., 468), does not bind us, because in that case the learned Judges considered that a state of things had come about in which the judgment-debtor had no saleable interest. In the present instance it is admitted that he has a saleable interest to the extent of eight annas. That being so we think we cannot hold that the case falls within the scope of s. 313. The appeal must, therefore, be dismissed with costs.

Appeal dismissed.

NOTES.

[See 10 Cal. 368 (372); 27 All. 537; 10 C. L. J. 492, and the Notes to 9 Cal. 506 *supra*.]

[9 Cal. 627 -12 C.L.R. 484 7 Ind. Jur. 604]

APPELLATE CIVIL.

The 15th August, 1882.

PRESENT:

MR. JUSTICE WILSON AND MR. JUSTICE FIELD.

Lucky Churn Chowdhry.....Plaintiff

versus

Budurrunnissa and others.....Defendants*

Appeal—Dismissal of Suit—Summons not served—Civil Procedure Code (Act X of 1877), ss. 97, 588.

An order under s. 97 of the Civil Procedure Code dismissing a suit on it being found that the summons has not been served on the defendant in consequence of the failure of the plaintiff to pay the Court-fee leviable for such service, is not appealable.

* Appeal from Appellate Decree, No. 682 of 1881, against the decree of Baboo Mothoora Nath Gupto, Subordinate Judge of Chittagong, dated the 27th January 1881, affirming the decree of Baboo Hurro Chunder Dass, Munsif of South Roajan, dated the 30th April 1880.

[628] Baboo Aukhil Chunder Sen for the Appellant.

Munshi Serajul Islam for the Respondents.

THE facts of this case sufficiently appear from the **Judgment** of the Court (WILSON and FIELD, JJ.), which was delivered by

Wilson, J.—We are disposed to think that this appeal will not lie. The order that is sought to be appealed against is one under s. 97 of the Civil Procedure Code, which says: "If, on the day so fixed for the defendant to appear and answer, it be found that the summons has not been served upon him, in consequence of the failure of the plaintiff to pay the Court-fee leviable for such service, the Court may order that the case be dismissed." The question is whether there is an appeal against such dismissal when no appeal is expressly given either in s. 588 or elsewhere. Section 588 says that an appeal will lie against a decree. A decree is defined in the interpretation clause as "the formal expression of an adjudication upon any right claimed, or defence set up, in a Civil Court when such adjudication, so far as regards the Court expressing it, decides the suit or appeal." A decree, therefore, must be an expression of opinion upon the rights of the parties; but this was a dismissal on a ground wholly apart from the merits of the case. We are, therefore, disposed to think that this is not a decree, but an order only. That view is confirmed by the latter part of the definition of a decree which expressly says that a certain class of orders, more or less analogous to those made under s. 97, shall be decrees, but says nothing of orders made under s. 97. Then again a large number of orders analogous to those made under s. 97 are expressly made appealable under s. 588, whereas orders under s. 97 are not mentioned. But however that may be, there are certainly no grounds on the merits of the case to lead us to interfere.

The decision of the Subordinate Judge was right, and the appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[The present C. P. C. 1908 in its definition of 'decree' excludes orders of dismissal for default, sec. 2 (b). Upon a dismissal as in this case (sch. I, O. 9, r. 2) the plaintiff under r. 4 of the same order, may bring a fresh suit or may apply for an order to set the dismissal aside. For the views under the previous Code, see:—19 Bom. 307; (1907) P. R. 121; 2 All. 318.]

[7 Ind. Jur. 604]
[629] APPELLATE CIVIL.

The 9th January, 1883.

PRESENT :
MR. JUSTICE MACLEAN AND MR. JUSTICE O'KINEALY.

Bhobotarini Debi.....Plaintiff
VERSUS
Sree Ram Paul.....Defendant.*

*Practice - Plaintiff - Infant plaintiff - Next friend - Form of plaintiff -
Title of plaintiff.*

A suit was brought by a minor, who appeared by her next friend, and a decree was given in her favour. The defendant appealed, making the next friend alone respondent, and had the decree of the Court of First Instance modified in his favour. The next friend appealed to the High Court, where the respondent objected to the next friend being heard, on the ground that she was no party to the suit.

Held, that the Court would not entertain the objection at the instance of the party through whose fault the error occurred, but that the judgment of the Court below should be set aside, and that of the Court of First Instance restored.

ON the 9th of December 1878, the plaint in this case was filed in the Munsif's Court at Ranaghat. The title of the plaint is as follows: "*Suttobali Debi*, minor, represented by her guardian, Bhobotarini Debi of Santipur, Station Santipur, by profession zamindar, *Plaintiff* v. *Sree Ram Paul*, son of the late Ram Mohun Paul, of Santipur, by profession a service-holder, *defendant*." The plaintiff's claim was decreed by the Court of First Instance, and the defendant appealed. In the appeal the defendant dropped the name of the minor, and entered on the record as respondent the name of Bhobotarini Debi. The Subordinate Judge struck off a sum of Rs. 208 from the amount decreed by the Munsif in favour of the plaintiff, and gave a proportionate amount of costs to the respondent. From this decision Bhobotarini Debi appealed to the High Court.

Baboo *Jussoda Nundun Paramanick* for the Respondent objected that the appellant had no *locus standi*.

Baboo *Nil Madhub Bose* for the Appellant.

[630] The **Judgment** of the Court (MACLEAN and O'KINEALY, JJ.) was delivered by

Maclean, J.— The respondent's pleader objects to our hearing this appeal on the ground that the plaintiff, appellant, Bhobotarini Debi, was not the plaintiff in the original suit, and that therefore she has no *locus standi* in this Court. It is a matter of surprise that this objection should have been raised here, because we find that the person who is now appellant before us was alone placed upon the record in the lower Appellate Court as respondent. We cannot, therefore, allow the objection to bar the hearing of this appeal. The appellant's vakeel recognizes his situation and asks us to set aside the judgment of the lower Appellate Court, which is adverse to her in saddling her with costs, on the ground that she was not liable under the Munsif's decree and was in fact improperly made respondent in the Court below. We think there is no way out of the respondent's dilemma. Having omitted to make

*Appeal from Appellate Decree, No. 843 of 1881, against the decree of Baboo Amrito Lal Chatterjee, Subordinate Judge of Nuddea, dated the 25th February 1881, modifying the decree of Baboo Rajendro Coomar Bose, Munsif of Ranaghat, dated the 31st March 1879.

Suttobali Debi, the real plaintiff, respondent in the lower Appellate Court, he has lost his opportunity of questioning the Munsif's decree in her favour. The decree of the lower Appellate Court, modifying the Munsif's decree, is valueless and should be set aside. As the ground upon which we set aside the decree of the lower Appellate Court was not taken by the appellant before us in the memorandum of appeal, we cannot allow her any costs. The appeal is decreed without costs, the decree of the Subordinate Judge is set aside, and the decree of the Munsif is restored.

Appeal allowed.

[631] APPELLATE CIVIL.

The 1st February, 1883.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE O'KINEALY.

Kally Prosunno Biswas and another.....Plaintiffs

versus

Mungala Dassee and another.....Defendants.*

Civil Procedure Code, Act XIV of 1882, s. 561—Limitation Act XV of 1877, s. 5—Cross Appeal—Notice of objection.

A notice of objection under s. 561 of the Code of Civil Procedure, Act XIV of 1882, must be filed not less than seven days before the date (if any) fixed for the hearing of the appeal in the notice served upon the respondent.

Section 5 of Act XV of 1877 does not apply to an objection under s. 561 of the Procedure Code.

THIS was a suit for possession of certain lands claimed by the plaintiffs to be portion of their ancestral property. On the 10th of February 1881, the Court of First Instance decreed a portion of the plaintiffs' claim only, and against this decision the plaintiffs appealed. The day fixed for the hearing of the appeal, under s. 552 of the Code of Civil Procedure, was the 11th of June 1881. One of the respondents filed a memorandum of objections, under s. 561 of the Code of Civil Procedure, on the 14th of June 1881, more than seven days before the appeal was actually heard.

In reference to this the Judge of the lower Appellate Court said :—

“The respondent Dwarka Nath has made a cross appeal. It is objected that notice of it was not given to the appellant in proper time, but s. 561 does not require notice to be given to the appellant, but it merely provides that it is to be filed at least seven days before the hearing. In the present case the cross appeal was filed before that time, and it was tantamount to filing notice of the

* Appeal from Appellate Decree, No. 145 of 1882, against the decree of Baboo Promotho Nath Mookerjee, Additional Subordinate Judge of Burdwan, dated the 10th November 1881, modifying the decree of Baboo Khetter Prosad Mookerjee, Munsif of Culna, dated the 10th February 1881.

cross appeal." The Judge dismissed the appeal and decreed the cross appeal with costs. The plaintiffs appealed to the High Court, on the ground that the Judge was wrong in entertaining the cross appeal.

[632] Baboo Bordo Nath Dutt for the Appellants.

Baboo Rashbehary Ghose for the Respondents.

The following **Judgments** were delivered :

Prinsep, J.—It seems clear from the record that the lower Appellate Court has wrongly admitted what has been termed a cross appeal, but what, strictly speaking, is an objection taken by the respondent under s. 561 of the Code. The day fixed for the hearing of the appeal in the lower Appellate Court was, according to the notice served on the respondent, the 11th of June 1881. Therefore, according to the terms of s. 561, as interpreted by a Division Bench of this Court, the notice of the objection, that is, the written petition of objection itself, should have been filed in the lower Appellate Court not less than seven days before the day fixed for the hearing of the appeal, namely, the 11th June. It was not filed till the 14th June. The only provision made by the Legislature for extending the period of limitation is to be found in the second clause of s. 5 of the Limitation Act (XV of 1877) ; and as has already been pointed out in the case of *Degamber Mozumdar v. Kallynath Roy* (I. L. R., 7 Cal., 654), that provision does not apply to anything, except an appeal or application for review of judgment, and therefore does not apply to an objection under s. 561.

The decree of the lower Appellate Court must accordingly be amended so far only as it relates to the cross appeal.

The appellant will receive his costs in this Court.

O'Kinealy, J.—I understand that the interpretation just put by Mr. Justice PRINSEP on s. 561 of the Code of Civil Procedure, has been adopted by several Benches of this Court. I am not prepared to dissent, but were I unfettered by any previous decision I should have considerable difficulty in coming to the conclusion that the seven days referred to in s. 561 mean seven days before the date fixed in the notice of appeal.

Appeal allowed.

NOTES.

[TIME FOR FILING OBJECTIONS—

Sec. 561 of the C.P.C. 1882, as originally enacted was amended by VI of 1888 ; see, 48 thereof gave " one month from the date of the service on him or his pleader under section 553 of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow." This amendment got rid of the effect of this case. 9 C.L.R. 281 ; 11 Bom. 698 ; 14 Bom. 111 were cases under the law previous to the amendment. The memo. of objections may now be received at any time (1910) 15 C.W.N. 205 211.]

[12 C.L.R. 146]

[633] APPELLATE CIVIL.

The 22nd August, 1882.

PRESENT :

MR. JUSTICE WILSON AND MR. JUSTICE FIELD.

Denonath Chuckerbutty.....Judgment-debtor

versus

Lallit Coomar Gangopadhya.....decree-holder.*

Limitation (Act XV of 1877), Sch. II, Art. 179, cl. 4--Application for execution of decree by benamidar.

An application for execution of a decree by a mere benamidar is not an application in accordance with law within the meaning of Art. 179, cl. 4 of Sch. II of the Limitation Act (XV of 1877), such as to afford a fresh starting point for limitation.

THE application out of which this appeal arose was made on the 9th December 1880 by Lallit Coomar Gangopadhya, who held a decree against Koilash Nath Dutt Rai, and was for execution of a decree, dated the 7th June 1877, which Koilash Nath Dutt Rai had obtained against Denonath Chuckerbutty.

The only previous application for execution of the latter decree had been made on the 1st of June 1880 by one Nobin Chunder Bhattacharjya, who alleged that he had purchased the decree from Koilash Nath Dutt Rai. Lallit Coomar Gangopadhya had opposed that application on the ground that he had attached the decree, and that Nobin Chunder Bhattacharjya was merely a benamidar for Koilash Nath Dutt Rai; and on the 4th of December 1880 Nobin Chunder Bhattacharjya withdrew his application.

In the present application it was *found as a fact that Nobin Chunder Bhattacharjya had applied for execution merely as benamidar for Koilash Nath Dutt Rai.

The first Court held that the present application was barred by limitation, and accordingly rejected it.

The lower Appellate Court reversed this order, and allowed the application, citing *Syud Nadir Hossein v. Baboo Pearoo Thovildarnee* (11 B. L. R., 425 : 19 W. R., 255), and *Purna Chandra Roy v. Abhaya Chandra Roy* (4 B. L. R., Ap., 40) [634] as authority for its decision, and holding that *Abdul Kueem v. Chukhun* (5 C. L. R., 253) did not apply in the present case.

Denonath Chuckerbutty, the judgment-debtor, appealed to the High Court.

Baboo *Grija Sunkur Mozoomdar* for the Appellant.

Baboo *Jogesh Chunder Roy* for the Respondent.

The **Judgment** of the Court (WILSON and FIELD, JJ.), was delivered by

Wilson, J.—This is an appeal against an order allowing an application for execution of a decree. The decree bears date the 7th of June 1877, and was in favour of Koilash Nath Dutt Rai. On the 1st of June 1880 one Nobin Chunder Bhattacharjya applied for execution claiming it as assignee of the decree. It is found as a fact that he was a mere benamidar for the original decree-holder. The present application, which is made by a person who has attached the decree, was made on the 9th of December 1880. The question raised is,

* Appeal from Appellate Order No. 107 of 1882, against the order of T. M. Kirkwood, Esq., Judge of Mymensingh, dated the 25th February 1882, reversing the order of Baboo Nobin Chunder Ghose, Subordinate Judge of that district, dated the 6th August 1881.

whether this application is barred by limitation. If the period of limitation runs from the date of the decree there is no doubt that the application is too late. If the period runs from the former application for execution there is no doubt that it is in time. We have, therefore, to say whether an application for execution by a mere benamidar is an application "in accordance with law" within the meaning of Art. 179, cl. 4 of Sch. II, of the Limitation Act. It has already been held in *Abdul Kureem v. Chukhun* (5 C. L. R., 253), that where a decree is held in the name of benamidar the proper person to apply for execution is the real decree-holder, and in that view we fully concur. It follows that an application by the benamidar is not an application in accordance with law.

The appeal will, therefore, be allowed, and the order for execution set aside with costs in all Courts.

Appeal allowed.

[APPLICATION BY BENAMIDAR STEP IN AID OF EXECUTION—

This case which was followed in (1883) 16 Cal. 355 was explained in (1892) 20 Cal. 388 as having proceeded on the footing of the transferee not having been recognised. If recognised, the application would be in proper form. See (1907) 10 O.C., 263 (265) where such an application as in this case was held valid.]

[13 C. L. R. 89]

[635] APPELLATE CIVIL.

The 30th November, 1882.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE WILSON.

Rughu Nath Singh Manku.....Decree-holder

versus

Pareshram Mahata and another.....Judgment-debtors.

Limitation Act XV of 1877, s. 4 Appeal—Cross appeal—Jurisdiction of Appellate Court—Question of limitation not raised in cross appeal.

On an application for execution of decree, the application was granted, but the interest claimed by the decree-holder on the amount of the decree was disallowed. The decree-holder appealed from the order, but the judgment-debtor filed no cross appeal. On the hearing of the appeal the application for execution was dismissed, on the ground that the execution of the decree was barred by limitation.

Held, that, under the circumstances of the case, the Appellate Court was not competent to take the question of limitation into consideration.

Almanissa Khatoon v. Syed Hossein Ali (6 C. L. R., 267) followed.

THIS was an application for execution of decree. The application was granted by the Court of First Instance, but the rate of interest claimed by the decree-holder was disallowed. The decree-holder then appealed. The judgment of the Appellate Court, so far as material, was as follows:—

"The appeal in this case relates to the question of interest. The respondents have not cross appealed; but their pleader raises an objection in bar which must be first considered. He urges that the decree was barred by

* Appeal from Appellate Order No. 173 of 1882, against the order of A. L. Clay, Esq., Officiating Deputy Commissioner of Manbhoom, dated the 14th March 1882, modifying the order of Baboo Krishnadhan Chowdhuri, Munsif of Chowkee Burabazar, dated the 21st May 1881.

limitation. This point was raised in the Court below, and decided in the appellant's favour. The question is, can the Appellate Court interfere with the Munsiff's judgment on a point decided by that Judge in that judgment and not appealed against? Ordinarily, no doubt, it cannot, but the point of limitation must, it seems to me, be considered, even though it be not pleaded— See s. 4, Act XV of 1877. I think, therefore, that the argument must be admitted and disposed of."

The lower Appellate Court then decided that the application [636] for execution was barred by limitation, and he dismissed it with costs.

The decree-holder appealed to the High Court on the ground, amongst others irrelevant to this report, "That the judgment-debtors not having appealed from the decree of the Munsiff overruling the plea of limitation and allowing execution to issue, the Court of appeal was not competent to interfere with such an order on the appeal of the judgment-creditor, who was dissatisfied with only a part of the Munsiff's order."

Baboo *Rash Behary Ghose* and Baboo *Surender Nath Mutty Lal* for the Appellant.

Baboo *Jogesh Chunder Dey* for the Respondents.

The following **Judgments** were delivered by the Court (PRINSEP and WILSON, JJ.)—

Prinsep, J.—The first Court in this case held that the decree was not barred by limitation, and on another point decided in favour of the judgment-debtors.

The decree-holder alone appealed against the latter finding. No objection under s. 561 was taken by the judgment-debtors against the finding as regards limitation which was adverse to him. At the hearing of the appeal, in the course of the argument, the point of limitation was raised, and the lower Appellate Court held that execution was barred.

We are of opinion that the lower Appellate Court was, under the circumstances, not competent to consider this point; and in this respect we concur in the judgment delivered by another Division Bench of this Court in the case of *Alimannussa Khatoun v. Syed Hossein Ali* (6 C. L. R., 267). The District Judge has gone beyond the law in stating that "the point of limitation must be considered, even though it be not pleaded." The terms of s. 4 of the Limitation Act declare that a Court has this power *although limitation has not been set up as a defence*; and we think that this has been rightly interpreted, in the judgment already cited, to mean so far as regards the particular suit, or appeal, then under decision before the Court is concerned. The present case differs from the [637] precedent cited only in this respect, that in that case the appellant had not made the question of limitation one of the grounds of appeal. In the case before us the judgment-debtors, against whom the judgment of the first Court on this point was pressed, did not appeal against it, nor did they, when the decree-holder appealed, make any objection in writing within the terms of s. 561. Under these circumstances the lower Appellate Court was not competent to re-open the point. The order of the lower Appellate Court must therefore be reversed, and that of the first Court restored. The decree-holder will be entitled to costs, both in this Court and in the lower Appellate Court.

Wilson, J.—I am entirely of the same opinion. The effect of s. 4 of the Limitation Act, as I understand it, is simply this: Whenever a case is properly before a Court, whether it is a Court of appeal or a Court of First Instance, it is bound to take notice of the question of limitation; but in order to enable the Appellate Court to do that the case must be before it. In the present case the

order objected to was not before the Court below at all in its entirety, but only a portion of it. The whole might have been brought before the Court by appeal, or by cross appeal only on objection under s. 561 of the Code. That was not done. The lower Appellate Court therefore had no right to enter into the question of limitation, affecting that part of the order which was not before it.

Appeal allowed.

NOTES.

[LIMITATION ACT SECTION. 4—

As regards when the Court should dismiss the suit, *see also* (1904) 28 Mad. 67 : 15 M. L. J. 402; (1907) 34 Cal. 941 : 11 C. W.N. 959 : 6 C.L.J. 237; (1893) 13 A.W.N. 144 : 8 N. L.R. 171.]

**[9 Cal. 637 : 7 Ind. Jur. 605]
APPELLATE CRIMINAL.**

The 28th February, 1883.

PRESENT:

MR. JUSTICE MITTER AND MR. JUSTICE FIELD.

The Empress
versus
Brojokanto Roy Chowdhuri.*

Criminal Procedure Code (X of 1882), s. 133—Nuisance—Erection of buildings—Unconditional order.

Every order made under s. 133 of the Code of Criminal Procedure, Act X of 1882, must appoint a time within which, and a place where, the person to whom it is directed may appear before the Magistrate, and move to have the order set aside or modified.

No unconditional order can be made under that section.

[638] THIS was a reference to the High Court by the Sessions Judge of Backergunge, to set aside an order made by the Deputy Magistrate of Putuakhali. The facts of the case are thus stated by the Sessions Judge: "On the 5th of January last the Deputy Magistrate addressed to the applicant for revision, an order, which after reciting that last year the official residence of the Subdivisional Officers of Putuakhali with its out-offices was destroyed by fire, that he apprehended a recurrence of such a calamity, and that the propriety of directing the applicant to remove his bazar to a distance from the Subdivisional Officers' abode was under consideration, forbade the applicant (1), to erect or cause or permit to be erected within his bazar (he is the proprietor of the soil on which stand the shops and other buildings that constitute the bazar) or within the prostitute's quarter, any thatched buildings, or buildings constructed of easily combustible materials; (2), to repair and cause or permit to be repaired within the aforesaid limits, any such buildings, and enjoined him to put a stop to the creation of such buildings, which had been undertaken within such limits prior to the issue of the Deputy Magistrate's order.

"The order served on the applicant is annexed to the application for revision. It purports to have been promulgated under s. 133 Criminal Procedure Code, but in lieu of being conditional peremptorily requires compliance therewith in

* Criminal Reference No. 16 of 1883, and letter No. $\frac{C}{36}$ from the order made by J. F. Bradbury, Esq., Officiating Sessions Judge of Backergunge, dated the 21st February 1883.

ten days, and threatens the applicant with pains and penalties in the event of disregard thereof. It appoints no time or place for showing cause against it, nor does it intimate that the applicant will have an opportunity of moving a Magistrate to set it aside or modify it." The Sessions Judge then went on to say that the Deputy Magistrate had given an explanation of his proceedings but that in such explanation he had "overlooked the one irregularity which is fatal to the validity of his order, namely, its unconditional character."

No one appeared to argue the case.

The **Judgment** of the Court (MITTER and FIELD, JJ.) was delivered by

Mitter, J.—We agree with the Sessions Judge that the order of the Deputy Magistrate of Putuakhali, purporting to have been passed under s. 133, Criminal Procedure Code, is illegal, and [639] should be set aside on the ground that it is unconditional. As required by the section, it does not appoint any time or place within which and where the person to whom it is directed may appear before the Deputy Magistrate himself, or some other Magistrate of the first or second class, and move to have the order set aside or modified. We accordingly set aside the order, which the Sessions Judge recommends to be set aside.

Order set aside.

[9 Cal. 639 : 13 C.L.R. 80 : 7 Ind. Jur. 606]

The 1st March, 1883.

PRESENT :

MR. JUSTICE WILSON AND MR. JUSTICE MACLEAN.

In the matter of Peary Mohun Sircar and others.

Peary Mohun Sircar

versus

The Empress*.

Unlawful assembly—Penal Code, Act XLV of 1860, s. 143

On the trial of certain persons charged with being members of an unlawful assembly, it was proved that there was a dispute of long standing between the accused and certain other parties regarding the possession of certain land ; that neither of the parties was in undisturbed possession of the land ; that the accused went to sow the land with indigo, accompanied by a body of men armed with *latties* ; that they were prepared to use force if necessary : and that the *lattials* kept off the opposite party by brandishing their weapons while the land was sowed.

Held, that the accused were rightly convicted of being members of an unlawful assembly, under s. 143 of the Penal Code.

Sunker Singh v. Burmah Mahto (23 W. R. Cr., 25) distinguished.

IN this case the prisoners were convicted by the Joint Magistrate of Rajshahye of being members of an unlawful assembly and sentenced to three months' rigorous imprisonment under s. 143 of the Indian Penal Code. The prisoners appealed to the Sessions Judge of Rajshahye, the material portion of whose judgment was as follows :—

It does not seem to be seriously denied in this case that the retainers of Messrs. Watson & Co. went in a large body to sow down indigo on the lands which are referred to by the witnesses, and that many of these retainers were armed. This fact is proved by the clearest evidence, and the evidence of the constable Pormeshwar Singh shews that while the *lattials*

* Criminal Motion, No. 32 of 1883, against the order of L. Hare, Esq., Joint Magistrate of Rajshahye, dated the 4th January 1883.

were brandishing their *latties*, some fifty persons sowed down the lands in indigo. The pleader for Messrs. Robert Watson & Co., relying upon the [640] case of *Shunkur Singh v. Burmah Mahto* (23 W. R., Cr., 25), contends that the charge in this case cannot be sustained, as the intention of the defendants was not to enforce a right, but to maintain, undisturbed, the subsisting enjoyment of their rights. It seems to me, however, that the ruling above quoted is not applicable to the present case. It referred to the enjoyment of water actually flowing, and to the protection of the then subsisting enjoyment of this right, under circumstances where there was no time to have recourse to the Police authorities. In the case now under appeal it is clear that the land, of which the enjoyment is claimed, is disputed land, and was so in April and May 1882, as well as in the following November, when it reappeared from the bed of Padma river. [The District Judge, went on to say that he agreed] with the Joint Magistrate that the evidence on the record is not sufficient to prove conclusively that either party was in *bona fide* possession. It is clear, however, that both parties claimed the right of possession, and that these claims arose as soon as the disputed land reappeared from the bed of the river. It is the forcible assertion of this claim on the part of the appellants, which is the subject of the present charge against them..... From a review of the whole evidence I concur with the Joint Magistrate in the opinion that the appellants are guilty of the offences of which they have been convicted, and I accordingly dismiss this appeal.

The prisoners moved the High Court for a rule to show cause why the conviction should not be set aside as bad in law.

Mr. *Evans* for the Petitioners.

The **Judgment** of the Court (WILSON and MACLEAN, JJ.) was delivered by

Wilson, J.—This was a rule granted to show cause why a conviction should not be set aside on the ground that, assuming the facts found to be correct, the conviction was bad in law. We have had the advantage of hearing the arguments of the petitioner's Counsel, and it appears to us that, assuming the facts found to be correct, the conviction is good in law. The facts found are these: that there was no one in undisputed possession of the land in question, but that a dispute of some considerable standing existed between the two parties as to who was entitled to the land and who was in possession of it; that a number of persons of the petitioner's party went to sow the land, together with a body of men armed with *latties*; that they were prepared to use force, if [641] necessary; and that they stationed these *lattials* to keep off the opposite party and these were brandishing their weapons, while the land was sowed. That falls within the definition of the offence, because there was an assembly for the purpose of enforcing a right by criminal force, or shew of criminal force.

It was contended that this case was governed by the case of *Shunker Singh v. Burmah Mahto* (23 W. R., Cr., 25); but as was pointed out by the Judge in the appeal Court in this case that case is distinguishable. It was decided on this ground that what was done there was an act justified by the sections relating to private defence, and it was expressly pointed out that it did not fall under cl. 3 of s. 99 of the Penal Code. There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities. In this case it appears that there was plenty of time to have recourse to the public authorities, therefore the law as to private defence does not apply.

This rule will be discharged.

Rule discharged.

[9 Cal. 641]

APPELLATE CIVIL.

The 9th January, 1883.

PRESENT:

MR. JUSTICE MACLEAN AND MR. JUSTICE O'KINEALY.

Dwarka Nath and others.....Plaintiffs

versus

Aloke Chunder Seal and others.....Defendants.*

*Sale for arrears of rent—Beng. Act VIII of 1869, ss. 59, 60—Sale Certificate
—Proclamation of sale—Under-tenure.*

Held, on the construction of a sale certificate and a proclamation of sale purporting to be made under ss. 59 and 60 of the Rent Act, Beng. Act VIII of 1869, that what passed by the sale was not an under-tenure, but merely the right, title and interest of the judgment-debtor therein.

The declaratory portion of a sale proclamation is not by itself sufficient to override the description of the property in the body of the document.

THIS was a suit for possession of a *howla* which the plaintiffs claimed to have purchased in 1871 at a sale held under the pro-[642]visions of ss. 59 and 60 Beng. Act VIII of 1869, in execution of a rent-decree. The defence was, amongst other things, that the tenure did not pass by the sale, but only the right, title and interest of the judgment-debtors. On this point the Judge of the Court of First Instance said: "It is manifest, as appears from the sale certificate, that the property was sold under ss. 59 and 60 of the Rent Act, and as such, the plaintiffs would be entitled to obtain the property free from incumbrances of the defaulting tenant. On appeal the Subordinate Judge said: "I find that the sale certificate, which was filed by the plaintiffs, and the certified copy of the sale proclamation, which has been now filed by the respondents, show that the right, title and interest of the judgment-debtors were sold, although in the heading of the sale proclamation it was mentioned that the tenure would be sold, but it is clearly mentioned below that '*dahaner bhog dakhli sathva*', that is the rights which are in possession and enjoyment of the judgment-debtors, would be sold. Such being the case the purchaser in such a sale did not purchase the tenure free from incumbrances --*Dular Chand Sahu v. Lal Chabil Chand* (3 C. L. R., 561)." The Subordinate Judge then reversed the decision of the Munsif, and the plaintiff appealed to the High Court.

Baboo Bhoobun Mohan Dass for the Appellants.

Baboo Rash Behari Ghose for the Respondents.

The **Judgment** of the Court (MACLEAN and O'KINEALY, JJ.) was delivered by

Maclean, J.—In this case the question to be decided is whether the sale, on the basis of which the plaintiffs sue as purchasers, passed the tenure or only the right, title and interest of the judgment-debtors. It appears that in 1870, the plaintiffs' mother brought a suit for arrears of rent of a *howla* for the years 1274, 1275 and 1276, and obtained a decree on the 19th July. In execu-

* Appeal from Appellate Decree, No. 873 of 1881, against the decree of Baboo Banoo Madhup Mitter, Subordinate Judge of Backergunge, dated the 23rd September 1880, modifying the decree of Baboo Doorga Churn Sen; Sudder Munsif of Burrisal, dated the 30th September 1879.

tion of that decree, the property, on account of which the suit for arrears had been brought, was sold. What was sold is the present dispute. It is contended on behalf of the plaintiffs that since the certificate purports to have been issued under ss. 59 and 60 of the Rent Act and the Court admittedly had no power to [643] sell under that Act anything but the tenure itself, there arises an irrebuttable presumption in favour of the tenure being sold. But when we turn to the notification, under which the sale is declared to have taken place, and the sale certificate, we find that they contain a clear and precise statement showing that what was proclaimed for sale and what was actually sold was not the tenure, but the right, title and interest of the defendants. This too appears to be consonant with the fact that the decree-holders purchased the property for a very small sum. Following the decisions of a Division Bench of this Court, in special appeal No. 2752 of 1875, we are of opinion that the declaratory portion of a proclamation is not by itself sufficient to override the description of the property in the body of the document, and that it is not the tenure, but the right, title and interest of the judgment-debtor that was sold in the former suit and purchased. In this view of the case, we uphold the decision of the Subordinate Judge and dismiss the appeal with costs.

Appeal dismissed.

NOTES.

[See also 29 Cal. 818 ; 14 C.L.J. 136.]

[9 Cal. 643 : 13 C.L.R. 119]

APPELLATE CIVIL.

The 26th February, 1883.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE WILSON.

Sripoti Churn Dey.....Plaintiff

versus

Mohip Narain Singh.....Defendant.*

Mortgage—Right to redeem—Mokurari—Regulation XVII of 1806,

s. 8—Notice of foreclosure.

“ The holder of a mourasi mokurari patta under the mortgagor is not a “ representative ” within the meaning of s. 8 of Regulation XVII of 1806, and is therefore not entitled to notice of foreclosure under that section.

Lalla Doorga Pershul v. Lalla Luchmun Sahoy (17 W. R., 272) followed.

Baboo Sree Nath Das and *Baboo Juggut Chunder Banerjee* for the Appellant.

Baboo Ras Behary Ghose for the Respondent.

THE material facts of this case are sufficiently stated in the **Judgment** of the Court (PRINSEP and WILSON, JJ.) which was delivered by

Prinsep, J.—The facts of this case are as follows : In Assin [644] and Pous 1276 Ikrami Rusul and others executed in favour of the plaintiff a mortgage

* Appeal from Appellate Decree No. 1572 of 1881, against the decree of Baboo Kedar Nath Muzumdar, Second Subordinate Judge of Midnapore, dated the 16th June 1881, reversing the decree of Baboo Dabendro Lal Shomo, First Munsif of that district, dated the 8th March 1880.

by way of conditional sale of certain lands. They subsequently granted a mourasi mokurari patta of the same land to the defendant. The plaintiff took foreclosure proceedings under Regulation XVII of 1806, and notice was served upon the mortgagors, but not upon the defendant, and the plaintiff subsequently obtained a decree for possession against the mortgagors. He now sues to set aside the defendant's patta.

The Subordinate Judge, reversing the decision of the Munsif, has held that the plaintiff's case fails on the ground that the defendant was entitled to redeem the plaintiff's mortgage and therefore ought to have been served with notice of foreclosure under s. 8 of the Regulation.

We do not agree in this view. It was held by a Division Bench of this Court, consisting of MACPHERSON and GLOVER, JJ., in *Lalla Doorga Pershad v. Lalla Luchmun Sahoy* (17 W. R., 272) that a person in the defendant's position is not entitled to redeem, and we think we ought to follow that ruling. And that being so he cannot, we think, be called a representative within the meaning of the section in question.

The decree of the lower appellate Court will be reversed and that of the Munsif affirmed with costs in all Courts.

[9 Cal. 644]

APPELLATE CIVIL.

The 18th March, 1883.

PRESENT :

MR JUSTICE MITTER AND MR JUSTICE FIELD.

Radha Prosad Singh.....Decree-holder

versus

Sundur Lall and another.....Judgment-debtors.*

Limitation Act (XV of 1877), Sch. II, Art. 179—Execution of decree—

Application for—Step in aid of execution.

On the 28th September 1877 an application was made for execution of a decree. On the 8th July 1878 the decree holder deposited Rs. 2 as Nilamce fees, that is to say, costs for bringing certain property to sale in execution of the decree. On the 28th March 1881 a further application for execution of the decree was made. *Held* that the deposit of Rs. 2 as Nilamce fees on the 8th July 1878 was a step in aid of execution of the decree, and that the application of the 28th March 1881, being within three years from the date of the deposit was not barred by limitation.

Quere—Whether, inasmuch as Act IX of 1871 is repealed by Act XV [645] of 1877 and the later Act contains no provision similar to that contained in s. 1 of Act IX of 1871, Act XIV of 1859 can be said to have been repealed in respect of suits instituted before the 1st of April 1873.

* Appeal from Original Order, No. 236 of 1882, against the order of J. F. Stevens, Esq., Officiating Judge of Sarun, dated the 5th of May 1882.

Baboo Chunder Madhub Ghose and Baboo Rughoo Nundun Pershad for the Appellant.

Baboo Anundo Gopal Palit for the Respondents.

THE facts of this case sufficiently appear from the **Judgments** of the Court (MITTER and FIELD, JJ.)

Mitter, J.—This is an appeal against the decision of the District Judge of Sarun, dismissing a petition for execution of decree, dated the 4th August 1870, upon two grounds: (1st), that the application for execution is barred by limitation; and (2ndly), that as regards one of the judgment-debtors, *viz.*, the defendant No. 2, he is liable only to the extent of the property hypothecated in a certain bond executed in favour of the plaintiff, decree-holder, and that that property having been sold he is not any further liable for the balance of the decree. It appears that the application next preceding the one now under our consideration for execution was filed on the 26th September 1877. It was followed by the sale of certain property on the 1st of April 1878. Then it further appears that on the 8th July 1878, the decree-holder deposited Rs. 2 as Nilamnee fees, that is, costs of bringing certain property to sale in execution of the decree in question. The present application was made on the 28th of March 1881.

Upon these facts the District Judge was of opinion that, under the Limitation Act of 1877, the present application, having been made more than three years after the application of the 26th September 1877, is barred by limitation. In appeal it is contended that the present Limitation Act does not apply to this case because the decree in question was passed on the 4th of August 1870, when the Limitation Act of 1859 was in force, and in support of this contention the well-known case of *Mungul Pershad Dichit v. Gria Kant Lahiri* (I. L. R., 8 I. A., 123; I. L. R., 8 Cal., 51), decided by the Judicial Committee of the Privy Council on the 10th June 1881, has been cited. There is a very essential difference between the facts of the case cited before us and of the present case,—that difference being that in *Mungul Pershad Dichit* [646] *v. Gria Kant Lahiri* the application for execution, which was under the consideration of the Judicial Committee, was filed when the Limitation Act of 1871 was in force, and the decision of the Privy Council was based upon the provisions of s. 1 of the Limitation Act of 1871. There is no such corresponding provision in the present Limitation Act. It is, therefore, doubtful whether the ruling referred to will apply to a case like the present in which the application for execution was filed after the Limitation Act of 1871 had been repealed; but it is not necessary to decide that question in this case, because it seems to us that, conceding in favour of the judgment-debtors that the present Limitation Act applies to this execution case, we are of opinion that the District Judge was in error in holding that the application of the 28th of March 1881 is barred by limitation. Under Art. 179. Sch. II of the Limitation Act, the decree-holder is entitled to apply for execution within three years from any date when he takes some step in aid of execution of the decree. The deposit of Rs. 2 as Nilamnee fees on the 8th July 1878, is certainly a step in aid of execution of the decree, and the application under our consideration, *viz.*, the application of the 23rd March 1881, being within three years from the 8th July 1878, is within time. We are, therefore, of opinion that the District Judge was in error in throwing out the application for execution on the ground that it is barred by limitation. As regards the second ground upon

which the District Judge has rejected the application in so far as the defendant No. 2 is concerned, it appears to us that the decree which is sought to be executed made both the defendants *viz.*, the defendant No. 1 and the defendant No. 2, personally liable. The last portion of the decree contains only a declaration of lien upon the property hypothecated for the realization of the amount decreed. That being so, the defendant No. 2 is as much personally liable for the balance of the decree as the defendant No. 1.

We, therefore, reverse the decision of the lower Court, and decree this appeal with costs.

Field, J.—Three points have been argued before us in this appeal. The first point relates to the application to this case of the principle laid down in the Privy Council decision of [647] *Mungul Pershad Dichit v. Grija Kant Lahiri* (L. R. 8 I. A., 123; I. L. R. 8 Cal., 51). Now the present case is to be governed by the Limitation Act of 1877, and that Act contains no provision similar to those contained in s. 1, Act IX of 1871. This being so the question arises whether Act XIV of 1859 can be said to have been repealed in respect of suits instituted before the 1st of April 1873. Now it may be argued that s. 2, Act IX of 1871 is a complete and absolute repeal of the Acts therein referred to, and to be found in the first schedule; one of these Acts being Act XIV of 1859, except a portion of s. 15 with which we have no concern, and it may then be contended that the effect of s. 1, Act IX of 1871 was to stay the applicability of the general repeal in respect of the suits in question, that is, suits instituted before the 1st day of April 1873. Then it may be argued that, when Act IX of 1871 was repealed by the present Act XV of 1877, the effect of that repeal was to do away with the stay of the repeal contained in s. 2, Act IX of 1871, and that the immediate result was that the complete and absolute repeal of Act XIV of 1859, which but for s. 1, Act IX of 1871, would have had effect upon the class of suits specified immediately, had that effect and operation which before were stayed or delayed. I agree with my learned colleague that in the present case it is not necessary for us to decide this point. It may perhaps arise hereafter, and other cases and other considerations may be laid before us which may assist us in forming a conclusion. I, therefore, think that it will be better to abstain from a definite determination of a question, the decision of which is not absolutely necessary for the disposal of this case.

The second point is, whether the payment of Rs. 2 as Nilameo fees in July 1878 was, within the meaning of the present law, a step in aid of the execution of the decree. I am of opinion that it was such a step.

The third point relates to the construction of the decree as regards the liability of the defendant No. 2, and in the view taken by my learned colleague upon that point I entirely concur.

Appeal allowed.

NOTES.

[STEP IN AID OF EXECUTION—DEPOSIT—

Deposit of poundage was recognised in 22 Cal., 827; 23 Cal. 196; but *see* to the contrary in 9 Cal., 790; (1894) 20 Bom. 179 (180); (1900) 22 All. 358 (360); 30 All. 179; 5 A. L. J. 258. In (1897) 22 Bom. 722 (726) it was pointed out that an oral application would be enough. *See* also (1901) 21 A. W. N. 42.

In (1911) 18 I. C., 189 (Cal.) the Calcutta High Court did not follow this ruling and preferred to follow the Allahabad ruling in 22 All. 358.]

[648] APPELLATE CIVIL.

The 7th March, 1883.

PRESENT :

MR. JUSTICE WILSON AND MR. JUSTICE MACLEAN.

Srishteedhur Biswas.....Plaintiff

versus

Mudan Sirdar and others.....Defendants.

Right of occupancy -- Ejectment—Transfer—Effect of asserting a right to transfer land by a ryot having a right of occupancy, who remains in possession.

A ryot having a right of occupancy is not liable to ejectment by his superior landlord merely because he has asserted a transferable right in the lands, and sold that right to a stranger without giving up possession of the land.

Narendra Narain Roy Chowdhry v. Ishan Chandra Sen (13 B. L. R., 274; S.C., 22 W. R., 22; and *Ram Chandra Roy Chowdhry v. Bholanath Lushkhar* (22 W. R., 200) distinguished.

Dwarka Nath Misser v. Hurrish Chundra (I. L. R., 4 Cal., 925) referred to.

IN this case the principal defendants, Nos. 2, 3, and 4, held a jama under the plaintiff, which they had transferred to the first defendant. The plaintiff sued to eject the defendants, alleging that the jama was not transferable. The only defendant who appeared to the suit was defendant No. 3, and he pleaded that his jama was kaemi, and transferable according to the custom of the country, and that as no notice to quit had been served upon him the suit could not be maintained. The following issues were accordingly framed :—

First.—Whether the suit could proceed, unless notice to quit was served upon the defendants ?

Second.—Whether the jama of defendants Nos. 2 to 4 was transferable or not ; and whether the sale of the jama by those defendants to defendant No. 1 was void ; and whether the plaintiff was entitled to the khas possession of the land by evicting the defendants ?

The Court of First Instance held with regard to the first issue, on the allegation of the plaintiff, that the defendants Nos. 2 to 4 [649] were no longer his tenants, but trespassers along with the first defendant, that no notice to quit was necessary.

With regard to the second issue the Court held, as regards the transferable character of the holding, that the defendants having failed to adduce any evidence, the sale of the jama to the first defendant was void, and that the plaintiff was entitled to khas possession.

The suit was accordingly decreed with costs.

The third defendant then appealed.

The lower Appellate Court, however, found as a fact that the appellant, with others, being tenants with certain occupancy rights under the plaintiff, had transferred their rights to the first defendant, from whom they again took a sub-lease and so remained throughout in possession, and that consequently

* Appeal from Appellate Decree, No. 1379 of 1881, against the decree of H. Beverley, Esq., Additional Judge of the 24-Pergunnahs, dated the 13th May 1881, modifying the decree of Baboo Roma Nath Seal, First Munsif of Satkheera, dated the 13th September 1880.

the only question at issue, and the only one that was urged in appeal, was whether the transfer having been set aside as invalid, the plaintiff could eject his former tenants.

In the plaint there was also an allegation that the tenants had denied the plaintiff's title, but this allegation was traversed, and no evidence was given in support of it, and in the lower Appellate Court the plaintiff's right to eject was based solely on the attempt, on the part of the tenants, to transfer their rights.

The lower Appellate Court held that this was not a sufficient ground to entitle the plaintiff to eject them and obtain khas possession, and accordingly varied the decree of the Court below by declaring that the tenure in question was not transferable, and disallowing the prayer of the plaintiff for ejectment of the defendants Nos. 2 to 4.

Against this decree the plaintiff now preferred a special appeal to the High Court, on the ground that the lower Court was wrong in holding that the defendants Nos. 2 to 4 could occupy the land after they had sold their right of occupancy to the defendant No. 1: that the third defendant having admitted, in this written statement and also in his deposition, that the tenants had sold their occupancy right and made over possession to defendant No. 1, and that they were not holding possession under the plaintiff on their occupancy right, but had completely severed their connection [650] with the landlord, the lower Appellate Court should not have disturbed the decree of the first Court for ejectment. It was contended, in support of this view, that the case was within the ruling in the case of *Narendra Narain Roy Chowdhry v. Ishan Chandra Sen* (13 B. L. R., 274: s. c., 22 W. R., 22).

Baboo *Umbica Churn Bose* appeared on behalf of the Appellant.

Baboo *Boyd Nath Dutt* for the Respondents.

The **Judgment** of the Court (WILSON and MACLEAN, JJ.), was delivered by

Wilson, J.—The question for decision here is, shortly, whether occupant cultivators who have asserted a transferable right in their lands and sold that right to a stranger without giving up their occupation, are liable to ejectment by the superior landlord, whom they may have repudiated in a suit brought against them for arrears of rent, and set themselves up as tenants of the purchaser.

Fortunately this question has been considered on several occasions by this Court.

In *Narendra Narain Roy Chowdhry v. Ishan Chandra Sen* (13 B. L. R., 274; s. c., 22 W. R. 22), it was ruled that the transferee of occupant rights, illegally sold, could be ejected if he had entered into actual possession of the land. The principle involved in that case was the abandonment by the tenant of his connection with the land, and the landlord's consequent right to re-enter. This principle is re-asserted in *Ram Chunder Roy Chowdhry v. Bholanath Lushkur* (22 W. R., 200), and is also referred to in a recent judgment delivered on 17th January 1883 (appeal from Appellate Decree No. 1655 of 1881, MITTER and O'KINEALY, JJ.).

In *Dwarka Nath Misser v. Hurrish Chandra* (1. L. R., 4 Cal., 925) there is a remark which seems to indicate that occupant ryots who after sale remain upon the land by permission of the transferee, as his tenants, do so under circumstances amounting to an abandonment of their right of occupancy, and the result of that case shows that neither they nor the transferee can resist an [651] action to eject them; but it must be remarked that in that case the

ryots did not question the decree for their ejection by appeal to this Court, and therefore we need not consider the judgment as deciding anything contrary to the other cases quoted above.

We accordingly follow those decisions and dismiss this appeal with costs.

Appeal dismissed.

NOTES.

[OCCUPANCY TENANT PARTING WITH HIS RIGHT—

The case of the tenant parting with the possession as well as the right came up for decision in (1896) 24 Cal., 212; (1897) 2 C. W. N., 63 (64), and it was held that in such case, the tenant can be ejected.

A tenant *retaining* possession cannot be ejected:—(1906) 33 Cal., 531 3 C. L. J., 343; (1904) 9 C. W. N. 379 (380); (1905), 30 Bom. 290; 7 Bom. L. R. 941; (1903), 9 C. W. N. 56. As for the case of a tenant remaining in possession under lease from the transferee, see (1907) 34 Cal. 689 11 C. W. N., 811 (815). As regards the C. P. see (1893), 7 C. P. L. R., 45 (48); (1895) 9 C. P. L. R., 101 (105); (1900) 13 C. P. L. R., 39 (41); (1901) 15 C. P. L. R., 17 (19).]

[9 Cal. 651]

APPELLATE CIVIL.

The 7th March, 1883.

PRESENT :

MR. JUSTICE WILSON AND MR. JUSTICE MACLEAN.

Cally Nath Bundopadhyas..... Plaintiff
versus

Koonjo Behary Shaha and others.....Defendants.*

'Mortgage—Money decree on mortgage bond—Mortgagee's lien—Registration Act (XX of 1866), s. 53—Frame of suit—Parties.

A and B, co-mortgagees, obtained a summary decree under the Registration Act XX of 1866, s. 53, on the 6th May 1868, in respect of certain property which was again mortgaged by the owner to C and D in March 1869. C and D having also obtained a decree on their mortgage brought the property to sale in execution of their decree and purchased it themselves in December 1874.

A not having had the whole of his mortgage debt satisfied instituted a suit on the 13th December 1879 against C and D, and the representatives of B (B having meanwhile died and his representatives not joining in the suit), to enforce his lien against the mortgaged property in the hands of C and D, and to recover the share of the mortgage debt still due to himself alone.

Held, that A did not acquire a better right to proceed against the property by reason of its having come into the hands of C and D, nor did C and D take subject to a greater burden than the mortgagor himself, and that as A had allowed his decree against the mortgagor to be barred by limitation, he had lost all right to proceed against the property by execution were it in the hands of the mortgagor, and consequently he could not be allowed to proceed against it by suit, merely because it was in the hands of third parties.

Quere.—Whether the suit being one for only a portion of the debt due on the mortgage (B's representatives not having joined and claimed the share due to them) was not properly framed, assuming it would lie.

* Appeal from Appellate Decree No. 1484 of 1881, against the decree of F. McLaughlin, Esq., Judge of Backergunge, dated the 28th May 1881, affirming the decree of Baboo Bani Madhub Mitter, First Subordinate Judge of that district, dated the 24th April 1880.

[652] *Syud Emam Montazooddeen Mahomed v. Raj Coomar Dass* (14 B. L. R., 408: S. C., 23 W. R., 187); and *Jonmenjoy Mullick v. Dossmoney Dossee* (I. L. R., 7 Cal., 714 S. C., 9 C. L. R., 353), referred to.

THE plaintiff in this suit, instituted on the 13th December 1879, sought to have his right to a prior lien on certain properties declared, and to obtain the amount due to him upon a mortgage bond by the sale of those properties.

He alleged in his plaint that one Koylash Nath Bhattacharji borrowed Rs. 1,500 from him and a like sum from Jugul Kishore Gupta, the father of the defendants 4 and 5, on a mortgage-bond, dated the 4th Pous 1273 (18th December 1866); that he and Jugul Kishore Gupta obtained a decree against Koylash Nath Bhattacharji under Act XX of 1866 on the 6th May 1868; that a part of the mortgaged property lying within the jurisdiction of the Dacca Court was sold under it, and that he and his co-mortgagee then brought a suit in the Second Subordinate Judge's Court at Backergunge against the mortgagor to establish their lien over the properties in dispute, and obtained a decree on the 13th September 1873; that subsequently to the mortgage in favour of himself and Jugul Kishore, Koylash Nath Bhattacharji again mortgaged the properties to the defendants Nos. 1 and 2 on the 24th Falgoun 1275 (6th March 1869); that the defendants Nos. 1 and 2 instituted a suit on their mortgage against Koylash Nath Bhattacharji, and obtained a decree on the 12th July 1870, and in execution of that decree brought the disputed properties to sale on the 3rd December 1874 and purchased them themselves in the name of defendant No. 3; that in the meantime the plaintiff had brought the properties to sale under his decree, and they were purchased by his wife, Nityakali Dabi, on the 3rd February 1875, but on her trying to get possession she was resisted by the defendants Nos. 1 and 2; that she thereupon instituted a suit to obtain possession, but being unsuccessful in such suit the plaintiff had to return her the purchase money. The plaintiff, therefore, now brought the present suit to have his right to a lien over the disputed properties declared and to obtain the amount of the debt due to him satisfied by the sale of those properties, and he joined the defendants Nos. 4 and 5, who were [653] the representatives of their deceased father, Jugul Kishore, his co-mortgagee.

The defendants pleaded, amongst other things, that the suit would not lie for want of parties, inasmuch as the representatives of the co-mortgagee had not been made plaintiffs, and that the plaintiff had only sued for his share of the mortgage debt; that the plaintiff having once obtained a decree for the recovery of the money due on the mortgage bond, a second suit to recover the money and enforce his lien would not lie; and that the suit was barred by limitation and also under s. 13 of Act X of 1877.

The Court of First Instance held that the plaintiff having once taken a money-decree upon the mortgage, under s. 53 of Act XX of 1866, could not again obtain a decree for the money due on the mortgage; that the debt due to the plaintiff on the mortgage had been changed from a contract-debt into a judgment-debt, and that he could therefore only sue to establish his right to sell the mortgaged properties for the satisfaction of the judgment-debt due to him; and that as the decree which the plaintiff had obtained under Act XX of 1866 was barred by limitation and the debt had ceased to exist, the plaintiff had no cause of action.

The Court also found that the suit being brought to enforce the payment of only a part of the mortgage-debt, it was badly framed and would not lie, and that the plaintiff, instead of suing only for his share of the debt, should have sued for the whole debt, and if his co-mortgagee, or in this case the

representatives of his co-mortgagee, declined to join in the suit, he should have made them co-defendants and asked that the Court should make them co-plaintiffs in the suit.

The suit was accordingly dismissed with costs.

The lower Appellate Court, on appeal, confirmed the decree of the Court of First Instance both on the ground that a suit for only a portion of a mortgage-debt would not lie, and also on the ground that the plaintiff had exhausted his remedies in the former suit and consequently could not maintain the present suit.

Against this decree the plaintiff now preferred a special appeal to the High Court.

[634] Baboo *Rash Behary Ghose* appeared on behalf of the Appellant.

Baboo *Durga Mohun Dass* for the Respondents.

The **Judgment** of the Court (WILSON and MACLEAN, JJ.), was delivered by **Wilson, J.**—The facts found in this case are as follows:—

The disputed property was mortgaged to the plaintiff and the father of defendants 4 and 5 in Pous 1273 (December 1866). They obtained a summary decree under the Registration Act XX of 1866 in May 1868.

The property was again mortgaged to defendants 1 and 2 in March 1869. They sued on their mortgage-bond, obtained a decree, sold the property in execution, and bought it themselves in December 1874.

The plaintiff now sues the first and second defendants to enforce his share of the mortgage-debt against the property in their hands, joining the fourth and fifth defendants as the representatives of his co-mortgagee.

The District Judge affirming the Munsif has dismissed the suit on two grounds:

First, he has held that the plaintiff's suit is improperly framed, and that he cannot sue for his share of the mortgage-debt. We think it very doubtful whether, on the construction of the mortgage-deed, this is so, whether the transaction was not several rather than joint; but it is not necessary to decide this.

The District Judge has held, secondly, that the plaintiff had exhausted his remedies in the former suit, and cannot sue again. This proposition is, we think, too broadly stated. The law applicable to the matter depends upon the effect of two Full Bench decisions, both of which are binding upon us.

In *Syud Emam Muntazooddeen Mahomed v. Raj Coomar Dass* (I. L.R., 7 Cal., 714 : s. c., 9 C. L. R., 353), a mortgagee, who had obtained a summary decree under the Registration Act XX of 1866, afterwards brought a suit to enforce his lien upon the mortgaged property in the hands of the mortgagor. The Court, having pointed out **[653]** that the effect of the summary decree was the same as that of a money-decree in an ordinary mortgage-suit, held that the plaintiff had not, by obtaining a personal decree, forfeited his lien upon the land, but that he must enforce it in execution, and could not maintain a suit for the purchase.

In *Joumenjoy Mullick v. Dossmoney Dossee* (I. L. R., 7 Cal., 714 : s. c., 9 C. L. R., 353), the plaintiff had obtained a money-decree against his mortgagor. After the decree the mortgagor sold the mortgaged property, and it was held that the plaintiff might enforce his lien by suit against the property in the hands of the purchasers.

These two cases establish that there is a difference in the procedure applicable between the case where the property is still in the hands of the mortgagor and the case where it has passed to a purchaser, the lien being enforceable in the one case by execution, in the other by suit.

But we do not see how the right can be more extensive in the one case than in the other.

It would be contrary to ordinary principles, we think, to hold that the mortgagee acquires a greater right by reason of the mortgagor's alienation, and that the purchaser takes subject to a greater burden than the debtor himself.

In the present case, the plaintiff has allowed his decree against the debtor to be long since barred by limitation, and has therefore lost all right to proceed by execution against the property in the hands of his debtor. We think he has no better right to proceed by suit against the property in the hands of the purchaser.

The appeal is dismissed with costs.

Appeal dismissed.

11 C. L. R. 494 : 10 I. A. 25 : 7 Ind. Jur. 164 : 4 Sar. P. C. J. 417]

[666] PRIVY COUNCIL.

The 24th November, 1882.

PRESENT :

LORD FITZGERALD, SIR B. PEACOCK, SIR R. COUCH, AND SIR A. HOBHOUSE.

Macnaghten and another.....Judgment-creditors

versus

Mahabir Pershad Singh and anotherJudgment-debtors.

[On appeal from the High Court at Fort William in Bengal.]

*Sale in execution of decree—Civil Procedure Code (Act X of 1877), s. 311—
Irregularity in publication of intended sale.*

An objection to the validity of a sale of revenue-paying land, on the ground that the revenue assessed upon it had not been stated in the proclamation of the intended sale, in accordance with s. 287 of Act X of 1877, was taken, for the first time, in the Court of appeal; an application to set aside the sale, on the ground that it had taken place without proclamation made, having been rejected by the Court of First Instance, which found that proclamation had been made.

Held, that the objection was taken too late, although, if properly taken in the Court of First Instance, it would have been good to the extent that not stating the amount of the revenue was an irregularity; substantial damage, resulting from it, remaining to be proved, as required by s. 311 of Act X of 1877.

Held, also, that inadequacy of price having been alleged as substantial damage, without having been proved to be the effect of the non-statement of the revenue, the applicant had not (as required by s. 311) proved, to the satisfaction of the Court, that he had sustained substantial damage by reason of such irregularity.

APPEAL from a decree (22nd April 1881) of the High Court reversing a decree (25th September 1880) of the Officiating Subordinate Judge of Zillah Tirhoot.

This appeal arose out of an order made by the High Court in its Appellate Jurisdiction in reference to the sale of fourteen villages in the Tirhoot District, in execution of a decree which had been obtained by the appellants against the respondents. In 1879 on two separate dates, 15th September and 20th November, the right, title, and interest of the respondents in twenty villages in that district were sold in execution, and purchased by the appellants, leave having been granted to them to bid at the sales. The respondents afterwards applied to have the sales set aside, on the ground that [637] the villages had been sold at an inadequate price, attachment processes not having been executed, and the sale proclamation not having been published in the villages.

This application having been rejected by the Subordinate Judge, who found that the sale proclamations had been published, the High Court (MITTER and MACLEAN, JJ.) on appeal, while maintaining the finding of the lower Court as to the fact of the proclamations having taken place, reversed its decision, and set aside the sale.

The High Court afterwards, on the 19th September 1881, reviewed its judgment as to six of the villages.

The judgment (22nd April 1881) on appeal was as follows :—

“The application was made on the ground that a property of a very large value was sold at a grossly inadequate price, attachment processes and sale proclamations not having been duly executed and published in the villages. Upon both these points the lower Court has found against the appellants. As regards the adequacy or otherwise of the value, the finding is manifestly against the weight of the evidence. Of the 20 villages sold, 19 were let in ticca by two leases in favour of the respondents. The net rent payable annually, under the two leases, was Rs. 4,172 and odd. The leases also cover 20 villages, one of which has not been sold. There is evidence to shew that the twentieth village sold, and which is not covered by the lease, is of comparatively more value than the unsold village of the lease. Therefore, upon the evidence, it may be safely taken that the villages sold yielded annually a little over Rs. 4,172. The lower Court remarks that the appellants adduced no evidence to show what is the general rate of value of landed property in the district. It is true that no direct evidence has been given upon that point; but instances in which property has been sold in the district, at not less than 20 years' purchase, have been proved. Calculating at that rate, it is clear that the villages sold are worth about Rs. 60,000.

“Upon the question, whether the sale proclamations were duly published, we do not think that the finding of the lower Court is wrong; but it may be reasonably supposed that the non-specification of the Government revenue in the sale pro-[658]clamations published is one of the causes which caused the diminution in the price. Such a mistake or omission is an irregularity contemplated by s. 311 of the Civil Procedure Code—*Girdhari Singh v. Hurdeo Narain* (L. R., 3 I. A., 230). It is true that this irregularity was not made one of the grounds of the appellant's application in the lower Court, but it is patent upon the face of the proceedings.

"We therefore reverse the decision of the lower Court and set aside the sale of the mouzahs in question."

In review of the above the judgment was as follows:—

"The judgment of this Court proceeded upon the ground that the Government revenue of the mouzahs sold (the auction-sale of which was sought to be set aside) was not specified in the sale proclamation, and we were of opinion that that was such an irregularity as really affected the prices which those mouzahs fetched at the auction-sale. We further found that the prices which were paid by the petitioners, who were the purchasers and decree-holders, were inadequate.

"It is contended on behalf of the petitioners now before us, that in respect of six mouzahs, namely, Badwa, Bazitpur, Sarsawa, Shafipur, Jahangira and Arazi Gungharar Hardaspur, the ground upon which the judgment of this Court proceeds is not applicable, inasmuch as the Government revenue of these six mouzahs was specified in the sale proclamation. It is admitted now by the learned pleader, who appears on behalf of the judgment-debtors, that in respect of these mouzahs the Government revenue was specified in the sale proclamation; but he contends that in stating the revenue of Bazitpur, instead of putting Rs. 547 odd annas, which is the correct amount, the amount mentioned in the sale proclamation of that mouzah was Rs. 500, and a similar mistake is pointed out in respect of Jahangira, the correct amount being Rs. 335-7-9, and the amount mentioned in the sale proclamation having been Rs. 345. It is not denied that in respect of the other mouzahs, the Government revenue was correctly specified. Therefore, as regards those four mouzahs, our order is not right and must be set aside. With reference to Bazitpur and Jahangira, the mistakes are so trivial and unimportant that we do not think that they in any way affected the prices of those mouzahs.

"We are, therefore, of opinion that in respect of all these six mouzahs, our judgment is not right; and we accordingly amend it, by directing that the appeal of the judgment-debtors, in respect of these six mouzahs, should be dismissed. In all other respects our judgment will stand."

On this appeal Mr. *Macnaghten*, Q. C., and Mr. *J. T. Woodroffe* appeared for the Appellants.

It was argued for the appellants that the omission to state the revenue assessed on the villages, described in the proclamations of the intended sales, was not a fatal irregularity, because it had not been shewn to have caused substantial injury to the applicant. The burden of showing such injury was upon him; also, the objection could not be effectively taken for the first time in the Court of Appeal, which was not in a position to find this substantial injury. The Appellate Court had attempted to find it in the inadequacy of price; but that inadequacy had not been connected with the irregularity, as effect with cause; nor was there any recorded evidence on which the Appellate Court could have arrived at this result. Moreover, the omission to state the revenue having taken place, in regard to some, but not in regard to all, of the villages, (as appeared from the review), while inadequacy of price was taken to have resulted in reference to all, that general inadequacy, if occasioned at all appeared not to be traceable to the omission. *Girdhari Singh v. Hurdeo Narain Singh* (L. R., 3 I. A., 230) was cited.

The Respondents did not appear.

Their Lordships' Judgment was delivered by

Sir B. Peacock.—This was an application to set aside a sale of certain property in execution of a decree in consequence of irregularity. The applica-

tion was made under s. 311 of the Civil Procedure Code of 1877, chap. X. By that section it is enacted that "the decree-holder or any person whose immoveable property has been sold under this chapter may apply [660] to the Court to set aside the sale on the ground of a material irregularity in publishing or conducting it; but no sale shall be set aside on the ground of irregularity unless the applicant proves to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity." Irregularity, therefore, alone is not a ground for setting aside a sale. There must be some substantial injury in consequence of the irregularity, and that must be proved by the applicant. It has also been held that inadequate price of itself is not a sufficient ground for setting aside a sale, unless there is irregularity. The question, therefore, in this case is whether an irregularity did occur, and, if so, whether that irregularity caused injury to the applicant; the injury complained of being the inadequacy of the price which was realised at the sale. The principal irregularity complained of was that no notification of the sale was properly published. Section 286 of the same Code provides that "sales in execution of decrees shall be conducted by an officer of the Court, or by any other person whom the Court may appoint, and, except as provided in s. 296,* shall be made by public auction in manner hereinafter mentioned." Then s. 287 says, "When any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court. Such proclamation shall state the time and place of sale, and shall specify as fairly and accurately as possible the property to be sold; the revenue assessed upon the estate, or part of the estate, when the property to be sold is an interest in an estate, or a part of an estate paying revenue to the Government"; and certain other things.

In addition to the irregularity as regards the notification of the sale, another alleged irregularity was complained of, *viz.*, that the attachment was not properly notified. Whether the notice of attachment not having been properly published would affect the sale, or be an irregularity in conducting the sale, it is not necessary to inquire, inasmuch as that point was given up by the applicant on the trial before the Judge. The question then is solely in respect of the alleged irregularity in the proclamation of the sale. The applicant contended that the proclamation [661] had not been published. He did not contend that in the proclamation the particulars were not properly described as required by the Act. He said in effect that no proclamation had been published. The parties went down to trial upon that point, evidence was given, and the learned Judge of the first Court held that the proclamation had been published, and the High Court affirmed the decision of the first Judge in that respect. There are, therefore, two concurrent findings of the Courts that a proclamation was published.

The Judge consequently refused to set aside the sale. The parties appealed to the High Court. They never took any objection in their grounds of appeal to the form of the proclamation, or stated that there was an irregularity in not having stated all that was required by the Act, and, amongst other things, the revenue which was assessed upon the estate. When the case came before the High Court it was discovered that in the proclamations which were published the amount of revenue had not been stated, and the High Court at that time considered that all the proclamations were alike, and that in each of

* [Sec. 296:—If the property to be sold be a negotiable instrument or a share in any public Company or Corporation, the Court may, instead of directing

Rules as to negotiable securities and shares in public Companies,

the sale to be made by public auction, authorize the sale of such instrument or share through a broker at the market-rate of the day.]

the proclamations with regard to the 20 mouzahs which were sold the amount of revenue had not been stated. It may be inferred from the grounds of review that the Court themselves first took the point ; but whether it was taken by the Court or by the applicant is immaterial, because their Lordships are of opinion that the objection could not be taken for the first time in the Court of Appeal. Even if the objection could have been properly taken at that stage of the proceedings, if no question was raised before the lower Court as to whether any injury had been sustained by the applicant by reason of the proclamations not stating the amount of revenue, that question was never tried in the lower Court, and no evidence had been given with reference to it.

The objection, if it had been properly taken in the first instance, would have been good to this extent, that not stating the amount of revenue was an irregularity ; but even then there would have been something more to be proved than the mere irregularity,—it would have been necessary to go on and show that substantial damage had been sustained by the applicant in consequence of that irregularity. No evidence was given upon that subject [662] before the lower Court, though by s. 311 the onus lay upon the applicant to prove, to the satisfaction of the Court, that he had sustained substantial damage in consequence of the irregularity ; nor was there any finding of the lower Court upon it, because the question was never raised.

The High Court, having held that the non-statement of the amount of revenue in the proclamation was an irregularity, proceeded to try the question whether the irregularity had caused substantial injury to the applicant. They say : “ But it may be reasonably supposed that the non-specification of the Government revenue in the sale proclamations published is one of the causes which caused the diminution in the price.” There was no evidence at all on the subject. It appears to their Lordships that the High Court could not, without evidence and upon a mere supposition, properly find that the non-statement of the revenue in the proclamation did cause an injury to the applicant by causing an inadequate price to be bid at the sale.

The High Court, however, upon the ground that there was an irregularity, and that it had caused substantial injury to the applicant, reversed the decision of the lower Court. Upon that a review was applied for, and then it was discovered that the objection as to the non-statement of the revenue did not apply to six of the mouzahs and six of the sales ; and the High Court, having found that the proclamation in respect of those six did contain the amount of the revenue, set aside their former decision as to them, and upheld it as to the other fourteen. But when they upheld the sale as to the six they never adverted to the fact that, as they had fallen into a mistake as to them, they might equally have fallen into a mistake as to the other fourteen. They found that the inadequacy of price as regards the six did not arise from the non-statement of the amount of revenue. They might, therefore, have reasonably supposed that their former supposition, that the inadequacy of price as to the fourteen was occasioned by the non-statement in the notice of sale of the amount of revenue, was as much without foundation as it was as to the six ; but instead of that they upheld their decision as to the fourteen, and set it aside as regarded the six. The question now is whether the judgment of the High Court as regards the four-[663]teen is correct in holding that there was an irregularity in the non-statement of the amount of revenue in the proclamation which could be relied on upon appeal, and that the appellant had sustained substantial injury by reason of that irregularity.

Their Lordships think that it was too late for the applicant to make the objection, and even if it were not too late for him to make the objection before

the High Court, there was no evidence to justify the High Court in arriving at the conclusion that there was inadequacy of price occasioned by the non-statement of the revenue in the sale proclamation.

Under these circumstances, their Lordships will humbly advise Her Majesty to reverse the decision of the High Court, and to affirm the decision of the first Judge. They think that the respondents must pay the costs of this appeal and the costs in the High Court.

Appeal allowed.

Solicitors for the Appellants : Messrs. *Lawford, Waterhouse and Lawford.*

NOTES.

[I. TIME OF OBJECTIONS—

See also (1888) 10 All., 506 ; (1900) P. L. R., 157 ; when the irregularity amounts to illegality, by reason of defects apparent on the proceedings and consequently not necessitating further inquiry, the objection may be raised for the first time in the Appellate Court :—(1892) 20 Cal., 86.

II. IRREGULARITIES IN SALE, WHEN RELIEF GIVEN ON ACCOUNT OF—

Inadequacy of price should be connected with the irregularity :—11 Cal., 200 ; 8 Bom., 424 ; 6 C. L. J. 163 ; 1 C. L. J., 22 ; 32 Cal., 509 ; 9 C. W. N. 348 ; 1 C. L. J. 91 ; 31 Cal., 915. See (1907) U. B. R. Civ. Pro., 311 as to sale at earlier hour ; (1911) 16 C. W. N. 1 : 38 I. A. 200 as to sale on later date ; 33 Bom. 657 ; 11 Bom. L. R. 980 ; 2 I. C. 459 as to time and place ; 21 Cal. 66 as to less interval ; 18 Cal. 188 as to absence of attachment ; 6 C. L. J. 163 (defect in sale notification) ; 18 I. C. 715.

Irregularity of whatever kind should be shown to have caused substantial injury :—32 Cal. 542 ; 9 C. W. N. 487. Relief is not given when the party stood by without objection when the description was defective :—10 I. A. 25 ; 12 Mad. 19 ; 28 All. 273 ; 3 A. L. J. 140 : (1906) A. W. N. 3 (description as ancestral property) ; 21 Cal. 799.

Sale in contravention of the express prohibitions will be illegality, and substantial injury need not be shown :—11 All. 333 ; 9 A. W. N. 115 ; (1912) 16 I. C. 235 ; 16 C. L. J. 557. Sales under the Public Demands Recovery Act should be judged by these rules :—(1901) 29 Cal. 73 F. B.

As regards injury resulting from the acts of officers conducting the sale, see (1908) 36 I. A. 32.

See 7 All. 641 as regards the expression *conducting the sale*. "

As regards the nature of the evidence that may be adduced in proof of injury, see 32 Cal. 509 ; 542 ; 30 Cal. 1 ; 24 Cal. 291 ; 11 Cal. 658 ; 74 ; 6 O. C. 61.]

[9 Cal. 663.—12 C.L.R. 269]
FULL BENCH REFERENCE.

The 9th March, 1883.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE
MITTER, MR. JUSTICE McDONELL, MR. JUSTICE PRINSEP,
AND MR. JUSTICE WILSON.

Rudra Kant Surma Sircar and others.....Defendants

versus

Nobo Kishore Surma Biswas.....Plaintiff

Samod Ali.....Defendant

versus

Mahomed Kassim and others.....Plaintiffs.*

*Limitation Act (XV of 1877), s. 7—Minority—Right to sue—Personal
exemption—Assignment by minor.*

Under s. 7 of the Limitation Act, a minor has, in respect of a cause of action accruing during his minority, a right to sue at any time within three years of attaining his majority; but if during his minority, or if after attaining his majority and within three years thereof, such person assigns all his right and interests to a third party, who is *sui juris*, the latter cannot claim the exemptions accorded to the minor by s. 7 of the [664] Limitation Act, but is subject to the ordinary law of limitation, governing suits in which relief of the same nature is claimed.

THESE cases were referred to a Full Bench by WILSON and FIELD, JJ., on the 6th of September. In addition to the facts stated it may be noticed that in No. 434 of 1881 the sale to the plaintiff was a private sale, and the vendor Rajoni Nath Chuckerbutty was made a party-defendant to the suit. In No. 1927 of 1881 the sale to the plaintiffs was made in execution of a money decree against the minors. In this suit also the minors were made defendants.

The reference in both cases was as follows :—

"No. 434 of 1881.—The question raised upon this appeal is a very short one, but it is important.

"Rajoni Nath Chuckerbutty, a minor, was entitled to the lands in suit. During his minority he was dispossessed. On attaining his majority, he assigned his interest to the plaintiff, and this suit was brought within three years of Rajoni Nath's coming of age, but more than twelve years after the dispossession. The question is whether the suit is barred by limitation.

"Had the question been wholly a new one, we should have been prepared to hold that it is not. By s. 7 of the Limitation Act (XV of 1877) : 'If a person entitled to institute a suit.....be, at the time from which the period of limitation is to be reckoned, a minor.....he may institute the suit within the same period after the disability has ceased, as would otherwise have been allowed from the time prescribed therefor.' "Nothing in this section..... shall be deemed to extend for more than three years from the cessation of the disability.....the period within which any suit must be instituted.'

* Full Bench Reference made by Mr. Justice Wilson and Mr. Justice Field, dated the 6th September 1882, in appeals from Appellate Decrees, Nos. 434 and 1927 of 1881.

"By s. 29, 'at the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished.'

"At the time when Rajoni Nath came of age, he had a good title to his property and a valid right to sue for it, which right of suit had three years still to run. We do not see why this right of property, with the right of suit incident to it, should not be assignable as other such rights are.

"If this view be not correct, and the right to sue after attaining [665] majority is limited to the person attaining majority, very incongruous results might follow. For example, if he died the day after he came of age, his right of suit, and, with it, his right of property must die with him : his representatives could not sue. Whereas if he died the day before coming of age, his representatives would have three years to sue.

"It was argued before us that the express mention in s. 7 of the right of the representatives to sue in case of death during disability, supported the view that the representatives took no benefit in any other case. But that does not seem to us sound reasoning. In the case of death under disability, it was necessary to prescribe a *new point of time* from which limitation was to run. And therefore special mention of the case was necessary.

"We were, however, referred to a case of *Mahomed Arsud Chowdhry v. Yakoub Ally* (15 B. L. R., 357), in which MARKBY and MORRIS, JJ., took a different view of the construction of s. 7 of Act IX of 1871, holding that the privilege given to the person, who was under disability, was limited to himself personally and did not extend to his assignee.

"It is true that that case was decided upon an Act different from that now in force ; but we are unable to find any material difference between the one Act and the other, so far as the present question is concerned. We, therefore, think it right to refer to a Full Bench the question whether this suit is barred by limitation.

"*No. 1927 of 1881*.—This case gives rise to a question very similar to one which we have already referred to a Full Bench in another case (No. 434 of 1881), with reference to s. 7 of the Limitation Act.

"In that case an infant attained his full age and then assigned his interest, and the assignee sued within three years of his assignor's majority.

"In this case the infants' interest was assigned while they were under age, and they have not attained majority. The assignee had sued within three years of the assignment.

It appears to us that the two cases must be decided upon the [666] same principle ; but as there is this difference between them, we think it right to refer this case also to the Full Bench.

Baboo Grish Chander Chowdhry for the Appellants in No. 434.

* [Sec. 7 :—If a person entitled to sue be, at the time the right to sue accrued, a minor, or insane or an idiot, he may institute the suit within the same period after the disability has ceased, or (when he is at the time of the accrual affected by two disabilities) after both disabilities have ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the second schedule hereto annexed.

When his disability continues up to his death, his representative in interest may institute the suit within the same period after the death as would otherwise have been allowed from the time prescribed therefor in the third column of the same schedule.

Nothing in this section shall be deemed to extend, for more than three years from the cessation of the disability or the death of the person affected thereby, the period within which the suit must be brought.]

Baboo *Guru Doss Banerjee* and Baboo *Harendra Nath Mukerjee* for the Respondent.

Baboo *Rash Behary Ghose* and Baboo *Aukil Chunder Sen* for the Appellant in No. 1927.

Baboo *Sree Nath Banerjee* for the Respondents.

The following **Judgments** were delivered by the Full Bench.—

No. 434 of 1881.

Garth, C.J.—I think that the question referred to us should be answered in the affirmative.

It seems to me that the provisions in the Limitation Acts, which relieve minors and others under disability from the rules which are binding upon other people, are *purely personal exemptions*, and must be considered as attaching to the person only, and not to the property, or the title, of those who are under disability.

The only reason, I conceive, why such persons are not subjected to the ordinary rules of limitation, is that the law considers them incapable of forming a proper judgment as to bringing suits, or otherwise managing their own affairs.

But this reason does not apply to the property of such persons, or the titles by which they hold it; nor does there seem to be any good ground why the protection thus afforded to them should be extended to purchasers from them.

It may perhaps seem rather hard, that in a case like the present, a man purchasing property from a minor, which is not in the minor's possession, should at once be disabled from bringing a suit to recover it; but after all, this is only one of those difficulties, against which purchasers, if properly advised, can easily protect themselves. In this particular instance, the plaintiff, instead of taking from the minor an absolute transfer of property, which was not in his possession, might have entered into a contract for purchase, to be completed when the property had been recovered by suit.

[667] But, on the other hand, if the law were, as the plaintiff contends, that a purchaser when he buys property from a person under disability buys the exemption from limitation along with it, anomalies without end would be the consequence.

Thus a minor of three years old, who had been out of possession of property for two years, might transfer it to a person of full age. The purchaser, if the minor were an Englishman, would then have 18 years within which to bring his suit, although during all that time he would be under no disability and perfectly capable of managing his own affairs.

Again, a purchaser buying the estate of a lunatic, who continued to be a lunatic for 60 or 70 years after the sale, would, during the whole of that period, be freed from the law of limitation; and the person in possession of the property might, after the lapse of 60 or 70 years, be sued by the purchaser, or his heirs, who had no excuse during all that time for sleeping upon his rights.

I entirely agree with the learned Judges who decided the case of *Mahomed Arsud Chowhry v. Yakooob Ally*, (15 B. L. R., 357) with regard to the proper construction of s. 7 of the Limitation Act of 1871; and I think also, that the fact of the minor's representative in interest being expressly allowed by that section a certain time for bringing his suit, *in those cases where the minor dies during the disability*, seems clearly to indicate the intention of the Legislature, that in other cases the assignee of a minor is to have no special privilege.

But apart from what I consider to be the meaning and the reason of the Limitation Act, I think an extremely strong argument against the plaintiff's contention arises from the fact, that our attention was not called to a single authority (except the case just cited), in which any attempt has been made to extend the exemption which is given to persons under disability to purchasers from those persons. If there had been any ground for the plaintiff's contention, we should have expected points of doubt and difficulty to have constantly arisen from such a state of the law.

I think, therefore, that this appeal should be allowed; that the [668] decision of the lower Appellate Court should be reversed, and the judgment of the Munsif restored; and I also think that the defendant should have his costs in all the Courts.

No. 1927 of 1881.

I think that this case must be governed by the same principle as the other; and that consequently the judgments of the lower Courts should be set aside, and the plaintiff's suit dismissed with costs in all the Courts.

Mitter, J.—I am also of opinion that the question referred to us should be answered in the affirmative.

The express mention of the legal representatives in the third paragraph of s. 7 clearly indicates that the representatives in any other case do not take any benefit under it. But it has been said that the express mention of the legal representatives was made, because in the case of death under disability, it was necessary to prescribe a new point of time from which limitation was to run. But suppose the property of a person, who was under disability at the time when he became entitled to institute a suit in respect of it, he sold, and after the sale he dies, the provisions of the third paragraph of s. 7 would not apply to the purchaser, this being so, if the provisions of s. 7 would apply at all to the purchaser, his case must come under the first paragraph of the section qualified by the proviso.

But the language of the first paragraph cannot be made applicable to a case like the one supposed. It provides that the suit may be instituted within the same period after the disability has ceased as would otherwise have been allowed. But in the case supposed there could not be any *cessation of disability*, because the death took place when the disability was continuing.

It has been suggested that the disability in the section means the disability to sue, and it may be reasonably considered to have ceased on the sale of the property in respect of which the person under disability is entitled to bring a suit; and therefore in the case of a sale the time would run, under the first paragraph of the section, from the date of the sale.

But it seems to me that this construction is not borne out by the language used by the Legislature. The section speaks [669] of the cessation of the disability, *i. e.*, the disability of the person who was entitled to the property. By the sale of the property his disability does not come to an end. The *ability* of the purchaser to institute the suit is not the same thing as the cessation of the disability of the person whose property is sold. Then, again, suppose the person on whose behalf the property is purchased is himself a minor, or insane, or an idiot, the date of the sale in that case could not reasonably be considered as the cessation of the disability. It would be almost impossible to apply the language of paragraph 1 of the section to a case like that.

I entirely agree with the learned Judges who decided the case of *Mahomed Arsud Chowdhry v. Yakooob Ally* (15 B. L. R., 357), in thinking that the

privilege under s. 7 is purely a personal one. It has been said that this construction leads to anomalous results; because there may be cases in which the right in a particular property may be still vested in a minor, or insane, or an idiot, and yet such right would not be saleable. There is no incongruity in this, because the privilege granted is to the minor, insane, or the idiot himself, but not to a stranger, who may choose to become a purchaser. Then as to the creditors of such persons, they cannot complain of any hardship, because they cannot reasonably claim any higher rights than they could have claimed if their debtors had not been under any disability. Then again the existence of a right does not carry with it, necessarily, the power of alienation of such right. For example, the right to recover a contract debt is not extinguished after the lapse of the period of limitation prescribed for enforcing it (*see* s. 28 of the Limitation Act), still it is not alienable after the lapse of that time in the same sense in which the right of a minor, insane, or an idiot in a particular property, moveable or immoveable, in respect of which he is entitled to bring a suit is not alienable after the lapse of the ordinary period of limitation.

On the other hand, any other construction of the section would lead to incongruous results. For example, the case of a purchaser buying the estate of a lunatic, which has been [670] put as an illustration by my Lord the Chief Justice, shows how inconvenient it would be if the construction put by the lower Appellate Court be adopted.

McDonell, J.—I would answer in both these cases the question referred to us in the affirmative, and generally for the reasons given by the Chief Justice and Mr. Justice MITTER.

Prinsep, J.—I agree in holding that under the terms of s. 7 of the Limitation Act XV of 1877, the privilege conferred is personal to minors, insanes, or idiots, and cannot be transferred *inter vivos*. I am not prepared to say whether this was intentional, or is due to an oversight on the part of the Legislature.

Wilson, J.—The questions raised in these cases are, to my mind, questions of considerable difficulty. I have felt grave doubts as to how they ought to be answered, and those doubts have not been removed. I agree that the construction placed upon the Act by the majority of the Court is one which it may fairly bear; but it involves serious anomalies and inconveniences. Thus, as appears from the first of the cases referred, a person who has just come of age may have property, and yet be practically unable to sell or dispose of it in any way. It appears from the second case that the same person, whether still under age or not, may have property, and the right to sue for it at any time for years to come; but that the property is wholly out of reach of his creditors.

If it be said that the difficulty may be removed by the purchaser's obtaining a power-of-attorney to sue in his vendor's name, there seem to be several answers. That is a mode of procedure not in ordinary use in this country. It would not be available for a purchaser in execution; and if it were, an infant cannot give a power-of-attorney. And if the infant did sell after he came of age with a power-of-attorney, the right of the purchaser would still be wholly dependent upon the life of his vendor. If the vendor died before suit, no suit could be brought. If he died pending the suit, it could not be revived, for the cause of action would not survive.

[671] I am by no means sure that another construction of the Act is not equally legitimate, and one which would remove many of these anomalies. I

am by no means sure that we ought not to hold that the person who is or has been under disability, having in him a right of property and a right to sue for that property, has a right to assign both, not because there are any words in the Act making them assignable, for there are none, but because property is by the general law ordinarily assignable, and, with it, the right of suit for its recovery. If we were so to hold and also to hold, as I think we well might, that an alienation of an infant's estate is, so far as that estate is concerned, a termination of the disability, we should, I think, get rid of most of the difficulties of the subject. The result would be, that a purchaser of an infant's estate, who purchased after the ordinary period for limitation had passed, would have three years from his purchase within which to sue; and a purchaser from one who had attained his full age would have three years from the date of majority.

I do not dissent from the judgment of the majority, but I feel great doubt about the matter.

NOTES.

[LIMITATION—MINOR—ASSIGNEE—

This principle has been affirmed in the later decisions :—(1888) A.W.N. 183; (1895) 20 Bom. 15; (1901) 21 A.W.N. 12; (1902) 26 Bom. 730; (1902) 5 O.C. 197 (200); (1894) 17 Mad. 316 (342).]

[9 Cal. 671: 12 C. L. R. 343]

APPELLATE CIVIL.

The 15th March, 1883.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE FIELD.

Judonath Ghose.....Plaintiff

versus

Schoene Kilburn & Co.....Defendants.*

Landlord and tenant—Dur-maurasi mokurari tenure—Notice of relinquishment—Surrender of lease.

A tenure under a dur-maurasi mokurari lease of land, which is not let for agricultural purposes, cannot be put an end to by a mere relinquishment, on the part of the lessee although after notice to the landlord.

Per FIELD, J.—The principle laid down in the case of *Heera Lall Pal v. [672] Neel Monee Pal* (20 W. R. , 383), where it was held that a patnidar cannot, of his own option, relinquish

* Appeal from Appellate Decree, No. 1866 of 1881, against the decree of Baboo Kedaresur Roy, Subordinate Judge of Hooghly, dated the 30th August 1881, affirming the decree of Baboo Huri Nath Roy, Officiating Munsif of Serampore, dated the 29th December 1880.

his tenure, is applicable to all intermediate tenures between the zamindar and the cultivator of the soil, except those held on farming leases.

THIS suit was brought by the plaintiff for the recovery of Rs. 532-8, being the balance of rent due for the year 1879 by the defendants, under the following dur-maurasi mokurari settlement which, he alleged he had made with them on the 10th Assin 1282 (25th September 1875).

"Our Company having applied for a dur-maurasi mokurari pottah of five beegahs of land, according to measurement, within the undermentioned boundaries, you give us a dur-maurasi mokurari pottah, at the fixed annual rent of Rs. 625, and we give you this kabuliati. From this day, we become owners of the said five beegahs of land under the dur-maurasi pottah right, and become vested with the right of making gift and alienation, and being vested with the rights that you possess, and paying the rent of the said land, we and our heirs and representatives from generation to generation shall forever enjoy and possess the same, directly or by sub-letting the land, building houses, digging tanks, making gardens, and establishing a coal depôt, or in any other way we like."

The defence set up in the written statement was that by a notice, dated the 29th April 1879, the defendants had informed the plaintiff that they would give up the land in suit in the month of Assar 1286 (June—July 1879). They then paid the rent up to the end of Assar, and since then had ceased to hold possession of the land.

Baboo *Nilmadhub Bose* for the Appellant.

Baboo *Juggudanund Mookerjee* for the Respondents.

The following **Judgments** were delivered by the Court (GARTH, C.J., and FIELD, J.)

Garth, C.J. (after shortly stating the facts, continued) :—I think that both the lower Courts have taken an erroneous view of the law in this case. In the Munsif's Court two issues were raised*: first, whether the defendants did relinquish the land; and, secondly, whether the relinquishment was good in law. With regard to [673] the first point, which was a question of fact, the Munsif found that the defendants had relinquished the land, and that they had given the notice to quit, upon which they relied. And upon the second point, namely, whether the notice was good in law, the Munsif found that it was, holding, apparently, that a lessee, under a lease of this kind, was at liberty, after due notice to his landlord, to relinquish his lease, and that upon relinquishing it, and hoding no further possession of it, his obligation was at an end.

The Subordinate Judge appears to me to be rather doubtful about confirming the view of the law which the Munsif had laid down. He says : "That the defendants gave three months' previous notice of their intention of relinquishing the holding, and afterwards actually relinquished the same, has been satisfactorily proved. Plaintiff could not prove that the defendants occupied the land after relinquishment." Then he goes on to say (by way, as it seems to me, of making himself secure whether his view of the law was right or no) : "It appears that the plaintiff brought this suit after more than a year; his long silence to make any objection may be considered as his accepting the relinquishment, for if he did not do so, he could have given defendants a notice that he would not accept. I, therefore, think that he must have consented to the relinquishment."

It has been boldly argued before us, on behalf of the respondent, that the Munsif was right, and, indeed, that both Courts were right, (if the Subordinate Judge intended to agree with the Munsif), in saying that the tenant, under a

lease of this character, had a right to relinquish the land at his option, whenever he pleased, upon giving due notice to his landlord; and it was also contended, that, whether that was so or not, the notice of relinquishment being proved to have been given, the facts of the case justified the Subordinate Judge in finding that the landlord, the plaintiff, had consented to the relinquishment.

Now, in order to see what the question really is, and what is the true nature of the lease with which we are dealing, I will read the language of the *kabuliat* itself. (His Lordship read the document and continued).

[674] Of course the terms of this lease are wholly inconsistent with any idea of its creating a *ryoti* tenure. It is in the nature of a building lease of valuable property, because, in addition to the yearly rental of Rs. 625, which is to be paid for five *bighas* of land, there was also a premium of Rs. 1,150 paid by the lessees.

Now it is said that a lessee, who holds under a lease of this kind, is entitled to relinquish his land at any time, and without assigning any reason, if he only gives due notice to the landlord.

Such a contention appears to me absurd. The bargain would then be entirely one-sided. If the learned Junior Government Pleader were right, the lessee might, under such a lease, do what he liked with the property, and then leave it. If there were trees on the land, he might cut them down and remove them; he might excavate pits, or alter the disposition of the land in any way he pleased; and then if he found that the alterations he had made answered his purpose, he might abide by his bargain; but if he found that he had made a bad speculation, and that the alterations were not likely to be beneficial, he might throw up the land and cancel his lease, although the landlord in the meantime might have had good opportunities of disposing of the land to advantage. This would be such an unfair and one-sided bargain, that I should require very strong authority to satisfy me that such was the true view of the law.

We, accordingly, pressed the learned Pleader for some authority in support of his view, and, so far as I can see the only authorities which he has cited, so far from supporting his contention, are decidedly opposed to it.

He has alluded (amongst others) to a case, decided in 1873 by Mr. Justice JACKSON and Mr. Justice DWARKANATH MITTER—*Heera Lal Pal v. Neel Monce Pal* (20 W. R., 383)—, which is decidedly against him.

That was a suit, as this is, for rent which was due under a *patni*, and the *patnidar* contended that he had surrendered the *patni*, and had a right to do so, and that he had thus terminated his obligation for rent. Mr. Justice JACKSON in giving judgment says: "The point which we reserved for consideration in this case is, whether it is optional with the *patnidar* to surrender the *patni* which he holds at any time, and to plead such surrender in answer [675] to a suit for rent. We are clearly of opinion that, whether or not the Civil Court might, upon sufficient ground, give relief in a suit brought to dissolve a contract between the *zamindar* and his *patnidar*, it certainly is not open to a *patnidar*, of his own choice to throw up the *patni*, and, by so doing escape his liability to pay rent. We do not say that the contract is indissoluble, because many circumstances might arise in which the interference of a Court of Justice might fairly be invoked to put an end to it, but the dissolution of such a contract must, we think, be an act of the Court and the result of proper enquiry, and cannot be taken by the *patnidar* alone, and pleaded in answer to a suit for rent."

This is a direct authority, as it seems to me, against the defendants' contention, but having regard to the fact, that my learned brother, who has been for twenty years in this country, both in executive and judicial capacity, has never even heard of such a contention as has been pressed upon us, I do not think I need say more on this part of this case.

The only other point that remains to be noticed is as to the supposed consent of the notice by the plaintiff. It was contended that there were sufficient grounds in point of law for the Subordinate Judge to find that the lessor has accepted the relinquishment which was tendered by the lessees.

Now what happened was this; I assume, of course, that a notice was given by the lessees to the plaintiff that they would relinquish the lease at the end of Assar 1286; and it appears that a day or two before Assar they paid the rent due for Assar, and they intimated at the same time that they would leave the premises at the end of the month, which they did. Nothing appears to have been said by the plaintiff on this occasion, nor was any communication received from him; and when the lessees set up that they had relinquished the property, he denied having received any notice. However, it was proved that a notice had been sent by post, though it is not suggested that the plaintiff ever said *anything* which could be construed into an express assent. Now was this enough, in point of law, to justify the Subordinate Judge in finding an assent on the part of the lessor to the relinquishment? I am clearly of opinion that it was not. A man who is bound by [676] lease to pay his rent cannot, by merely informing his landlord that he is going to relinquish the land, get rid of his obligation, and the mere fact that the landlord silently receives the notice, which the lessee had no legal right to give, cannot be construed, in my opinion, into an assent to the relinquishment; and no Court has any right under such circumstances to find that the landlord did assent.

I am clearly of opinion, that the judgment of the lower Courts should be reversed, and that the plaintiff's claim should be decreed with costs in all the Courts.

Field, J.—This was a suit for the recovery of Rs. 532-8, being the rent of the year 1286, together with interest, after giving credit for certain payments made.

The defence to the suit was that a notice was issued on 29th of April 1879, corresponding with the 17th of Bysakh 1286, by the defendant of his intention to give up the land, for the rent of which this suit has been brought, and that this notice was followed up, on the 8th of July 1879, by an actual relinquishment.

Upon this defence one of the issues fixed by the Munsif was, whether the relinquishment was good in law, and upon this point the Munsif says: "With reference to the other contention of the defendant, I think that it is tenable. What is a *dur-maurasi mokurari* tenure? It is an ordinary contract to pay the rent as long as the tenant would occupy the land, and that the landlord would not be able to eject him or enhance his rent, for which consideration a price is paid. The occupation of the land is the consideration for payment of the rent, and the tenant can, at any moment, say (of course giving the landlord reasonable notice) take back your land and let me go."

On the hearing of this appeal a question was raised as to whether upon the appeal to the Judge in the Court below the question was raised as to whether a tenure of this nature could be relinquished. I think there can be no doubt that this question was raised in the fourth ground of appeal, and this being so, it appears to me clear that the contention of the plaintiff,

throughout the whole course of the case, has been that a tenure [677] of this nature, that is a dur-maurasi mokurari, could not be put an end to by a mere relinquishment on the part of the lessee.

As to the question whether the plaintiff accepted the relinquishment I think there can be no doubt. It was no doubt very wrong for him to deny that which we must take to have been clearly proved, *viz.*, the service of the notice of relinquishment upon him, but according to a principle that has been laid down by the Privy Council we must not, in dealing with this case, allow ourselves to be led to decide otherwise than according to law, because the plaintiff has been ill-advised, or misled into doing, in the conduct of his suit, that which was beyond doubt very wrong and improper.

The one question then which we have to decide is, whether a tenure, such as that with which this case is concerned, can be terminated at the will of the lessee by a relinquishment.

Let us see what this tenure is. It is quite clear that it is not a lease of agricultural land. The contents of the kabuliati shew this very distinctly. This being so, the provisions of the Rent Act have no application, and the defendants could not, under the provisions of s. 20 of that Act, relinquish their holding.

But it is contended that according to a well-known custom in this country, any person holding a permanent interest intermediate between the zamindar and the cultivator may, of his own option, unless he has restrained himself by an express provision to the contrary, relinquish such interest or tenure.

I am bound to say that this is a proposition which I have never heard advanced until this case came before us; and before the hearing of this case, my impression has always been that no such tenure can be terminated unless with the consent of the landlord, *i.e.*, apart from any question of a sale for arrears of rent brought about by the action of the landlord himself.

In support of the proposition advanced for the defendants three cases have been quoted to us from the reports of the Sudder Dewany Adawlat. The first of these cases is that of *Kowla Kant Mukerjee v. Ram Mohun Gosain* (2 Sel. Rep., 325). The marginal note of that case, which is substantially correct, is as follows:—"The right of landholders of patni taluks of [678] the second or lower degrees in the zamindari of Burdwan, is not liable to be cancelled by the resignation of the patnidar who granted the taluk. It can only be cancelled by a public sale for arrears of revenue." This stands to reason. If an individual having taken a patni taluk from the zamindar, and having, according to the well-known custom of that district, granted a number of darpatnies for a considerable amount of salami, could afterwards go to the zamindar, resign his patni, and thereby destroy the interest of the darpatnidars, the door would be opened for a large amount of fraud. Of course, the zamindar may, if he chooses, accept the relinquishment of the patni, but, by doing so, he is in no better position than an assignee of the patnidar. This case certainly does not show that, either by the law or custom of the country, a patnidar has any right, of his own option, to relinquish his tenure, and thereby free himself from future liability for rent.

The next case relied upon is that of *Rajah Kishen Chunder Bahadoor v. Shunkeree Dassee* (7 Sel. Rep., 174). Now, in the first place, that was a case, not of an intermediate tenure in the nature of a taluk, but a case of a farming lease; and it further appears that proceedings had been taken to enhance the rent, and that after those proceedings, the lessee, alleging that, according to the valuation of the officer deputed for the purpose of increasing the assessment, an excessive rent had been imposed, sought to resign the lease. It

appears to me that this case also does not support the proposition advanced before us. It is just and reasonable that a person who takes a maurasi lease at a fixed rent should be bound to hold the land so demised, and pay the rent according to the terms of the lease ; but the same justice and the same reason have no application, when one of the most important conditions of the original contract is altered, and the rent is enhanced. The lessee may very justly say to his landlord that, under the original contract, I agreed to pay that rent for the term of the lease. I certainly deny that you can raise the rent and compel me to continue to hold the tenure whether I desire to do so or not.

The third and last case quoted from the report of the Sudder Dewany Adawlat is a case of *Omachurn Chuckerbutty v. Hur* [679]-*chunder Haldar* (S. D. A., 1855, p. 205). That was also a case of a farming lease, and the only question decided related to the stamp required for an *istafa* or relinquishment. This observation disposes of that case as an authority upon the question before us.

It thus appears to me that none of the cases quoted from the Sudder Dewany Adawlat Reports support the allegation that has been made before us, while there are many cases to be found in those reports which go to shew the contrary.

The very learned Chief Justice has dealt with the case of a patni tenure in which it was distinctly held that a patnidar cannot, of his own option, relinquish his tenure, and, so far as I understand the law of this country, the principle of that case is applicable to all intermediate tenures between the zamindar and the cultivator of the soil, and in this term tenure I do not here include a farming lease.

I think, therefore, that the alleged relinquishment was no answer to this suit for rent, and that this appeal must be decreed with costs.

Appeal allowed.

NOTES.

[See also 19 Cal. 489 (497) ; (1899), 26 Cal., 460 (465).]

[9 Cal. 679 : 13 C. L. R. 120]
SMALL CAUSE COURT REFERENCE.

The 28th February, 1883.

PRESENT :

SIR RICHARD GARTH, KNIGHT, CHIEF JUSTICE, AND MR. JUSTICE
WILSON.

Carlisles, Nephews and Co.....Plaintiffs
versus
Hurmook Roy and another.....Defendants.*

*Contract—Construction of contract—Printed form of contract—Writing and
Printing—Sale of goods to arrive.*

The defendants contracted to purchase certain piece-goods from the plaintiffs, who were dealers in those goods. The contract of sale was written out on one of the printed forms of the plaintiffs' firm, which forms contained in print, the words "now in course of landing or in the said godowns" and "now on boardship." As a matter of fact, well known to both parties, the goods contracted for were neither in the godowns nor on boardship.

Held, that under the circumstances the printed words above set out formed no part of the contract entered into between the parties.

[680] THIS was a reference from the Chief Judge of the Calcutta Court of Small Causes. The terms of the reference are as follows :—

This suit is brought by the plaintiffs to recover Rs. 678-7-3 as damages by reason of the failure of the defendants to take delivery of certain goods under a contract, dated 11th August 1880.

Certain facts having been admitted by both sides, the parties have practically stated a special case for me to decide on the points of law raised.

The plaintiffs have given up their interest, *viz.*, Rs. 74, and the defendants in turn admitted that Rs. 604-7-3 would be the damages to which the plaintiffs would be entitled if they have legal right on their side.

The contract runs thus—

"The sellers (*i.e.*, the plaintiffs) sell, and the buyers (*i.e.*, the defendants) buy such of the undermentioned goods as have already arrived and are now in the seller's godowns or as may hereafter arrive and be deliverable at the said godowns at the rates specified, *viz* :—

P c|s	or otherwise 150 cases	}	per
White Grd. Prints	c/2 p. yd.	}	and now in course of landing or in the said godowns.
	4145/69		
To arrive	P c|s 417/589		

Nov.	Dec.	Jan.	Feb.	Mar.	April	May	}	now on boardship."
20	20	20	25	25	20	20 cases.		
<div style="display: flex; justify-content: space-between;"> <div> 45 chests checks 105 chests assorted </div> <div> <i>One month's extension for delivery from the last day of each month in which shipments to arrive. No sales to others.</i> </div> </div>								

* Small Cause Court Reference, from an order made by H. Millett, Esq., Chief Judge of the Calcutta Small Cause Court, dated the 5th of July 1882.

The above is the important part of the contract, which is in English, the italicised words representing the words in writing as distinguished from the printed form of the contract. At the foot one of the defendants made a note in Nagri, of which the following is a translation.

" Hurmook Roy Ram Chunder chintz, shirtings boxes 150, rate 2 annas condition
9 pies. Goods same as before ——— November 20, December 20, January agreement.
20, February 25, March 25, April 20, May 20. Godown due 30 days more condition
——— from date 30th ; goods to be taken according to ——— agreement.
agreement. agreement.

On the same date as this contract the defendants took 40 cases of the same goods (ready goods) under another contract. A suggestion has been made by the defendants' pleader that the Nagri writing, which must control the English, makes a different contract to that stated in the printed form ; but the only difference I can ascertain is, that the defendants say the goods are to be same as before. But the plaintiffs admit that the contract really was for the same class of goods as the defendants had taken before, and, [681] that they (the plaintiffs) have understood it as such. There is therefore no material difference.

Though the contract states it, no cases were, as a matter of fact, in the godown at the time, except those bought under the other contract.

No cases arrived either in November or December, and when they did arrive they were not according to quality. Twenty cases arrived in each of the months of January and February, but they were not according to quality. In March twenty cases arrived according to quality. Notice was given to the defendants, but they declined to take them. This resulted in a correspondence, and on the 5th April 1881, Mr. Camell, the defendants' attorney, wrote a letter to the plaintiffs, of which the following is a portion :—"I am further instructed to state that the contract having been broken by you, my clients contend they are not bound to take delivery of the March instalment, and they therefore decline to take delivery of the 25 cases now offered to them, and they repudiate all liability in respect thereof, and also of the future instalments, and they will defend any action which you may institute against them." The plaintiffs accordingly resold the goods.

In April 20 cases arrived, but they were not according to quality. In May 20 cases arrived according to quality. Notice was given to the defendants, but they refused to take them, and the plaintiffs resold. The main argument adduced on the part of the defendants is, that the contract is an indivisible one for 150 cases, and that as there was a failure on the part of the plaintiffs to perform the former portion of the contract, the defendants in their turn were justified in refusing to accept both the March and subsequent arrivals, *Honck v. Muller* (L. R. 7 Q. B. D., 92), being cited an authority for the proposition. On the other side it is contended, among other things, that this being a contract to arrive, the plaintiffs are not bound to tender delivery unless the goods arrive. Let us see what the material words of the contract are. They are that the sellers sell and the buyers buy such of the undermentioned goods, *i.e.*, 150 cases specifically described as may hereinafter arrive or be deliverable. There can be no difficulty as to the construction of these words. There is nothing ambiguous about them. They mean clearly that the contract is only for such of the goods as may arrive. It is not a contract that the goods shall

arrive. If no goods of the specified quality arrived before March 1881, there was no contract to deliver them, but only a contract to deliver them in case they arrived. But if it were necessary to go further than this and put a construction on the words "to arrive," the same conclusion would be arrived at, because the words "to arrive" have already in *Johnson v. Macdonald* (9 M. & W., 600) been construed to mean that the goods shall be sold on arrival. Whether this decision is right or wrong need not affect the construction of this contract, because the words "to arrive" would have to be taken in conjunction with the previous portion of the contract. If then the contract was only to sell such of the goods as did [682] arrive, there was no breach on the part of the plaintiffs previous to March 1881. If, on the other hand, there was a contract to buy such of the goods as did arrive, there was a breach on the part of the defendants to take delivery of the March arrival, and the same may be said as regards the May arrival.

For these reasons I am of opinion that the plaintiffs are entitled to a decree for Rs. 604-7-3.

The defendants' pleader has asked me to refer certain questions to the High Court, which I do in the following form :—

- (1) Is the construction of the contract put upon it the correct one ?
- (2) If any other construction can be put upon the contract, are the plaintiffs entitled to succeed on the facts, as admitted ?
- (3) Does the Nagri writing by defendants at the foot of the contract prevail over or control the printed portion thereof ?
- (4) Are the plaintiffs entitled under the contract to the damages sued for (*viz.*, for the 5th and 7th month's deliveries) when they have failed to deliver the 1st, 2nd, 3rd, 4th, and 6th months' goods ?

Mr. Sale for the plaintiffs was stopped by the Court.

Mr. M. P. Gasper (for the Defendants).—We are not bound to take these goods. The sellers warranted that at the time of the contract these goods were partly on boardship, and partly in their own godowns, neither of which was the fact. The goods were not according to quality—*Honck v. Muller* (L. R. 7 Q. B. D., 92) ; *Hoare v. Rennie* (5 H. & N., 19).

Mr. Sale (in reply).—Suppose there were the warranty stated, that would be a separate contract, and be no defence to this suit. GARTH, C. J., referred to *Johnson v. Macdonald* (9 M. & W., 600). In truth, the words relied on by the other side, though they are printed in the paper containing the contract, yet form no part of it whatever, and never were intended to form part of it.

[The Court intimated they would inspect the original contract, before delivering judgment.]

The **Judgment** of the Court (GARTH, C.J., and WILSON, J.) was delivered by

Garth, C. J.—We think that the judgment of the Court below is correct. It is satisfactory to have seen the original contract, because it seems clear that the printed words in the margin "now in course of landing, &c.," were merely the common form generally used by the plaintiffs' firm, and were not intended to constitute [683] any part of this particular contract. The argument, therefore, which was addressed to us upon those words entirely fails.

We think that the questions referred to us should be answered as follows :—The first and fourth questions should be answered in the affirmative. The

second question of course, does not arise; and as to the third, we do not see that the Nagri writing is at all inconsistent with the English contract.

The defendants must pay the costs of this reference.

NOTES.

[Compare with this case, the following observations of Lord PENZANCE in the House of Lords case of *Dudgeon v. Pembroke* (1877) 2 A. C. 284 at 293:—"It has been suggested that by reason of the policy having been drawn up on a printed form, the printed terms of which are applicable to a voyage and also to goods as well as to the ship, the policy is something less, or something more, than a time policy. But the practice of mercantile men of writing into their printed forms the particular terms by which they desire to describe and limit the risk intended to be insured against, without striking out the printed words which may be applicable to a larger or different contract, is too well known, and has been too constantly recognized in Courts of Law, to permit of any such conclusion."]

[9 Cal. 683 : 12 C.L.R. 304]

FULL BENCH REFERENCE.

The 28th February, 1883.

PRESENT :

SIR RICHARD GARTH, KNIGHT, CHIEF JUSTICE, MR. JUSTICE MITTER,*
MR. JUSTICE McDONELL, MR. JUSTICE PRINSEP, AND MR. JUSTICE WILSON.

In No. 308.—Titu Bibi.....Defendant
,, 357.—Munsurunnissa Bibi.....Defendant
,, 358.—Ibrahim Malla.....Defendant
versus

Mohesh Chunder Bagchi and others.....Plaintiffs.*

*Sale for arrears of rent—Patni tenure—Darpatni tenure—Under-tenure—
Incumbrance—Beng. Act VIII of 1869, ss. 59, 60, 66.*

The sale of a patni tenure for its own arrears under ss. 59 and 60, Beng. Act VIII of 1869, does not *per se* avoid the darpatni tenures, but only renders them voidable at the option of the purchaser.

An under-tenure is an incumbrance within the meaning of s. 66, Beng. Act VIII of 1869.

THIS case was referred to a Full Bench by McDONELL and FIELD, JJ., on the 29th of June 1882. The facts are as follows: The plaintiffs claimed rent as darpatnidars of a certain mehal. The patni mehal was sold for its own arrears in Pous 1285 (December 1878), and purchased by certain persons who were not made parties to this suit. The amounts claimed are arrears for the year 1285 (1878). The ryots objected to the suit on the ground that the patni mehal having been sold for its own arrears the darpatni rights had been extinguished, and that in consequence they were not liable to pay the rent to the plaintiffs for the [684] period subsequent to the sale. They also alleged that they had paid rent for that period to the new purchaser. The Judge of the lower Appellate Court held that the sale of Pous 1285 did not *ipso*

* Full Bench Reference made by Mr. Justice McDONELL and Mr. Justice FIELD, dated the 29th June 1882, in appeal from Appellate Decrees Nos. 308, 357, and 358 of 1881.

facto avoid the darpatni; and he gave the plaintiffs a decree, there being no evidence to show that the purchasers of the patni had ever taken possession of the mehal. The following is the reference to the Full Bench :—

“The question raised in the case is, whether upon the sale of an under-tenure, under the provisions of ss. 59 and 60 of Beng. Act VIII of 1869, a subordinate under-tenure is *ipso facto* avoided by the sale; or is not avoided until the purchaser by some overt act indicates his intention to exercise his power of avoidance. In the present case a darpatnidar sued the tenants immediately under him for rent; and they have set up as a defence that in consequence of the sale of the patni tenure for its arrears in 1285, the darpatni was *ipso facto* avoided, and the darpatnidar's rights came to an end :—

“The lower Appellate Court has held that the darpatni was not *ipso facto* avoided; that the effect of the sale was to make it avoidable only; and that there is nothing to show that the purchaser of the patni has exercised his option of avoidance.

“It is now contended before us, upon the authority of the cases of *Unnoda Churn Dass Biswas v. Mathura Nath Dass Biswas* (I. L. R. 4 Cal., 860; s.c. 4 C. L. R. 6), and *Mohini Chunder Mozumdar v. Jotirmoy Ghose* (4 C. L. R., 422), that this decision is wrong, and that the Subordinate Judge should have held that the effect of the sale was to avoid the darpatni, irrespective of any act of the purchaser. The question is one of some intricacy and the decisions of this Court are conflicting. A sale for arrears of revenue and a sale for arrears of rent have, on many occasions, been regarded as analogous; and in considering the consequences of a sale for arrears of rent, an argument has been drawn from the consequences of a sale for arrears of revenue. In the case of *Ranee Surnomoyee v. Suteesh Chunder Roy* (10 Moore's I. A., 123; s. c. 2 W. R., P. C., 14), their Lordships of the Privy Council say, [Here his Lordship quoted from 10 Moore's I. A., pp. 143 to 147: “Upon [685] the argument before their Lordships”——“According to usages and rate of the Parganas.”]

“The case just referred to was followed by the case of *Khajah Assanoollah v. Obhoy Chunder Roy* (13 Moore's I. A., 317), and this latter case is discussed in the case of *Kazee Munshie Aftabooldeen Mahomed v. Sanioolla* (23 W. R., 245). Then comes the case of *Raja Suttia Sarun Ghosal v. Mahesh Chandra Mitter* (2 B. L. R., P. C., 30; 11 W. R., P. C., 10). In this case the principle laid down in the case of *Ranee Surnomoyee* was applied to a sale under the subsequent Regulation XI of 1822; and it was laid down that the option of avoidance was to be exercised within a reasonable time. The language of s. 30 of Regulation XI of 1822 was: “All tenures which may have originated with the defaulter or his predecessors, &c.....shall be liable to be avoided and annulled by the purchaser, &c.” To the same effect is the case of *Tara Chand Dutt v. Mussanmut Wakenoonnissa Bibee* (7 W. R., 91), which was also decided upon s. 30 of Regulation XI of 1822. In the case of *Koylash Chunder Dutt v. Subur Ali* (22 W. R., 29), the same principle was extended to sales under s. 37 of Act XI of 1859, and it was further held that the assignee of a purchaser may exercise the power of avoidance. The language of s. 37 of Act XI of 1859 is: “The purchaser.....shall acquire the estate free from all incumbrances which may have been imposed upon it after the time of settlement, and shall be entitled to avoid and annul all under-tenures and forthwith to eject all under-tenants with the following exceptions.” The same language “acquires it free of all incumbrances” is used in s. 66 of Beng. Act VIII of 1869.

"In the case of *Madhusudan Kundu v. Ram Dhan Ganguli* (3 B. L. R., A. C. 431; 12 W. R., 383), the same principle was extended to patni sales. MARKBY, J., referring to the decision upon the Revenue Sale Law, said: "It is true that these decisions turned upon words of the law not precisely similar to those of Regulation VIII of 1819, [686] s. 11, cl. 1, but it is clear to my mind that it would be impossible to put a construction upon that Regulation different from that put in those decisions on the Regulation of 1793, of 1822, and Beng. Act VI of 1862 which are all in *pari materia*; and I think it must now be taken as an established principle of law that no sales for arrears of rent have *ipso facto* the effect of cancelling tenures created by defaulting owners, but merely to give to the purchaser the power to do so if he thinks proper, which has not been done in this case." In the case of *Gobind Chunder Bose v. Alimooddeen* (11 W. R., 160) the same principle was applied to a sale under Beng. Act VIII of 1865. BAYLEY, J., there said: "The expression used by the first Court is not that it finds that the intervenor was so in receipt of such rents, but to the effect that, *even if he were*, the plaintiff's auction-purchase would over-ride every position that the intervenor might have under the law. In my opinion this is quite erroneous. Section 16, Beng. Act VIII of 1865 enacts 'that the purchaser of an under-tenure, sold under this Act, shall acquire it free of all incumbrances which may have accrued thereon by any act of any holder of the said under-tenure, his representatives or assignees, unless the making of such incumbrances shall have been expressly vested in the holder by the written engagement under which his under-tenure was created, or by the subsequent written authority of the person who created it, his representatives or assignees.' But it does not follow that without any act on the part of the auction-purchaser, or any notice of an intention to cancel a pre-existing miras tenure, an auction-purchaser might avoid any incumbrance. The real duty of the first Court, therefore, on Beckwith's intervention, was to fix an issue and take evidence and try whether, firstly, at the time of the auction-purchase, Beckwith, as dur-mirasdar of Kristo Jibun, was in actual receipt and enjoyment of the rents *bona fide* or not. This will include the question as to whether there was any notice given by the auction-purchaser of the cessation of Beckwith's dur-maurasi right, and of the auction-purchaser's intention to exercise his right with reference to the provisions of s. 16, Beng. Act VIII of 1865."

[687] "Now, up to this case, there seems to have been a *consensus* of decision that the same principle applied to sales for arrears of revenue and sales for arrears of rent. But then come the cases of *Unnoda Churn Dass Biswas v. Mothura Nath Dass Biswas* (I. L. R., 4 Cal. 860; s. c. 4 C. L. R., 6), and *Mohini Chunder Mozumdar v. Jotirmoy Ghose* (4 C. L. R., 422) in which a contrary view has been taken. In this conflict of decisions we refer the following questions to a Full Bench:—

(1) Has a sale under ss. 59 and 60 of Beng. Act VIII 1869 the effect of avoiding incumbrances irrespective of any act done by the purchaser in order to the exercise of the right of avoidance? (2) Is an under-tenure an incumbrance within the meaning of s. 66 of Beng. Act VIII of 1869? With reference to the last question, it is to be observed that while the patni regulation provides expressly for incumbrances and under-tenures, s. 66 of Beng. Act VIII of 1869 provides for incumbrances only."

Bahoo Nil Madhub Bose for the Appellants.

No one appeared for the Respondents.

The Judgment of the Full Bench was delivered by

Garth, C. J.—In answer to the questions referred to us, I think that an under-tenure is clearly an incumbrance within the meaning of s. 66 of the Rent

Law of 1869, and I also think that, for the purposes of this case, the effect of a sale for arrears of revenue under Regulation VIII of 1819 is substantially the same as that of a sale for arrears of rent under s. 37 of the Rent Law. In either case the under-tenures are not *ipso facto* avoided by the sale, but are voidable only at the option of the purchasers.

In the case of *Unnoda Churn Dass Biswas v. Mothura Nath Dass Biswas* (I.L.R., 4 Cal., 860; s. c. 4 C.L.R. 6) the question which we have now to decide hardly considered. That case came up on appeal before my learned brothers and myself from a decision of Mr. Justice MARKBY and Mr. Justice PRINSEP, who had differed as to the time within which a purchaser under the Rent Law was bound to bring a suit to cancel an under-tenure.

[688] Mr. Justice MARKBY thought that the purchaser, in order to entitle himself to sue, must give some notice of his intention to cancel the under-tenure within a reasonable time after the sale. Mr. Justice PRINSEP was of opinion that the purchaser was not bound to give any notice; and that what was a reasonable time for cancelling the under tenure had been defined by Art. 120* of the Limitation Act of 1871.

In this I agreed with my brother PRINSEP, and all that we really decided in that case, so far as I am aware, was, that it is not necessary, for the purpose of avoiding an under-tenure or other incumbrance, that the purchaser should give any notice, or to do any act before bringing his suit; and that his suit must be brought within the time prescribed by the Limitation Act.

I fear, however, that my own judgment in that case was not as carefully worded as it ought to have been, and that it may have led to an impression, which appears to have been acted upon in subsequent cases, that we intended to lay down as law, that under s. 37 of the Rent Law incumbrances including under-tenures were absolutely avoided by the sale.

I consider the view of the learned Judges who referred this case to be quite correct, namely, that for the purpose of the question which we have to determine, the same principle applies to sales of arrears of rent as to sales for arrears of revenue, and that both are only voidable at the option of the purchaser.

The appeals, therefore, in all the cases depending upon our decision will be dismissed.

Appeals dismissed.

NOTES.

[NOTICE BEFORE SUIT TO AVOID UNDER-TENURES, UNNECESSARY—

See also (1898) 2 C.W.N. 229 (233); (1903) 31 Cal. 393; (1907) 6 C.L.J. 472 (484); (1906) 7 C.L.J. 191; (1910) 37 Cal., 559; 14 C.W.N. 849; 11 C.L.J. 503; 6 I.C. 69; 11 I.C. 85.]

* [Art. 120:—

Description of suit.	Period of limitation.	Time when period begins to run.
To avoid incumbrances or under-tenures in a <i>patni taluq</i> or other saleable tenure sold for arrears of rent, the <i>taluq</i> or tenure being by virtue of such sale, freed from incumbrances and under-tenures.	Twelve years ...	When the sale becomes final and conclusive.]

[=13 C.L.R. 402]

[689] SMALL CAUSE COURT REFERENCE.

The 9th March, 1883.

PRESENT :

SIR RICHARD GARTH, KT. CHIEF JUSTICE, AND MR. JUSTICE WILSON.

H. Mackintosh

versus

C. Crow and another.*

H. Mackintosh

versus

G. C. Gore and another.

Interest—Promissory Note—Failure to pay on due date—Enhanced rate of interest—Penalty—Breach of contract.

Where money is borrowed under a contract for repayment with interest on a certain day, and the contract stipulates that if the money is not paid at the due date it shall *thenceforth* carry interest at an enhanced rate, such a stipulation is not a penalty, and the enhanced rate agreed to be paid may be recovered in its entirety.

Mackintosh v. Hunt (I.L.R., 2 Cal., 202) followed; *Bansidar v. Bu Ali Khan* (I.L.R., 3 All., 260) considered.

THIS was a reference in two cases heard by the Second Judge of the Calcutta Court of Small Causes. The material portions of the reference are as follows :—

This is a suit brought by the plaintiff to recover from the defendants Rs. 190 on a promissory note, dated 20th December 1877, which is in these terms :—

“On the 3rd March 1878, we jointly and severally as principals promise to pay Mr. H. Mackintosh, or order, the sum of Rs. 50 for value received allowing him a discount to due date out of it Rs. 10 as agreed upon previously. Should we neglect or fail to pay or delay payment of the amount beyond due date, it shall carry interest from due date to date of final payment at the rate of ten per cent. per mensem.”

The note is for Rs. 50, from which was deducted Rs. 10 as discount at the time the loan was given, so that Rs. 40 was all that the defendants received. They have already paid Rs. 110 towards interest, and the present claim is for Rs. 50 as principal and Rs. 140 as interest, making a total of Rs. 190. The amount of interest on a loan of Rs. 50 or more, properly speaking Rs. 40, which has already been paid and is still payable, [690] is Rs. 240, which is six times the actual amount of the loan : and the contention is that the amount of interest claimed after due date of the note is a penalty, and that as such the Court has a discretionary power to award a reasonable rate of interest, and that if the Court exercise this discretion, there would be found nothing due to the plaintiff. A further plea of fraud in the original contract has also been raised, of which no evidence has been given.

The defendants' pleader relies, in support of his argument, upon the following authorities :—*Rajah Baroda Kant Roy v. Bhagwan Dass* (I.L.R., 1

* Small Cause Court Reference No. 7 of 1882, from orders made by Baboo Koonjo Lal Bannerjee, Second Judge of the Presidency Small Cause Court, Calcutta, dated the 1st of July 1882.

All., 344); *Din Dayal Lall v. Hetnarain Singh* (I. L. R., 2 Cal., 41); *Cook v. Fowler* (L. R., 7 H. L., 27); *Chuhar Mal v. Mir* (I. L. R., 2 All., 715); *Mazhar Ali Khan v. Sardar Mal* (I.L.R., 2 All., 769); *Bansidhar v. Bu Ali Khan* (I. L. R., 3 All., 260); *Khurram Singh v. Bhawani Baksh* (I. L. R., 3 All., 440).

These authorities, except *Din Dayal Lall v. Hetnarain Singh* and *Cook v. Fowler*, and some others, fully support the view contended for. The question whether the stipulation for payment of a higher defaulting rate of interest is a penalty or interest, has at times been viewed in different lights by the highest Courts in India. Mr. Justice HOLLOWAY, in *Adanky Ramachandra Row v. Indukuri Appalaraju Garu* (2 Mad. H. C., 351), in an exhaustive judgment has ruled that the higher rate is not a penalty, but liquidated damages. While in *Motoji Bin Ratanji v. Shekh Husen* (6 Bom. H. C., A. C., 8), and *Pawa Nagaj v. Govind Ramji* (10 Bom. II. C., 382), the Bombay High Court has held that the increased rate of interest is a penalty. Then again in *Mackintosh v. Hunt* (I.L.R., 2 Cal., 202) referred by the First Judge of this Court in a suit on a promissory note, which was worded exactly as the present instrument is, and in which the question whether the higher rate of interest was a penalty or interest was directly put by the learned Judge, the High Court (His Lordship the present Chief Justice and Mr. Justice MACPHERSON) decided that it was not a penalty but interest. But in another case *Bichook Nath Panulay v. Ram Lochan Singh* (11 B.L.R., 135), Mr. Justice PONTIFEX has held that a stipulation to pay the higher rate of interest on a default being made in payment of a smaller rate is a penalty. This view has been clearly shown to be quite in accordance with the principle laid down by TINDAL, C.J., in the well-known case of *Kemble v. Farren* (6 Bing. 141), which, I believe, first laid down the rule that when a larger sum at once became due on failure to make payment of a smaller sum, the former is a penalty.

[691] *Mackintosh v. Hunt* was decided on the 18th July 1877, or nearly five years ago. Since then the Judges of the Allahabad High Court, in four successive cases, have held that the higher rate of interest payable in default of the payment of the principal with the lower rate of interest is a penalty, and they accordingly reduced the rate. Those cases are *Chuhar Mal v. Mir* (I. L. R., 2 All., 715); *Kazhar Ali Khan v. Sardar Mal* (I. L. R., 2 All., 769); *Bansidhar v. Bu Ali Khan* (I. L. R., 3 All., 260); *Khurram Singh v. Bhawani Baksh* (I. L. R., 3 All., 440); and *Kharag Singh v. Bhola Nath* (I. L. R., 4 All., 8).

In the other case the promissory note runs as follows :—

"We jointly and severally as principals promise to pay Mr. H. Mackintosh, or order, in Calcutta the sum of rupees one hundred in the following manner, for value received allowing him a discount to the due date of the instalments out of it as agreed upon previously.

"The instalments to be paid thus :—

On the 12th July 1880	...	...	Rs. 10	0	0
On the 12th August 1880	...	...	" 10	0	0
On the 12th September 1880	...	...	" 10	0	0
On the 12th October 1880	...	...	" 10	0	0
On the 12th November 1880	...	...	" 10	0	0
On the 12th December 1880	...	...	" 10	0	0
On the 12th January 1881	...	...	" 10	0	0
On the 12th February 1881	...	...	" 10	0	0
On the 12th March 1881	...	...	" 10	0	0
On the 12th April 1881	...	...	" 10	0	0

"Should we neglect or fail to pay or delay payment of any instalment beyond due date it shall carry interest from due date to date of final payment at the rate of (10) ten per cent. per mensem."

The amount claimed is Rs. 275, of which Rs. 100 is principal and 175 interest. The same objections have been raised in this case as in the other case, and treating the condition to pay a higher rate of interest as a penalty. I have directed a verdict to be entered for the plaintiff for Rs. 117-8; allowing interest at twelve per cent. per annum from the date of the note. Both these judgments are contingent upon the opinion of the High Court.

The question I respectfully submit is whether, under the circumstances of these cases and the facts found and the authorities quoted, I am right in treating the stipulation to pay the defaulting rate of interest at a higher rate as a penalty, and in decreeing interest at a reasonable rate.

No one appeared to argue the reference.

The **Opinion** of the Court (GARTH, C.J., and WILSON, J.) was delivered by

[692] Wilson, J.—Two rules of law are established by the Legislature of this country :—

First.—That a man is free to contract to pay any rate of interest that he chooses upon money borrowed; and the Courts must enforce it against him, Act XXVIII of 1855, s. 2*, and there is nothing to hinder his agreeing with regard to the future as well as the present. He may contract to pay no interest at present, but interest hereafter; or to pay one rate of interest now, and a higher or lower rate hereafter.

Secondly.—By s. 74 of the Contract Act, "when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of such breach is entitled, whether or not actual damage is proved to have been caused thereby, to receive from the party, who has broken the contract, reasonable compensation not exceeding the amount so named." This section, it will be observed, does away with the distinction between a penalty and liquidated damages and this must be borne in mind in dealing with cases decided before the Contract Act, many of which turned upon this distinction. Under this section, whether a sum would formerly have been held a penalty or liquidated damages, if it be named in the contract as the amount to be paid in case of breach, it is to be treated, much as a penalty was before, as the maximum limit of damages.

The contracts now before us are two, which are substantially similar in their terms. It is sufficient to set out one. (His Lordship read the note set out at page 689 *ante*.)

The question is, whether this note not having been paid at the due date, the plaintiff can recover interest at the rate stipulated for after due date. And to answer this question we must say under which of the two rules of law referred to this contract falls.

* [Sec. 2 :—In any suit in which interest is recoverable, the amount shall be adjudged or decreed by the Court at the rate (if any) agreed upon by the parties; and if no rate shall have been agreed upon, at such rate as the Court shall deem reasonable.]

What rate of interest shall be decreed by the Court in any suit.

Of course, the use of the word *interest* does not conclude the case. The substance of the transaction must be looked to; and many cases have occurred in which what has been called interest has been held to be a penalty under the old law, or to fall under s. 74 of the new.

[693] Thus in many cases the provision has been, that in case of default in payment on the due date, an increased rate of interest shall be payable from the date of the contract. Such a provision was formerly a penalty, and is now within s. 74. This was the case in *Rasaji bin Davlaji v. Sayana bin Sagdu* (6 Bom. H. C. A. C. 7); *Mazhar Ali Khan v. Sardr Mal* (I. L. R., 2 All., 769); and in a recent case before FIELD, J., and myself, *Muthura Persad Singh v. Luggun Koor* (*ante*, p. 615).

In another class of cases the contract has been one of loan for a term certain, with a provision that, if default be made in payment of interest, or of an instalment of principal, the whole shall bear an increased rate of interest. This was the nature of the contract in *Motoji bin Ratnaji v. Shekh Husen* (6 Bom. H. C. A. C. 8), and in a recent case before MACLEAN, J., and myself, R. A. No. 99 of 1881.

In *Bichook Nath Panday v. Ram Lochun Singh* (11 B. L. R., 135) and in *Khurram Singh v. Bhawan Baksh* (I. L. R., 3 All., 440) both these circumstances appear. In *Pava Nagaji v. Govind Ramji* (10 Bom. H. C., 382), the terms of the contract do not clearly appear from the report. But in the judgment it is said that the case of *Motoji bin Ratnaji v. Shekh Husen* (6 Bom. H. C. A. C. 8) was precisely in point. At any rate the case was not decided under the section with which we have now to deal.

In all such cases this element is present, that by the terms of the contract a sum is made payable by reason of the breach, capable of calculation at the time of the breach, and payable in all events, though in the second class of cases the payment is spread over a term.

But where, as here, the contract is merely, that if the money is not paid at the due date, it shall *thenceforth* carry interest at an enhanced rate, I do not see how it can be said that there is any sum named as to be paid in case of breach. No one can say at the time of the breach what the sum will be. It depends entirely on the time for which the borrower finds it convenient to retain the use of the money. It is a fresh sum becoming due [694] month by month, or as the case may be, for a new consideration. And, in my opinion, the case falls under the first rule of law above mentioned, not under the second. This view of the law was acted upon by this Court in *Mackintosh v. Hunt* (I. L. R., 2 Cal., 202).

A case is referred to by the learned Judge of the Small Cause Court, which may seem to conflict with this view. *Bansidhar v. Bu Ali Khan* was decided by a Full Bench of the Allahabad Court. The facts of the case were very peculiar. The document in question was dated the 9th November; it acknowledged a loan of Rs. 50, to be repaid in four days, on the 13th November, and added "in the event of default he shall pay interest at the rate of Re. 1 per diem." The Court held that this last provision was a penalty. STUART, C.J., says that he regards it as a penalty, and STRAIGHT, J., delivering the judgment of the rest of the Court, explains the view somewhat more fully, saying that, looking at the entire instrument, the parties intended, when they spoke of interest, a penalty for each day's default in payment of the principal sum. If I rightly apprehend the principle of that decision it is based on the view that the provision as to interest was intended not to regulate the terms on which the loan was to continue, but to prevent the continuance of the loan, by imposing a

penalty of Re. 1 for the first default and treating each day's further delay as a new default, for which a new penalty should be payable. So regarded, the decision is not inconsistent with the view which I take of this case.

I would answer the question referred to us in the negative.

Garth, C.J.—I agree.

[= 12 C.L.R. 440]

[695] APPELLATE CIVIL.

The 19th June, 1883.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE FIELD.

Shyam Chand Koondoo.....Defendant

versus

The Land Mortgage Bank of India, Limited.....Plaintiff.*

Sale in execution of decree—Right to sue for damages—Mesne profits—Civil Procedure Code (1877), s. 266, cl. (e).

The right to sue for mesne profits is a "right to sue for damages" within the meaning of s. 266, Cl. (e) of the Code of Civil Procedure, and therefore cannot be sold in execution of decree.

Where, therefore, the plaintiff purchased the right to sue for *mesne profits* at a sale in execution of a decree, *Held* that a suit by him to enforce the right was not maintainable.

Baboo Grija Sunkur Mozoomdar for the Appellant.

Baboo Chunder Madhub Ghose for the Respondent.

THE facts are sufficiently stated in the **Judgment** of the Court (GARTH, C.J., and FIELD, J.), which was delivered by

Field, J.—The Land Mortgage Bank of India is the plaintiff. The facts of the case are apparently somewhat complicated, but when they are understood, they really present no difficulty. The defendant No. 1, Shyam Chand Koondoo, was the 8-annas proprietor of a patni taluk, lot Buradakundi, and as the result of certain litigation, to which I shall presently refer, the defendant No. 2, Durga Churn Shaha, was the proprietor of the other moiety of the same patni.

* Appeal from Appellate Decree, No. 1830 of 1881, against the decree of F. W. V. Peterson, Esq., Judge of Jessore, dated the 15th June 1881, modifying the decree of Baboo Kedareswar Roy, Subordinate Judge of that District, dated the 27th September 1880.

Durga Churn Shaha, on the 8th of March 1872, mortgaged his 8-annas share to the Bank. The mortgage debt not having been discharged, the Bank took steps upon the mortgage bond, and having obtained a decree was about to bring the 8-annas share belonging to Durga Churn Shaha to sale, when one Shoshi Bhoosan Shaha came in and preferred a claim, alleging a title in himself to [696] half of Durga Churn Shaha's moiety, that is, a 4-annas share of the entire patni.

This claim was at the time successful, and in consequence the Bank, abstaining from the further execution of their decree, brought a suit to have a declaration of Durga Churn Shaha's title to the entire moiety of the patni.

This suit was ultimately successful; meanwhile, however, the defendant No. 1, Shyam Chand Koondoo, executed a decree against Shoshi Bhoosan Shaha, the successful objector; and having brought to sale the disputed 4-annas share of the patni taluk, himself purchased it on the 7th of June 1876.

The Bank being successful in the suit brought by it to have a declaration of Durga Churn Shaha's title to the disputed 4-annas share, was about to execute its original decree, but the patni was now allowed to fall into arrears of rent, and was in consequence brought to sale under the provisions of Regulation VIII of 1819.

This sale realized a gross sum of Rs. 26,600: deducting from this Rs. 5,019-13-3, being the amount of rent due to the zamindar, and Rs. 266-1-3, the amount of auction fees to which the Government was entitled, there remained a balance of Rs. 21,314-1-6, being the surplus sale proceeds. Of this amount, Shyam Chand Koondoo took from the Collectorate one moiety, which represented the 8-annas share of the patni, which, without dispute, belonged to him. The other moiety has been taken by the Bank, in consequence of their having successfully made out a title to Durga Churn Shaha's moiety.

The present suit has been brought to recover, first, mesne profits for the period during which Shoshi Bhoosan Shaha and the defendant No. 1, who subsequently purchased his interest, were in wrongful possession of the disputed 4-annas share, and also a sum of Rs. 1,254, which represents the rent due for the disputed 4-annas share during the period of arrear, in consequence of which arrear the summary sale took place under the Regulation.

The Bank bases its claim to the recovery of mesne profits upon the allegation that in execution of a decree the Bank purchased the right of Durga Churn Shaha, the defendant No. 2, to recover [697] damages for the period of the wrongful possession of Shoshi Bhoosan Shaha and Shyam Chand Koondoo.

Upon the hearing of this appeal, it appeared to us that the cause of action thus alleged will not entitle the Bank to recover.

Under the provisions of s. 266 of the Code of Civil Procedure, certain property therein specified may be sold in execution of a decree for money. The proviso to that section excepts certain items, and, amongst those items, we find in clause (e), "mere rights to sue for damages."

Now there can be no doubt that mesne profits are damages; and this being so, it appears to us that Durga Churn Shaha's right to sue for these damages could not have been sold in execution, and that therefore the plaintiff, having purchased that right, has taken nothing upon which he can base a cause of action capable of being maintained in a Court of Justice.

Then as to the sum of Rs. 1,254 for rent, we think that this sum also represents the profits of the property appropriated by the person in wrongful possession. No doubt the sum ought to have been paid as rent ; and inasmuch as it was not paid as rent, and so never reached the hands of the zamindar, we think that the plaintiff cannot, by giving the defendant credit in that portion of his claim which is concerned with mesne profits, alter the character of this particular item of claim.

It has been contended before us that this particular sum ought to be regarded as representing the disputed 4-annas share of the property. No doubt, when property to which a person has successfully set up a title is sold otherwise than by private sale, pending his litigation, and surplus sale proceeds remain in the hands of the Civil Court, those surplus sale proceeds are property regarded as representing the immoveable property; but it appears to us that the present case does not fall within this principle. The sum of Rs. 1,254 never did, in the hands of the Collector, represent surplus sale proceeds, because the zamindar was entitled to take this amount out of the gross sum of Rs. 26,600 realized, and this amount is not included in, and does not constitute any portion of the remainder, Rs. 21,314-1-6, which alone, in the hands of the Collector, can be regarded as surplus sale proceeds.

[698] Such are the facts of the case ; but it appears to us that, although the plaintiff may have misconceived the cause of action, the equity of the case is on his side, and under these circumstances we will allow the appeal to stand over until Monday next, with a view to consider any application that may be made to us for the amendment of the plaint. We reserve the question of costs.

Subsequently the following order was made :—

The respondent is allowed to amend the plaint as prayed. The case will be sent back to the Court of First Instance to be tried *de novo* on the plaint so amended, upon the plaintiffs paying to the defendant the costs incurred by him in all the Courts on the amount claimed, less the sum in respect of which the amendment is allowed.

The costs in regard to the sum as to which the amendment is allowed will abide the result of the trial hereby directed.

Case remanded.

NOTES.

[AMENDMENT BY APPELLATE COURT—

See also 37 Cal., 229 P.C., which affirmed 5 C.W.N. 273 ; 22 Cal., 692 ; 11 M.I.A. 468 ; 2 L.B.R. 4 (7) ; as to when amendment is permitted, see also (1903) 5 Bom. L.R. 329 ; 5 Bom. 496 ; 5 Bom. at 613, 614.]

The 6th December, 1882.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE NORRIS.

Lutchmeeput Singh.....Plaintiff

versus

Sadaulla Nushyo and others.....Defendants.*

Limitation Act (XV of 1877), s. 26—Dispossession—Fishery—Custom—Suit to restrain fishing in certain Bhils.

In a suit to restrain the defendants from fishing in certain bhils, which admittedly belonged to the plaintiff's zamindari, it appeared that the plaintiff had let out some of the bhils to ijaradars who had sued the defendants for the price of fish taken by them from the bhils, and that the suit had been dismissed, on the ground that the defendants, in common with other inhabitants of the villages in the zamindari, had acquired a prescriptive right to fish in the bhils. The defendants contended that they had been in possession of the bhils for more than 12 years, and that they had a prescriptive right to fish therein, under a custom according to which all the inhabitants of the zamindari had the right of fishing.

Held, that the mere fact that the defendants had trespassed and had misappropriated fish did not amount to a dispossession of the plaintiff, and that the suit was not barred by limitation.

[699] *Parbutty Nath Roy Chowdhry v. Mudho Paræ* (I. L. R., 3 Cal., 276) distinguished.

Held, also, that no prescriptive right of fishery had been acquired under s. 26 of the Limitation Act,† and that the custom alleged could not, on the ground that it was unreasonable, be treated as valid.

Lord Rivers v. Adams (L. R. 3 Ex. D., 361) followed.

Baboo *Rashbehary Ghose* and Baboo *Sreenath Dass* for the Appellant.

Baboo *Chunder Madhub Ghose* and Baboo *Hurry Mohun Chuckerbutty* for the Respondents.

* Appeal from Appellate Decree, No. 2156 of 1880, against the decree of J. R. Hallott, Esq., Officiating Judge of Rungpore, dated the 25th June 1880, affirming the decree of Baboo Bhugwan Chunder Chuckerbutty, Subordinate Judge of that District, dated the 20th March 1880.

† [Sec. 26 :—Where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, and as of right

Acquisition of right to easements. without interruption, and for twenty years, and where any way or water-course, or the use of any water or any other easement (whether affirmative or negative) has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right without interruption, and for twenty years, the right to such access and the use of light or air, way, water-course, use of water, or other easement, shall be absolute and indefeasible.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

Explanation :—Nothing is an interruption within the meaning of this section, unless where there is an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made.]

THE facts of this case sufficiently appear from the **Judgment** of the Court (MITTER and NORRIS, JJ.) which was delivered by

Mitter, J.—The plaintiff is the patnidar of Pergunnah Batasone. The defendants Nos. 1 to 9 are the inhabitants of Roopsi, the defendants Nos. 10 and 11 are the inhabitants of Joroollahpore, and the defendants Nos. 12 and 13 are the inhabitants of Manipore. The villages of Roopsi, Joroollahpore and Manipore appertain to the zamindari of Pergunnah Batasone.

The plaintiff brought this suit praying for an injunction against the defendants to restrain them from fishing in certain bhils set out in the schedule to the plaint, and for a declaration that they had no right of fishing in the aforesaid bhils.

The grounds of action stated in the plaint are, that the bhils in question appertain to the zamindari of Pergunnah Batasone, of which the plaintiff is the patnidar; that the plaintiff is in possession of the fishery right in the said bhils; that out of these bhils, bhils Kendra and others, named in the second paragraph of the plaint, were let out in ijara to Kholie Mahomed and Deve Nushyo for three years, from 1283 to 1285 (1876 to 1878); that during the term of this ijara lease the defendants, in the months of Falgoon and Cheyt 1283 (February and March 1877), without the permission of the ijaradars, having caught and taken away fish from these bhils, the said ijaradars brought a suit for damages against them; that in that suit it was held by the Courts that the defendants, in common with the inhabitants of the villages mentioned above, had a prescriptive right to catch fish in these bhils, [700] using for the purpose certain specified fish traps; that the defendants are still continuing to fish in these bhils in the manner stated above; that they have no right of fishing in these bhils, the julkur right in which is owned and held by the plaintiff.

The prayers mentioned above were based upon these allegations.

The defendants in their written statement stated that the plaintiff did not possess any julkur right in these bhils; that neither he nor his predecessor in title ever held the possession of julkur right in them; that the defendants and other tenants of Pergunnah Batasone and the tenants of Pergunnahs Koondi and others had been in possession of the aforesaid julkur right under an adverse title for more than twelve years; that the tenants of these pergunnahs had exercised their right of fishing in these bhils from time immemorial for generation after generation.

Upon these allegations the lower Courts substantially raised the following issues: (1st), Is the suit barred by limitation; (2nd), Has the plaintiff any right in the disputed julkur; (3rd), Have the defendants in common with the tenantry of pergunnahs Batasone, Koondi, etc., any right to fish in the disputed julkur; (4th), Whether the defendants, in common with the tenantry of Batasone, Koondi, and other pergunnahs have any prescriptive right to fish in these bhils.

The lower Courts have dismissed the plaintiff's suit. It is clear from the judgments that the plaintiff is the owner of the disputed bhils. This fact was admitted. The lower Courts, however, have laid some stress upon the fact which they find, *viz.*, that the plaintiff does not pay the revenue of these bhils; but the fact that these bhils appertain to his zamindari being admitted, it seems to us incomprehensible how the lower Courts could come to the conclusion that no revenue was being paid for these bhils. The Sub-Judge refers to a Punchsona paper in support of this finding. We have referred to that paper, and it is clear to us that it does not afford any ground whatsoever for the conclusion

based upon it. We must, therefore, decide this case, taking it as an admitted fact that the plaintiff is the owner of these bhils. The second issue may be, therefore, dismissed from our consideration.

[701] The lower Courts, it seems to us, have dismissed this suit upon the first and the fourth issues. The Sub-Judge based his decision simply upon the plea of limitation; but the lower Appellate Court, while concurring with the decision of the Sub-Judge on the question of limitation, has based his judgment also upon the ground of the defendants having established their right of fishing by prescription.

We are of opinion that the decisions of the lower Courts upon both these questions are erroneous. In order to determine whether the plaintiff's claim is barred by limitation or not, we must see what the finding of the lower Court upon this point is. The Sub-Judge says:—

“They (the defendants) have examined six witnesses, almost all of whom are aged between 50, 60, and 70 years, and prove beyond doubt that the defendants, including the people of the neighbourhood, have been fishing in the bhils from their infancy, their knowledge extending since they came to sense when they were seven or eight years old. It is also amply in evidence that there are shingadars in some of the villages adjacent to the bhils, who, by the sound of their instruments called shinga, would invite the people in the vicinity, who would then assemble together and join in a body to catch fish in the bhils, which the witnesses in this case have styled in the colloquial language the *bowaet* system of fishery.” In order to ascertain clearly what this finding really amounts to, we have referred to the witnesses upon whom the Sub-Judge relies. They, without any special reference to the defendants in this case, prove that the tenants of the pergunnahs mentioned above have been in the habit of fishing in these bhils in the manner stated in the passage cited above. This does not, in our opinion, amount to a dispossession of the plaintiff, the owner of the bhils. It cannot be said that the defendants, upon the facts stated above, are in wrongful possession of the bhils. Unless it can be shown that the acts of misappropriation of the fish were done by a person or defined number of persons, the acts of misappropriation, even if they have the effect of depriving the owner of a property wholly of its profits, would not constitute dispossession of the owner. Suppose from a field belonging to A, B and C [702] carry away the crops raised by him in one particular year, D and E in the next year, and so on for any number of years—these acts can be only looked upon as mere trespasses, giving to A a right of action for damages against the successive trespassers, but in the eye of the law, the possession of A is not discontinued, because, it cannot be said that any ascertained persons, *viz.*, B and C or D and E, are in wrongful possession of the property in question at any given time. You cannot say that an owner is out of possession unless you can say that a third party is in wrongful possession.

Moreover, supposing that such a fluctuating body, as the tenants of certain pergunnahs, can be said to be in wrongful possession of a property, still, until it is shewn that the owner is excluded from the participation of the enjoyment of it, he cannot be said to be out of possession.

For these reasons we are of opinion that the facts deposed to by the witnesses, upon whom the lower Courts rely, amount only to successive acts of trespass, and do not amount to a complete ouster of the plaintiff.

A question similar to this was raised in *Parbutty Nath Roy Chowdhry v. Mudho Paroe* (I. L. R., 3 Cal., 276); but in that case the defendants were ascertained persons who, under a claim of right, continuously exercised the right of taking fish from a bhil; and it was held that they were in possession

for more than twelve years of an interest in land. Accordingly the claim of the plaintiff, who was the owner of the bhil, to restrain the defendants from exercising that right, was held to be barred by limitation. It is obvious that the distinction between that case and the present is,—that in the former some ascertained persons were proved to have been in adverse possession for more than twelve years of an interest in an immoveable property; in the present case, it has been already shown that no defined and ascertained persons have been in continuous possession of the fishery right in these bhils. The plaintiff's claim is, therefore, not barred by limitation.

The next question is, whether the defendants have established a prescriptive right to this fishery right. The learned pleader for the respondents upon this point has relied upon s. 26 of the [703] present Limitation Act. That section requires that any easement which is claimed (a right of fishery has been held now to be an easement under the present Limitation Act)—see *Chundee Churn Roy v. Shib Chunder Mundul* (I. L. R. 5 Cal., 945; 6 C. L. R., 269) must be shewn to have been peaceably and openly enjoyed by *any person* claiming title thereto, etc., etc. For the reasons given above, it cannot be said that in this case that right was exercised by any person or persons. The section evidently requires that the same person or persons must be shewn to have exercised that right for a particular length of time. Then, again, from the length of user (a fact found by the lower Courts in favour of the defendants), it cannot be presumed that there was a grant by the Sovereign Power. It seems to us that the presumption of a grant is impossible; because in this case it cannot be shewn that there was some ascertained grantee or grantees. The Subordinate Judge was of opinion that the tenants of the several pergunnahs, in whose favour the right in question is claimed, must be considered to constitute a unit,—that is to say, he considers that they form a corporate body. We fail to see any tangible ground for this assumption. For instance, it may be that such a grant may be presumed in favour of a village community if such community be shewn to possess all the essentials of a corporate body; but we do not see any reason suggested by any evidence on the record which can support the conclusion that the tenants of the different pergunnahs, in whose favour the right in question is claimed, form anything like a corporate body. This point in the defence must, therefore, also fail.

This disposes of the grounds upon which the lower Courts' decisions are based. There remains to consider whether the right, set up by the defendants, can have for its basis a valid existing custom. It seems to us that it is unnecessary to enquire whether such a custom as the one set up by the defendants, has been established by the evidence. Because, supposing that it has been established, in our opinion, it cannot be treated as a valid custom on the ground of its unreasonableness. According to the custom set up, there is no limitation to the number of persons entitled to enjoy it. The tenantry may increase to any number, so that [704] according to this custom, an unlimited number of persons can take away the profits of a private property, and that nothing may be left to the owner. If the defendants are entitled to exercise the right of fishery in the way stated by them, they may take away the whole of the fish stocked in the bhils, leaving nothing for the plaintiff, who is admittedly the owner of them. Such a custom as this does not seem to be reasonable. We are, therefore, of opinion that it ought to be rejected as invalid.

Upon these questions of custom and prescriptive right, there is the case of *Lord Rivers v. Adams* (L. R. 3 Ex. D., 361), which is exactly in point. It is true that we are not absolutely bound by the authority of this case, but if the

grounds upon which the decision is based be founded upon natural justice, we would be fully justified in following it. On an examination of the reasons given by the Court in that case it will appear that they are not peculiar to any country or any particular state of society, but they are in conformity with the dictates of natural justice.

We are, therefore, of opinion that the decisions of the lower Courts are erroneous and should be reversed. We reverse them accordingly and decree the plaintiff's suit with costs in all the Courts.

Appeal allowed.

NOTES.

[CUSTOMARY RIGHT—REASONABLENESS—

"The criterion of 'reasonableness' by which the case of *Lutchmeput Singh v. Sadaulla* (9 Cal. 698) was decided, may have been a good one as regards the alleged right of an indefinite number of persons to fish in the bails of a private owner; but it cannot be extended as a matter of law to all customs; for, as shown in *Hall v. Nottingham*, a custom may be good though its exercise may have the effect of depriving the owner of the soil of the whole use and enjoyment of his property."—(1889) 23 Bom. 666 at 672; 1 Bom. L. R. 170. In this case the right of burial was successfully established. Compare also the following observations of the Privy Council in (1903) 31 Cal. 503; 8 C.W.N. 425. "They averred that from time immemorial they and their predecessors had enjoyed the right of pasturage over the waste lands of the villages, to which they belonged, and, in some cases, over waste lands of adjoining villages. It appears to their Lordships that on proof of the fact of enjoyment from time immemorial there could be no difficulty in the way of the Court finding a legal origin for the right claimed. Unfortunately, however, both in the Munsiff's Court, and in the Court of the Subordinate Judge, the question was overlaid, and in some measure obscured, by copious references to English authorities, and by the application of principles or doctrines more or less refined, founded on legal conceptions not altogether in harmony with Eastern notions."

As regard quantitative limits, See (1907) 6 C.L.J., 218 (222); (1899) 1 Bom. L. R. 499; (1909) 14 C.W.N. 15 (17).

II. ACQUISITION BY PRESCRIPTION—

On this subject of acquisition by prescription, see also (1903) 31 Cal. 397; (1889) 14 Bom. 213 (220)

[9 Cal. 704 : 10 I.A. 39 : 12 C.L.R. 395 7 Ind. Jur. 215 : Sar. P.C.J. 419]

PRIVY COUNCIL.

The 28th November, 1882.

PRESENT :

LORD FITZGERALD, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH,
AND SIR A. HOBHOUSE.

Omrao Begum and another.....Plaintiffs

and

The Government of India and another.....Defendants.

[On appeal from the High Court at Fort William in Bengal.]

Jurisdiction of Commissioners appointed under the Nawab Nazim's Debts' Act (XVII of 1873).

The Commissioners appointed under the Nawab Nazim's Debts Act XVII of 1873, * having ascertained and certified that a certain zamindari was nizamut property, (i.e., held by the Government for the purpose of upholding the dignity of the Nawab Nazim for the time being), the fact that [705] this property had, before the passing of the Act, been conveyed

* An Act to provide for the liquidation of the debts of the Nawab Nazim and for his protection from legal process.

by the Nawab Nazim to his son, did not deprive the Commissioners of jurisdiction to deal with the question. The plain language of s. 12 of the Act is not controlled by any words in the preamble.

A suit brought by a claimant against the Government and the grantee to recover the property, without the Nawab Nazim having been joined as a party, could not proceed.

APPEAL from a decree of the High Court, dated 26th April 1880, affirming a decree of the Judge of the Murshedabad District, dated 29th May 1878.

The question raised on this appeal was whether the suit, out of which it had arisen, could proceed without the Nawab Nazim of Bengal having been made a party to it; and this, again, depended on whether the Commissioners appointed under the Nawab Nazim's Debts Act XVII of 1873 had had jurisdiction to certify a zamindari to be nizamat property.

The appellants were the daughters of one Mehdi Ali Khan, who died on the 4th of January 1865, and were entitled by Mahomedan law to seven-eighths of his estate. He was the half brother of Amirannissa Begum, a deceased widow of a former Nawab Nazim. This widow had in her lifetime purchased a zamindari in the Murshedabad District, named Pargana Gopinathpur, which she held, not in her own name, but in that of Mehdi Ali. On her death in 1858, a question arose as to whether the succession to her estate was to be governed by the Mahomedan law, in which case Mehdi Ali would have succeeded to it, or by a custom alleged by the Nawab Nazim to the effect that the latter was the heir of every "gaddinashin Begum," or wife of a Nawab Nazim, such as Amirannissa had been.

Mehdi Ali received maintenance from the Nawab Nazim, not taking the zamindari; and on the 24th February 1858, he and his wife executed a la-dawa-nama, or deed renouncing claim, receiving a grant by purwana from the Nawab to the effect that "His Highness should grant to Mehdi Ali Khan and his heirs from generation to generation, Rs. 600 per month, upon condition that he should always remain submissive to the Nawab and never depart from this arrangement. On the death of Mehdi Ali in 1865, an order was made, by the Magistrate having jurisdiction, [706] under s. 318^b of the Criminal Procedure Code then in force, placing Gopinathpur in the possession of the present appellants. Litigation followed, the Nawab Nazim obtaining a decree for the possession of Gopinathpur, on the ground that his was the better title, upheld on appeal both by the High Court at Calcutta and by order of Her Majesty in Council. According to the final judgment in that case given in 1875, their Lordships saw no reason to doubt that both Mehdi Ali and the Nawab at the time of the execution of the la-dawa-nama of 1858, and of the purwana, believed, *bona fide*, that the Nawab had a right to succeed to Amirannissa's estate; and that those two instruments amounted to a valid contract by which the Nawab Nazim and Mehdi Ali were respectively bound, and they maintained the title of the former to Gopinathpur. Meantime, and some years before this judgment was given in his favour, *viz.*, on the 11th February 1869, the Nawab had made a gift of this zamindari to his second son Humayun Kader Mahomed

* [Sec. 318 :—When any person, under the age of sixteen years, is sentenced by any Criminal Court to imprisonment for any offence, such Court

Confinement of youthful offenders in reformatories.

may direct that such offender, instead of being imprisoned in the Criminal Jail, shall be confined in any reformatory established by the Local Government as a fit place for confinement, in which there are means of suitable discipline and of training in some branch of useful industry, or which is kept by a person willing to obey such rules as the Government prescribes with regard to the discipline and training of persons confined therein.

All persons confined under this section shall be subject to the rules so prescribed by Government.]

Ali Mirza Bahadur, commonly called Amir Saheb, the second respondent in this appeal.

In 1870 the present appellants, alleging that the maintenance, Rs. 600 per month, had not been paid, sued the Nawab Nazim for recovery of the estate of Amirannissa, and also for arrears of the maintenance. They obtained a decree for the latter only to the amount of Rs. 50,000, confirmed by the High Court in 1872.

On the 24th November 1873 the Nawab Nazim's Debts' Act XVII of that year came into operation, and under it were appointed Commissioners having power to investigate claims against the estate of the Nawab Nazim, and to compel the attendance of witnesses for that purpose, with power to ascertain and certify what jewels and immoveable property were held by the Government of India for the purpose of upholding the dignity of the Nawab for the time being.

(Section 11 of Act XVII of 1873 enacts) :--

" No suit shall be commenced or prosecuted, and no writ or process shall at any time be sued for against the person or property of the said Nawab Nazim, unless such suit be commenced, or such writ or process be sued for with the consent of the Governor-General in Council, first had and obtained.

" Such consent shall be certified by the signature of one of the Secretaries to the Government of India, and every such signature shall be judicially noticed.

" And any suit which at any time shall have been or shall be commenced, and any writ or process which at any time shall have been or shall be sued for against the person or property of the said Nawab Nazim, shall be of no effect unless and until the consent of the Governor-General in Council, certified in manner aforesaid, is obtained."

Section 12. " The Commissioners shall ascertain what jewels and immoveable property are held by the Government of India for the purpose of upholding the dignity of the Nawab Nazim for the time being, and shall certify the particulars of such jewels and property : and their finding thereon shall be binding and conclusive on all persons whomsoever."

[707] The present appellants then preferred a claim before the Commissioners, appointed under the above Act, for Rs. 50,000, the amount of the decree which had been given in their favour, but this claim, with one for further maintenance, was rejected.

On the 10th May the Commissioners certified that all the properties of which the Nawab Nazim had taken possession as heir of Amirannissa Begum, including Gobinathpur, became an appanage of his office and state; that he could not convey them to any one else; and that they were held by the Government of India for the purpose of upholding the dignity of the Nawab.

The Government having refused leave to the present appellants to execute the decree of 1872 against the property of the Nawab Nazim, they brought this suit in 1877 in the District Court of Murshedabad. They claimed against the Government and Amir Saheb Rs. 60,969, the arrears of maintenance decreed, with further arrears up to date, asking in the alternative for a return of Gopinathpur, which had been charged (it was alleged) with the payment of the allowance. They alleged that it was bound in the hands of the person to whom it had passed, so that upon non-payment of the allowance, it was recoverable by the plaintiffs. The Nawab Nazim was not made a party to the suit. The defence made by the Government was, amongst other things, that "as the present Nawab Nazim has an interest in the property, the subject-matter of the present suit, the plaintiffs should have made him a party."

On the 4th October 1877 the Court decided an issue framed in regard to this defence that the Nawab Nazim ought to be made [708] a party. The Government being empowered by the Act of 1873 to withhold its consent to a suit being brought against him, refused, in February 1878, to grant the necessary permission.

On the 29th May 1878 the Judge of the Murshedabad District dismissed the suit, on the ground that the Nawab Nazim was not joined, and his decision was upheld by the High Court (JACKSON and TOTTENHAM, JJ.) on the 26th April 1880.

The Court said, in dismissing the appeal: "However the suit may be brought, it is clear that it is not one which ought to be allowed to proceed without the Nawab Nazim being a party to it. The Legislature has given the Governor-General in Council full discretion to allow or not to allow the Nawab Nazim to be made a party to such suits; and in this case the Governor-General has refused to grant such permission."

On this appeal,—

Mr. *R. V. Doyne* appeared for the Appellants.

Mr. *Graham*, Q. C., and Mr. *J. D. Mayne* for the Respondents.

For the appellants it was contended that the suit had been wrongly dismissed. The question whether the Nawab Nazim should have been made a party to the suit (the only question now raised on the record as it stood) had been incorrectly dealt with. If Gobinathpur had come to the Nawab by inheritance, as it had come, it was an estate which he had power to convey; and if he had done so, thereby parting with his entire interest in the property, he would not be a necessary party to the present suit. Reference was made to the preamble of Act XVII of 1873; and it was contended that the property having passed away from the Nawab Nazim before that enactment, the jurisdiction of the Commissioners under the Act did not attach; and that, although, if they had had jurisdiction, their report would have been conclusive, yet, for the above reason, the matter was beyond their powers.

Counsel for the Respondents were not called upon.

Their Lordship's **Judgment** was delivered by

Sir R. P. Collier.—This was an action brought by Omrao Begum and Zahuran Begum, daughters of the late Saiyud Mehdi [709] Ali Khan, against the Government of India and the second defendant, who is called for shortness Amir Saheb, for the recovery of certain arrears of an allowance, or, in lieu thereof, possession of certain immoveable property. There is also a claim that the allowance may be charged upon this property, and that if it be not paid, the property be sold for the purpose of payment.

The facts necessary to the decision of this case may be shortly stated. Mehdi Ali Khan was a half-brother of Amirannissa, who was the widow of the grand-uncle and predecessor of the present Nawab Nazim of Bengal. A certain estate of Gopinathpur had been purchased by her, benami, in the name of the Mehdi Ali, but really for herself. Upon her death the Nawab Nazim claimed, by a custom of the family, all her property. Mehdi Ali, the father of the plaintiffs, raised some question upon this subject, and made some claim to the property himself; but he withdrew his claim upon an agreement, which is to be found in a purwana, not before their Lordships, to the effect that he was to receive Rs. 600 per month, and in consideration thereof to forego any claim he

might have, and not to molest the Nawab Nazim for the future. It seems that, notwithstanding the agreement, he took possession of the property, whereupon the Nawab Nazim was put to a suit which finally came before this Board, and in which this Board decided that he was entitled to recover possession of the property in dispute, mainly upon the strength of the agreement, which agreement prevented the defendant from disputing his title. In the Courts of India a suit was brought by the appellants against the Nawab Nazim, to recover, amongst other things, the arrears of the allowance granted to Mehdi Ali Khan; and a judgment for some Rs. 18,000 was obtained in December 1873, about a month after the passing of the Act called the Nawab Nazim's Debts' Act. on which the question in the present case turns.

The Government of India plead, among other things, that the suit could not proceed because the Nawab Nazim was not made a party to it. Whether they are right or wrong in that contention depends upon the construction of the Act which has been referred to—an Act to provide for the liquidation of the debts of the Nawab Nazim of Bengal, and for his protection against [710] legal process. The object of this Act was, as stated in the preamble, to put a stop to various suits, to ascertain what property, with respect to which there had been some disputes, was or was not held by the Government of India for the purpose of upholding the dignity of the Nawab Nazim, and for the purpose of exempting him for the future from being sued in the Courts. This Act appointed certain Commissioners for the purpose of determining what claims or debts were enforceable against the Nawab Nazim, and how much it was equitable to pay in respect of them, and gave them this jurisdiction without their being bound by any previous agreement or judicial proceeding; and then it proceeded, by s. 12, to enact thus: "The Commissioners shall ascertain what jewels and immoveable property are held by the Government of India for the purpose of upholding the dignity of the Nawab Nazim for the time being, and shall certify the particulars of such jewels and property; and their finding thereon shall be binding and conclusive on all persons whomsoever."

The contention on the part of the appellants has been that the Nawab Nazim having, as it is admitted, executed a conveyance of this property of Gopinathpur to the second defendant, his son, in the year 1859, it was not what may be called nizamat property, and that the Commissioners had no jurisdiction to deal with it, or to declare it to be nizamat property. But it has been very properly admitted on the part of Mr. *Doyne* that, if they had such jurisdiction, and if they rightly declared it to be nizamat property, then the suit cannot proceed.

Their Lordships are of opinion that the power of the Commissioners under s. 12 is by no means controlled, as it has been contended, by any words in the preamble, but must be construed according to the plain meaning of the language and that the language is, that the Commissioners are to ascertain "what jewels and immoveable property are held by the Government of India for the purpose of upholding the dignity of the Nawab Nazim." Whether this property had been conveyed to the son; whether the conveyance was valid; whether it was voluntary; whether it was collusive; or whether it was revocable—all these were questions which would come under the jurisdiction of the Commissioners to decide; and they have held that this property was immoveable [711] property held by the Government for the purpose of upholding the dignity of the Nawab. Their Lordships have no doubt that that was within the jurisdiction of the Commissioners; and if so, as has been very properly admitted, the suit cannot proceed, and the judgment of the High Court was right.

Under these circumstances their Lordships will humbly advise Her Majesty to affirm that judgment ; and this appeal will be dismissed with costs.
Appeal dismissed.

Solicitors for the Appellants : Messrs. *Wrentmore and Swinhoe*.

Solicitor for the Respondents : Mr. *H. Treasure*.

NOTES.

[As regards the necessity for previous consent, see 19 Cal. 742 ; 9 Cal. 914.]

[9 Cal. 711 = 12 C.L.R. 318]
FULL BENCH REFERENCE.

The 9th March, 1883.

PRESENT :

SIR RICHARD GARTH, KNIGHT, CHIEF JUSTICE, MR. JUSTICE MITTER,
MR. JUSTICE McDONELL, MR. JUSTICE PRINSEP, AND
MR. JUSTICE WILSON.

Mamtazul Huq and others.....Decree-holders

versus

Nirbhai Singh.....Judgment-debtor.*

*Beng. Act VIII of 1869, s. 58—Limitation—Landlord and tenant—
Execution of decree—Instalments.*

On the 10th of July 1878, a rent-decree was passed in favour of certain parties for the sum of Rs. 168, payable in two equal instalments, on the 4th of June 1879 and the 30th of October 1879, respectively. On the 18th July 1881, the decree-holders applied for execution of the decree.

Held, by the majority of the Full Bench (GARTH, C.J., and MITTER, J., *dissenting*) that the application was barred by limitation under the provisions of s. 58, Beng. Act VIII of 1869.

Gureebullah Sircar v. Mohun Lall Shaha (I. L. R., 7 Cal., 127 : S.C. 8 C. L. R., 409), dissented from.

THIS case was referred to a Full Bench by Mr. Justice MITTER and Mr. Justice MACLEAN, on the 22nd December 1882, with the following opinions :—

MITTER, J.—As at present advised I am inclined to follow the ruling in *Gureebullah Sircar v. Mohun Lall Shaha* (I. L. R., 7 Cal., 127 : S.C., 8 C. L. R., 409). As my [712] learned colleague is unable to take the same view, I would refer the question arising in this case to a Full Bench. The question I propose to refer is, whether the application for the execution of the decree, dated the 10th July 1878, is barred by the law of limitation.

As my learned colleague agrees to make this reference, the question stated above is accordingly submitted for the decision of a Full Bench.

* Full Bench Reference made by Mr. Justice Mitter and Mr. Justice Maclean, dated the 22nd December 1882, in appeal from Appellate Order No. 184 of 1882.

MACLEAN, J.—In my opinion the order of the District Judge should be affirmed. The question decided by him was, that the application made by the decree-holder, on the 18th July 1881, was a substantive application to execute the decree of the 10th July 1878, against the immoveable property of the debtor, and was therefore barred by the provisions of s. 58, Beng. Act VIII of 1869. The Munsif had decided that the application, which was made on the 18th July 1881, was in effect, a continuation of an application dated 11th March 1881. This was, in my opinion, entirely a mistake. The application of 11th March 1881 asked for realisation of the judgment-debt in one manner only, by arrest of the debtor. Process issued to that end, but was not successfully executed. The application was therefore exhausted.

The document of 18th July 1881 is in no sense an application made in the manner prescribed by law. It is a mere petition and should not have been acted upon. What the law requires is set out in s. 235 of the Civil Procedure Code, and no other application can be recognized. On this ground alone I would decide that the order, directing that execution should not issue, should stand; but as that point was not taken in either of the Courts below, and as I would affirm the order on other grounds, I proceed to state them.

It is admitted that the decree is for rent and for a sum below Rs. 500, and it is not disputed that it provided for payment of Rs. 168, in two equal instalments, on the 4th June and 30th October 1879. The contention here, which does not appear to have been made below, is that the special rule of s. 58 of the Rent Act is controlled by the provision of Art. 179 (6), Sch. II, Act XV of 1877, and it is argued that where a decree [713] for rent is passed in the terms of s. 210 of the Code of Civil Procedure, s. 58, Beng. Act VIII of 1869 is not to be applied.

It is certain that s. 6, Act XV of 1877, preserves any special law of limitation, and excludes the general law, and it seems to me that no Court ought to pass a decree which shall affect this provision. The provisions of s. 58, Beng. Act VIII of 1869 are identical with those of s. 92, Act X of 1859, and the latter Act was independent of the Code of Civil Procedure Act VIII of 1859. The provisions of s. 194 of the latter had, therefore, no operation in rent-suits under Act X of 1859. The Rent Law of 1869, s. 34, provides for the application of the Code of Civil Procedure to all suits and proceedings therein, save as in the Act provided. It may be said that section 210 of the Civil Procedure Code is not incompatible with the Rent Law. Granting this, I think, the rule of limitation for an application to execute a decree contained in s. 58 of the Rent Law, is applicable to a judgment passed under the provisions of s. 210 of the Code of Civil Procedure, and if the Court chooses to make a decree in the terms of that section for a sum below Rs. 500, it must do so with regard to the provisions of the Rent Law. In the case before us, the decree was passed by consent of both parties. The last instalment was payable on 30th October 1879, or 15 months 20 days after the date of the decree. The plaintiff must have known that he had 20 months 10 days within which to execute his decree with reference to s. 58, Act VIII of 1869. He waited 16 months 10 days before making any application whatever for execution. His first application of 11th March 1881 was infructuous, and he has made no application according to law since then; but conceding that the petition of 18th July 1881 was an application to execute, it could not be entertained with regard to s. 58, Beng. Act VIII of 1869.

I am unable to follow the ruling in *Gureebullah Sircar v. Mohun Lall Shaha* (I. L. R., 7 Cal., 127; 8 C. L. R., 409), which lays down that the words "from the date of such judgment" in s. 58, Beng. Act VIII of 1869,

should be read as [714] if they were "from the date when the rent is adjudged to be payable." This decision seems to me contrary to the rulings quoted at the foot of page 131 (I. L. R., 7 Cal.,) and to the decision of the Judicial Committee in *The Brenhilda v. British India Steam Navigation Co.* (I. L. R., 7 Cal., 547 at p. 551). It seems to me to be more impolitic to pass a decree, the execution of which shall run contrary to the provisions of s. 58 of the Rent Law than to limit the power given to the Courts under s. 210 of the Civil Procedure Code. The Rent Law, Act X of 1859, was passed while the provisions of s. 194 of Act VIII of 1859 were in existence, and the Limitation Act of 1877, when the Rent Law of 1869 was in force. I see no reason for supposing that s. 6 of the Limitation Act was passed without regard to s. 58 of the Rent Law.

I would, therefore, dismiss this appeal with costs; but I have no objection to the case being referred to other Judges of the Court or to a Full Bench. I concur in the terms of the question proposed by MITTER, J.

Moonshee *Serajul Islam* for the Appellants.

Baboo *Joyesh Chunder Roy* for the Respondent.

The following **Judgments** were delivered by the Full Bench:—

Prinsep, J.—I have had the advantage of seeing the judgments of my learned colleagues in this case, and I entirely concur in the opinion expressed by Mr. Justice WILSON. I would only add, as I have already stated in the case of *Gureebullah v. Mohun Lall Shaha* (I. L. R., 7 Cal., 127 : 8 C. L. R., 409), that if a reference to the Code of Civil Procedure is necessary to interpret the terms "date of judgment" used in s. 58, Beng. Act VIII of 1869, we find in s. 185 Act VIII of 1859, and also in s. 202, Act XIV of 1882, that the "judgment shall be dated by the Judge in open Court at the time of pronouncing it," and this is supplemented by s. 189 of the former Act and by s. 205 of the Code of 1882; both of which declare that "the decree shall bear date the day on which the judgment was passed." I also confirm the experience of Mr. Justice McDONELL, that until the decision of the case of *Gureebullah [715] Sircar v. Mohun Lall Shaha* (I. L. R., 7 Cal., 127 : 8 C. L. R., 409), this view of the law has always been accepted by our Courts ever since I have held judicial office.

Wilson, J.—I would answer the question referred to us in the affirmative.

Section 58 of the Rent Act VIII of 1869 is clear in its terms: "No process of execution of any description whatsoever shall be issued on a judgment in any suit for any of the causes of action mentioned in ss. 27, 28, 29 or 30 of this Act, after the lapse of three years from the date of such judgment unless the judgment be for a sum exceeding five hundred rupees."

I am unable to agree with the view expressed in *Gureebullah Sircar v. Mohun Lall Shaha* (I. L. R., 7 Cal., 127 : 8 C. L. R., 409), that the date of the judgment ought to be read as meaning the date at which the sum adjudged is made payable. The date of a decree or judgment and the date of payment under a decree or judgment are two distinct points of time, each of which has frequently been used as the starting point for limitation in the Limitation Acts. And the expression "date of decree," or order, or judgment, is used several times in this Act, as in ss. 53 and 103, and always, so far as I can see, in its ordinary sense.

I think the governing intention to be collected from s. 58 is that small decrees shall not in any event be kept hanging over judgment-debtors for more than three years; and I think that the express provision by which effect is given to that intention must override any provision of the Procedure Code

introduced by the general terms of s. 34, even if the effect were to render the provision of the Procedure Code wholly inoperative. This, however, is not quite the case. No doubt, the limits within which a decree for payment by instalments can be made under the Procedure Code, are practically very much narrowed by s. 58 of the Rent Act, and within those limits, I have no doubt that such a decree ought not to be made except by consent, and then not without very great caution: but I suppose such a decree might in some cases properly be made, provided the effect of s. 58 of the Rent Act be always kept in view.

McDonell, J.—I think we are bound to construe s. 58 of [716] Beng. Act VIII of 1869 strictly, and to hold that the application for execution in the case referred to us is barred by limitation. I entirely agree with the opinion expressed now by my brother Judges (PRINSEP and WILSON) and also by Mr. Justice MACLEAN in the referring order. It seems to me that the intention of the framers of s. 58 of Beng. Act VIII of 1869 was to prevent any decree for rent when not exceeding Rs. 500 being kept pending over the heads of judgment-debtors for more than three years under any circumstances, and as far as my experience goes, it is only lately that any different construction has been put upon this section. In the view held by the majority, the appeal must therefore be dismissed with costs.

Mitter, J.—The decision of the question referred to us turns upon the true construction of s. 58 of Beng. Act VIII of 1869. It is clear that if we are to follow the construction which the language of the section strictly suggests quite apart from any other consideration, we must come to the conclusion that the application for execution in this case is barred by limitation. It is also unquestionable that we have no right to add to or subtract from the language of a legislative enactment, unless there are adequate grounds for the inference that the Legislature intended something which it has failed precisely to express.

It seems to me that there are adequate grounds for the inference, that the language of s. 58 does not precisely express the intention which the Legislature had in framing it.

Whether for gathering the intention of the Legislature or for construing the words used for expressing that intention, one of the cardinal rules of construction is, that all the parts of a legislative enactment should be read together.

Now s. 34 of the Act says: "Save as in this Act is otherwise provided, suits of every description brought for any cause of action arising under this Act, and all proceedings therein shall be regulated by the Code of Civil Procedure passed by the Governor-General in Council, being Act No. VIII of 1859, etc."

The effect of this section would be to incorporate the provisions of s. 194 of Act VIII of 1859 without any modification, unless the contrary were provided in any other part of the Act. Is the [717] contrary provided in any other part of the Act? This question must be answered in the negative, unless it can be said that it is so provided *by implication* by s. 58 itself.

It is clear that s. 58 does not contain any express provision upon this point; nor does it appear to me reasonable to infer from it that the Legislature intended that the provisions of s. 194 of Act VIII of 1859 should be incorporated in the former Act with some modification. It is evident that the provisions of the two sections would be repugnant to one another, if we are to put a literal construction upon s. 58. It would be preposterous to hold that in a suit for rent not exceeding Rs. 500, the Legislature under s. 194 conferred upon the Courts the power of ordering in the decree that the amount adjudged shall be paid by instalments, the first of which shall fall after three years from the date of the decree, and at the same time to put a strictly literal construction

upon s. 58. Most incongruous consequences would arise from a construction of that nature, because the Legislature in that case would be saying in one and the same breath that a decree of the description mentioned above may be legally passed, but it would be impossible for the decree-holder, under any circumstances, to execute it.

Therefore, unless we can say that there are valid grounds for the inference that the Legislature did not intend to extend the provisions of s. 194 of Act VIII of 1859 at all to the classes of suits not exceeding Rs. 500, mentioned in the first part of s. 58 of Beng. Act VIII of 1869, or to extend it with this modification, that the instalments shall range within three years, we must come to the conclusion that the language used in s. 58 fails to express precisely its real intention. I do not think that there are any adequate grounds for the inference that the Legislature intended that the defendants in the suits mentioned in s. 58 should not have the benefit under s. 194 of Act VIII of 1859 conferred upon impecunious debtors, or should have that benefit considerably curtailed. It must be borne in mind that, in the latter case, the time for executing the decree would be shortened by the time which elapses between its date and the dates of the respective instalments. I can [718] imagine no reasonable ground which would lead the Legislature to place the decree-holders in these cases in any disadvantageous position.

Furthermore, it seems to me that the necessity for the exercise of the discretionary power under s. 194 of Act VIII of 1859 would arise more frequently in suits for rent than in any other class of suits for money.

I come to the conclusion, therefore, that the language of s. 58 of Beng. Act VIII of 1869 fails to express precisely the intention of the Legislature which was to provide that, in the class of suits mentioned in the first part thereof, the execution must be sued out within three years from the date or the dates when the amount or the amounts decreed became payable.

In another respect also the Legislature in the language used in s. 58 has failed to express its true intention. It is quite evident that it intended in that section to provide for the limitation of the execution of decrees in *all* kinds of suits that may be instituted under the Act, because there is no other section upon the subject, and the s. 34 extended to suits of this description only, the Civil Procedure Code and not the law of limitation applicable to civil suits generally. It is also evident that the Legislature intended that there should be one rule of limitation in respect of suits of the value not exceeding Rs. 500, and another rule regarding the rest.

That being the intention of the Legislature, let us see how far the language used expresses it accurately. The section is to the following effect: "No process of execution of any description whatsoever shall be issued on a judgment in any suit for any of the causes of action mentioned in ss. 27, 28, 29, or 30 of this Act, after the lapse of three years from the date of such judgment, unless the judgment be for a sum exceeding Rs. 500, in which case the period within which execution may be had shall be regulated by the general rules in force in respect to the period allowed for the execution of decrees of the Court."

Now, in order to designate the class of suits in which the [719] value of the subject-matter exceeds Rs. 500, the Legislature uses the words "unless the judgment be for a sum exceeding Rs. 500." This description, if literally construed, would exclude suits for the *possession* of lands valued above Rs. 500. But there cannot be any doubt that the Legislature intended to include this class of suits in the last part of the section because there is no reason why simple money claims should have a longer period of limitation than claims for land. It would appear from the Acts relating to limitation of suits generally

that the policy of the Legislature is just the contrary. Longer periods are generally allowed to suits for land than for money claims.

For the foregoing reasons, I am of opinion that the Legislature in the first part of s. 58 intended to provide for decrees under Rs. 500 other than those passed under s. 194 of Act VIII of 1859, or s. 210 (the corresponding section) of the present Civil Procedure Code, and that in the latter part it intended to lay down a rule of law applicable to the execution of all other classes of decrees. But it has failed to express this intention precisely by the language of the section. Under these circumstances, in order to give full effect to the intention of the Legislature, it is open to us to modify the language of the law. The cases bearing upon this subject, which are all collected in the 9th Chapter of a text-book on the interpretation of statutes by Maxwell, show to what extent it is allowable to modify the language of an Act, in order to carry out the intention of the Legislature.

In order to give effect to the intention of the Legislature with reference to s. 58, it would not, I think, be an unwarrantable modification of its language if we read it thus: "No process of execution of any description whatsoever shall be issued on a judgment in any suit for any of the causes of action mentioned in ss. 27, 28, 29 or 30 of this Act (*not being a decree under s. 194 of Act VIII of 1859 or s. 210 of Act XIV of 1882*), after the lapse of three years from the date of such judgment, unless the judgment be for a sum exceeding Rs. 500, in which case (and in all [720] other cases) the period within which execution may be had shall be regulated by the general rules in force in respect of the period allowed for the execution of decrees of the Court."

Having regard to the cases collected in the 9th Chapter of Maxwell on the interpretation of Statutes already referred to, it seems to me that the above modification of the language of s. 58 is not, as I have already said, unprecedented or unwarranted.

There are some Indian cases in which modifications of a similar nature in the language of a legislative enactment have been made by the Judges.

In *Rhidoy Krishna Ghose v. Kailash Chundra Bose* (4 B. L. R., F. B., 82: 13 W. R., F. B., 3) it was held, with reference to s. 92 of Act X of 1859, of which s. 58 of Beng. Act VIII of 1869 is a re-enactment, that the words "be issued" should be altered into "be sued out."

In *Kangalee Churn Ghosal v. Bonomalee Mullick* (B. L. R. Sup. Vol., 709) ss. 20 and 21 of Act XIV of 1859, were almost reconstructed; but in *Bai Udekuvar v. Mulji Naran* (3 Bom. H. C., A. C., 177), COUCH. C.J., was of opinion that the Judges in *Kangalee Churn Ghosal's* case had overstepped the limits allowed to the Judges to modify the language of an Act in the matter of construction.

The cases which bear the closest analogy to the present are *Utaf Ali Khan v. Ram Lal* (Agra H. C., F. B., 83); *Gopala Setty v. Damodara Setty* (4 Mad. H. C., 173); and *Utam Ram Manik Ram v. Girdhar Lal Moti Ram* (6 Bom. H. C., A. C., 45). In these cases the same question which is now before us was *virtually* raised. The language of s. 20 of the Limitation Act of 1859, like that of s. 58 of Beng. Act VIII of 1869, did not fit in well with the provisions of s. 194 of Act VIII of 1859, and it was held in these cases that "when a decree awards payments by instalments to be made at particular specified dates, *the date when each instalment becomes due is to be deemed the date of the decree in respect of that instalment* for the purpose of calculating the time within which execution may be issued to enforce payment of it."

For these reasons I am of opinion that in this case the execution of the decree under our consideration is not barred by limitation.

Garth, C. J.—I regret that I am constrained to differ in this case from the majority of the Court; but I still think it right to adhere to the view which was taken by Mr. Justice MORRIS and myself in the case of *Gureebullah Sircar v. Mohun Lall Shaha* (I. L. R. 7 Cal., 127; 8 C. L. R., 409).

We all know that, as a general rule, the language of an Act should be strictly construed; and of course under ordinary circumstances the date of a judgment means the day on which the judgment is delivered.

The decision of the Privy Council, which is quoted in the reference, does no more than affirm this general rule, and there was no reason, apparently, in that case why the rule should not be followed.

But here, as explained by my brother MITTER, we have a provision in the Rent Law, which, if construed strictly, would conflict with, or at any rate render nugatory, an enactment in the Civil Procedure Code, in a very large class of cases, where that enactment is especially needed.

Under these circumstances I think we should do our best to reconcile, as far as we can, the two enactments, and to put such a construction upon the language of the one, as not to curtail the beneficial effects of the other.

In the result, therefore, I agree with my brother MITTER that the execution in the case is not barred by limitation.

NOTES.

[See also (1895) 22 Cal. 644.]

[==12 C. L. R. 398]

[722] APPELLATE CIVIL.

The 9th March, 1883.

PRESENT:

MR. JUSTICE CUNNINGHAM AND MR. JUSTICE MACLEAN.

G. M. Reily.....Plaintiff

versus

Hur Chunder Ghose and others.....Defendants.*

Sale for arrears of rent—Landlord and tenant—Sale of a portion of a Tenure—Beng. Act VIII of 1869, ss. 59, 60, 64—Co-sharers—Parties.

A portion of a tenure cannot be the subject of a sale under s. 64, Beng. Act VIII of 1869 so as to give the purchaser the same privilege as he would acquire by the purchase of an entire tenure under ss. 59 and 60.

A landlord who was in receipt of a half share of the rent of a certain tenure caused that share of the tenure to be sold in execution of a decree for arrears of rent. After such sale A, the purchaser, took possession. Subsequently the tenant executed a mortgage, and a decree being obtained by the mortgagee the whole tenure was brought to sale in execution thereof and purchased by the mortgagee who proceeded to oust A.

In a suit by A to recover possession of his half share of the tenure on the footing of his purchase,

* Appeal from Appellate Decree No. 2130 of 1881, against the decree of Baboo Upendro Chunder Mullick, Subordinate Judge of Jessore, dated the 5th August 1881, affirming the decree of Baboo Prosunno Coomar Ghose, Munsif of Magura, dated the 28th February 1881.

Held, that he could not make out a title to the half tenure with the privilege attaching to the purchase of an entire tenure under ss. 59 and 60 of Beng. Act VIII of 1869, and that as it appeared that the mortgagor, whose rights and interests only were thus sold, was only one of several co-sharers, in the absence of the co-sharers who were not parties to the suit, A was not entitled to the relief he sought.

THE plaintiff in this suit alleged that Lal Khatoun, defendant No. 4, held a jama of Rs. 60-11 under Purno Chunder Roy, defendant No. 3, and one Bepin Chunder Roy, and that the rent thereof was separately paid to the maliks in two equal shares of Rs. 30-5-6 each; that in 1875 the defendant No. 3, in execution of a rent decree against the defendant No. 4, brought his share of the jama to sale, and it was purchased by the plaintiff on the 15th January of that year; that similarly the remaining eight-anna share of the jama was brought to sale by Bepin Chunder Roy, and was purchased by one Gouri Prosad Kundu, and that after their purchase both the plaintiff and Gouri Prosad were in possession [723] of their purchased shares by separately collecting rents from the sub-tenants of that tenure; that subsequently Hur Chunder Ghose and Ramdyal Ghose, defendants Nos. 1 and 2, in collusion with the defendant No. 4, made a false mortgage-bond against the latter, and defendant No. 1 obtained a decree thereon, and in execution of that decree fraudulently purchased the jama of Rs. 60-11, and dispossessed the plaintiff of his share. The plaintiff accordingly brought this suit to recover possession of his share upon the basis of his auction-purchase, and on the allegation that the purchase by the defendant No. 1 was a fraudulent one, and as such conferred no right on him.

Defendants Nos. 1 and 2 alone entered appearance and pleaded that the plaintiff having purchased only a share of his undivided tenure of Rs. 60-11, his purchase was illegal and conferred no right on him; that his allegation as to the possession and dispossession were totally false; and that the mortgage-decree and the auction-purchase of the defendant No. 1 were real and *bona fide* transactions; that defendant No. 1 alone was in possession of the tenure; and that as purchaser the plaintiff had no preferential right as against him.

The Court of First Instance found that the tenure of Rs. 60-11 was an undivided joint estate, and that it was never sub-divided into two jamas as alleged by the plaintiff, though the rent of it was paid separately to the maliks, and that there were several co-sharers in it besides Lal Khatoun. It therefore held that the plaintiff by his purchase of the jama of Rs. 30-5-6 purchased the rights of Lal Khatoun in the moiety of an undivided tenure, and that his purchase was illegal and created no rights in him. That Court also found that after the tenure was purchased by the plaintiff and Gouri Prosad, Ramdyal got up a false mortgage deed in collusion with the Khatouns, and subsequently got possession of the property under that deed by virtue of his purchase. The suit was accordingly dismissed. The lower Appellate Court confirmed that decree, agreeing with the finding of the lower Court that the plaintiff got nothing by his purchase; but it declined to express any opinion as to whether the mortgage transaction was a *bona fide* one or not.

The plaintiff preferred a special appeal to the High Court.

[724] Baboo Kashi Kant Sen appeared on behalf of the Appellant.

Baboo Bangsidhur Sen and Baboo Rash Behary Ghose for the Respondents.

The **Judgment** of the Court (CUNNINGHAM and MACLEAN, JJ.) was delivered by

Cunningham, J.—The main question in this case is, whether a portion of a tenure can be sold for arrears of rent under Beng. Act VIII of 1869.

Appellant's case is, that defendant No. 3, who was the landlord of defendant No. 4, and in receipt of a half share of the rent of a tenure rated at

Rs. 60-11, caused his share in the tenure to be sold in execution of a decree for arrears of rent. Appellant became the purchaser, and he now claims possession on the ground that he purchased the property free of encumbrances, and that defendant No. 1 has fraudulently and collusively set up a false mortgage by defendant No. 4 and his co-sharers, and in execution of a decree obtained on the mortgage has bought the whole tenure, and ousted appellant from one-half.

Reference to the sale certificate shows that the sale, at which appellant purchased on 15th January 1875, was held under the provisions of Beng. Act VIII of 1869, and that a jama of Rs. 30-5-6 out of Rs. 60-11 was sold.

Both the lower Courts have held that appellant acquired nothing by the purchase, regard being had to s. 64 of the Act referred to. The first Court found that the title of defendant No. 1 was bad, as the mortgage he set up was a fraudulent one.

The lower Court expressed no opinion upon this question.

We think that the decision of the Courts below is correct, so far as it decides that a portion of a tenure cannot be the subject of a sale under s. 64, Beng. Act. VIII of 1869, and that appellant cannot make out a title to the half tenure with the privileges attaching to the purchase of an entire tenure under s. 59. It has been established by a number of decisions in this Court that a purchaser under s. 108, Act X of 1859, which corresponds to s. 64, Beng. Act VIII of 1869, acquires the judgment-debtor's rights and interests only.

[725] It appears, however, that the defendant No. 4, whose rights and interests were thus sold, was only one of several co-sharers, and we cannot decide in this case, and in the absence of his co-sharers, what that share was. There are, therefore, no sufficient grounds for saying that appellant has even purchased rights in the tenure to the extent of one-half, and it is therefore unnecessary to remand the case for a decision as to the validity of the first defendant's alleged mortgage and decree as against appellant.

Appeal dismissed.

We therefore dismiss the appeal with costs.

NOTES.

[See (1885) 12 Cal. 464 (467).]

[9 Cal. 725 : 12 C. L. R. 460 : 7 Ind. Jur. 651]

APPELLATE CIVIL.

The 13th December, 1882.

PRESENT :

MR. JUSTICE MITTER, OFFG. CHIEF JUSTICE,
AND MR. JUSTICE NORRIS.

Jullessur Koorer.....Defendant

versus

Uggur Roy and others.....Plaintiffs.*

*Hindu Law—Inheritance—Mitakshara—Sister—Male
gotraja sapindas—Stridhan.*

According to the Mitakshara law a sister is not in the line of heirs, and is not entitled to succeed in preference to male gotraja sapindas. Nor does an estate inherited by a female become her stridhan. Such estate on her death goes to the heirs of the last male heir, and not to the heir of her separate property.

* Appeal from Original Decree No. 33 of 1881, against the decree of Baboo Kali Prosono Mukerjee, Subordinate Judge of Sarun, dated the 6th November 1880.

Baboo Mohesh Chunder Chowdhry and Baboo Gooru Dass Banerjee for the Appellant.

Baboo Kali Kissen Sen and Baboo Golap Chunder Sircar for the Respondents.

THE facts of this case sufficiently appear from the **Judgment** of the Court (MITTER and NORRIS, JJ.), which was delivered by

Mitter, J.—This suit relates to the estate left by one Sheo Prosad Roy, who died in Assar 1270 (June 1863). It is admitted by the contending parties that on Sheo Prosad's death his estate devolved upon his widow, Sunder Kali Koor, under the Mitakshara law of inheritance which governs the family. Sunder Kali [726] died in 1271, (1864) and the estate then devolved upon Komla Koor, the mother of Sheo Prosad Roy. The dispute which led to the institution of this suit arose on the death of Komla Koor, which took place on the 26th Assin 1286 (11th October 1879). The plaintiffs are the male gotraja sapindas of Sheo Prosad, descended from his great-grandfather, and the defendant, who is in possession of the estate in question, is his sister. The plaintiff's contention is, that under the Mitakshara law the sister is not in the line of heirs at all. If this contention be correct then there cannot be any question that the decree of the lower Court in favour of the plaintiffs is correct.

It has been urged before us that a sister is a sapinda; and that as all sapindas inherit in order of propinquity, the defendant's claim is superior to that of the plaintiffs'. As to the question of propinquity it is unquestionable that the defendant is nearer of kin than the plaintiffs. Therefore the question for decision is whether under the Mitakshara law all sapindas (including females) are entitled to inherit. This question arose in the case of *Ananda Bibee v. Nounit Lall* (*ante*, p. 315).

For the reasons given at some length there, the conclusion to which I came was, that of the female sapindas only those that are specified by name are heirs according to the Inheritance Law as administered in Behar. It is unnecessary to repeat those reasons again here. I shall consider here the arguments which are peculiarly applicable to the case of a sister.

Then let us see how the question stands upon the Mitakshara itself. The heirship of the sister was sought to be established on the authority of that treatise of Hindu law in two ways: *1stly*, it was contended upon an annotation of Balambhatta and Nanda Pundit that in para. 1, s. 4, chap. II, the word "brethren" includes brothers and sisters in the same manner in which "parents" have been explained to include father and mother in para. 2, s. 3, chap. II. With reference to this interpretation all the other commentators and writers of *Nibandhus*, who are followers of the Mitakshara, differ from this opinion. For example even Nilkantha, the author of *Vyavaharmayakha*, who [727] upholds the sister's heirship upon another ground, controverts this opinion. Moreover, if we are to adopt this interpretation as correct, we must give effect to it to its full logical consequences; we must then hold that the sisters and brothers would succeed simultaneously as joint heirs to the estate of a deceased brother; but such a conclusion as this would be contrary to a well established rule of Hindu law that has obtained in the province of Behar for a long series of years. The observations of the Judicial Committee of the Privy Council made with reference to an argument based upon this contention may well be cited here: "Again," their Lordships observe, "were the arguments in favour of the construction which Mr. Piffard would put upon the Mitakshara far stronger than they really are, their Lordships would nevertheless have an insuperable objection, by a decision founded on a new construction of the words of that treatise, to run counter to that which appears to them to

be the current of modern authority. To alter the law of succession as established by a uniform course of decisions, or even by the dicta of received treatises, by some novel interpretation of the vague and often conflicting texts of Hindu commentators would be most dangerous, inasmuch as it would unsettle existing titles"—*Thakoorani Sahiba v. Mohun Lall* (11 Moore's I. A., 306 at p. 403). The same contention was pressed in *Mussamut Guman Kumari v. Srikant Neogi* (2 Sev., 460), and the Court overruled it in the following words: "That recognition" (*viz.*, the recognition of the sister as heir) "is due to the commentators (*i.e.*, Balambhatta and Nanda Pundit)," and it is clear from the notes that all "other commentators were not of this opinion."

This contention must therefore fail.

The other argument in favour of the sister's succession is based upon the following passage of the Mitakshara: "If there be not even brother's sons, gotrajas share the estate," para. 1, s. 5, chap. II. Then in para. 3 it is laid down: "On failure of the paternal grand-mother, saman-gotraja sapindas, *viz.*, the paternal grand-father and the rest inherit the estate." It has been contended that a sister is a gotraja-sapinda, and is therefore entitled to inherit under the text set forth above; but it is clear [728] from these two texts that the author of the Mitakshara intended to designate the same class of persons by the two expressions, *viz.*, "gotraja-sapindas" and "saman gotraja-sapindas" used in paras. 1 and 3 respectively. Therefore the author of the Mitakshara used the word "gotraja-sapindas" not in the sense "of born in the same gotra," but in that of "belonging to the same gotra." A sister after marriage leaves the gotra of her father and consequently of her brother, and acquires that of her husband. Therefore a married sister does not come within the class designated by the expression "gotraja-sapindas" as used in the Mitakshara. This view of these passages of the Mitakshara is also taken by West and Bühler in their treatise on the Hindu law of inheritance and partition at page 180. They say: "The substitution of 'saman-gotraja' for 'gotraja' as well as the employment of 'bhinna-gotra' to designate the opposite of the term, both show that Vijnanesvara took 'gotraja' in the sense of 'belonging to the same family'". If the term has this meaning it would follow that no married daughters of ascendants, descendants or collaterals, can inherit under the text which prescribes the succession of the gotrajas. For the daughters by their marriage pass into another family or, as the Hindu lawyers say in their expressive language, are born again in the family of their husbands. But it seems improbable that even unmarried daughters of gotraja-sapindas can inherit under the text mentioned (*a*). For, though they belong to their father's gotra up to the time of marriage, they *must* leave it, under the Hindu law, before the age of puberty, and consequently by the succeeding to the estate of sapindas belonging to their fathers' families, the object of the law, in placing sagotra-sapindas before the bhinna-gotra-sapindas, *viz.*, the protection of the family property, would be defeated, since such property, through them, would pass into their husbands' families. It seems therefore more in harmony with the principles on which the doctrines of the Mitakshara are based to exclude even unmarried daughters of gotrajas.

For these reasons it seems to me clear that the sister is not in the line of heirs according to the Mitakshara law.

The learned pleader for the appellant further relied upon a passage to be found in the Virmitrodaya at p. 216; but it has [729] nothing to do with the general question of the right of inheritance of the sister. The passage in

question relates only to the subject of succession to reunited property. The author of *Virmitrodaya*, as already shown in the case referred to before, is of opinion that of the female sapindas only those that are specified by name are heirs. I am, therefore, of opinion that both these contentions are unsound.

It has been urged in the next place that, supposing the defendant is not entitled to succeed as the heiress of her brother, still there is not the slightest doubt that she is entitled to inherit to the stridhan left by her mother; that according to the Mitakshara law the estate of Sheo Prosad became the stridhan of his mother, because she acquired it by right of inheritance. It has been further urged that according to the Mitakshara law an estate acquired by a female, through the right of inheritance, becomes her stridhan. It is true that there is some foundation for this contention, but the question has been set at rest by the Privy Council decision in *Chotay Lall v. Chunnoo Lall* (I. L. R., 4 Cal., 744 : 3 C. L. R., 465). This decision is based upon a uniform current of decided cases, some of which are noted below : *Keerut Singh v. Koolahul Singh* (2 Moore's I. A., 331) ; *Collector of Masulipatam v. Caraly Venkata Narain Apah* (8 Moore's I. A., 529) ; *Mussamut Thakoor Deyhee v. Rai Baluk Ram* (11 Moore's I. A., 139) ; *Bhugwandeem Doobey v. Myna Bae* (11 Moore's I. A., 487) ; *Mussamut Bijya Dibeh v. Mussamut Unnopoorna Dibeh* (1 Sel. Rep., 162) ; *Rughobur Suhace v. Tulashee Kowur* (S. D. A., 1847, p. 87) ; *Punchanund Ojhah v. Lalshan Misser* (3 W. R. 140) ; *Narsappa Lingappa v. Sakharam Krishna* (6 Bom. II. C., A. C., 215) ; *P. Bachiraju v. Venkatappadu* (2 Mad. H. C., 402) ; *Sengalamathammal v. Valayudu Mudali* (3 Mad. H. C., 312) ; and *Kattama Nachiar v. Dora Singa Tevar*, (6 Mad., H. C., 310).

According to these cases an estate inherited by a female does not become her stridhan, and on her death goes to the heir of the last male heir and not to the heirs of her separate property. This appeal therefore fails on all points. We accordingly dismiss it with costs.

Appeal dismissed.

NOTES.

[In the Mitakshara schools of North India, a female can inherit only if expressly named in the texts :—(1889) 16 Cal. 367 (369). In no case of inheritance (whether from males or females) does the female heir become a fresh stock of descent :—(1903) 25 All., 468—In Bombay, however, gotraja sapinda females by birth take as full owners, and this rule does not apply :—(1890) 15 Bom., 206 ; 28 Bom., 82. But there too, the gotraja sapindas by marriage take but a limited estate :—(1892) 17 Bom., 690.

In the Madras school, the widows of gotraja sapindas are not recognised as heirs :—(1894) 18 Mad., 168 ; but female heirs (other than those expressly mentioned in the texts) when born in the family are recognised as bandhus :—8 M. H. C., 88.]

[=13 C.L.R. 91]
[730] APPELLATE CIVIL.

The 14th March, 1883.

PRESENT :

MR. JUSTICE McDONELL AND MR. JUSTICE TOTTENHAM.

Toree Mahomed.....Judgment-debtor

versus

Mahomed Mabood Bux and others.....Decree-holders.*

Limitation Act (XV of 1877), s. 19, and Sch. II, Art. 179—Execution of decree, Application for—Acknowledgment in writing.

The mere payment of a court-fee in connection with execution proceedings, with a view to obtain leave to bid for property then up for sale in execution of a decree, does not constitute "the taking of some step in aid of execution" within the meaning of Art. 179, Sch. II of the Limitation Act (Act XV of 1877), so as to prevent the execution of the decree being barred within three years from the date of such payment.

An application for the execution of a decree is an application in respect of a "right" within the meaning of s. 19,† Act XV of 1877, and a petition made by a judgment-debtor, and signed by his vakeel, praying for additional time for payment of the amount of a decree constitutes an "acknowledgment of liability" within the meaning of that section, and a new period of limitation should be computed from the date of such petition in order to ascertain whether the execution of the decree is barred or not under the provisions of Art. 179, Sch. II of the Limitation Act.

Ramhit Rai v. Satgur Rai (I. L. R., 3 All. 247); and *Ram Coomar Kur v. Jakur Ali* (I. L. R., 8 Cal., 716) followed.

THE sole question in this case was, whether the execution of a decree, dated the 26th August 1878, was barred by limitation or not. The application for execution, out of which this appeal arose, was dated the 26th January 1882, and the judgment-debtor contended that it was barred by limitation, as having been made more than three years after any previous application to the Court to take some step in aid of execution of the decree within the meaning of Art. 179, Sch. II of the Limitation Act (Act XV of 1877).

The facts, as admitted by both sides, were as follows :—

The first application for execution was filed on the 7th November 1878, and on the 22nd February 1879, the decree-holders paid a fee of Rs. 2 into Court, in connection with those execution proceedings, with a view to obtain leave to bid for some property then up for sale.

* Appeal from Original Order, No. 321 of 1882 against the order of Colonel P. W. D. Morton, B. S. C., Subordinate Judge of Julpigoree, dated 29th August 1882.

†[Sec. 19:—If, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the acknowledgment was so signed.]

When the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but oral evidence of its contents shall not be received.

Explanation 1.—For the purposes of this section an acknowledgment may be sufficient, though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come, or is accompanied by a refusal to pay, deliver, perform, or permit to enjoy, or is coupled with a claim to a set-off, or is addressed to a person other than the person entitled to the property or right.

Explanation 2.—In this section "signed" means signed either personally or by an agent duly authorized in this behalf.]

[731] In the lower Court the decree-holders relied on that proceeding as sufficient to withdraw the case from the operation of Art. 179 of the Limitation Act, and the Court adopted that view and disallowed the judgment-debtor's objection.

The latter accordingly appealed, and at the hearing of the appeal the decree-holders contended, in addition, that, inasmuch as a petition was filed by the judgment-debtor on the 21st February 1879, and signed by his vakeel, praying for additional time to be granted him in which to pay the amount of the decree, under s. 19 of the Limitation Act, a fresh period commenced to run from that date, and consequently that they were entitled to the order for execution asked for.

Moonshi *Serajul Islam* appeared on behalf of the Appellant.

Baboo *Gooroo Dass Banerjee*, for the Respondents.

The **Judgment** of the Court (McDONELL and TOTTENHAM, JJ.), was delivered by

Tottenham, J.—The question for decision in this appeal is, whether an application made on the 26th of January 1882 for the execution of a decree, dated the 26th of August 1878, is barred by limitation. The judgment-debtor, appellant, contends that it is barred, as having been made more than three years after any previous application to the Court to take some step in aid of execution of the decree within the meaning of Art. 179 of the Schedule to the Limitation Act.

It appears that execution proceedings were going on in February 1879, and the decree-holders on the 22nd of that month paid a Court-fee of Rs. 2 into Court, in connection with those proceedings. The lower Court has held that this act of the decree-holders was practically such an application as comes within the meaning of Art. 179, and that thus the decree is saved from limitation.

We think that this opinion is not sustainable, for it seems to us clear that the decree-holders did not on that occasion ask the Court to take any step in aid of the execution. It is said that their object was to obtain leave to bid for some property then up [732] for sale, but such an application would not, in our opinion, give a fresh starting point. We are aware that very liberal constructions in favour of decree-holders have been put upon Art. 179 by other High Courts in India, but we cannot in this case adopt the interpretation of the Subordinate Judge.

Yet we think that we may upon other grounds support his decision that the decree is not barred. Last of all the several points laid before us by the respondent's vakeel was one which is supported by the authority both of law and precedent. Section 19 of the Limitation Act provides for a new period of limitation from the date of signing any written acknowledgment in respect of a right claimed against the party signing.

A Division Bench of this Court has held, in the case of *Ram Coomar Kur v. Jakur Ali* (I. L. R., 8 Cal., 716), that a petition made by a judgment-debtor, and signed by his vakeel, praying for additional time for payment of the amount of a decree, does constitute such an acknowledgment as is mentioned in s. 19; and that an application for execution of a decree is an application in respect of "a right" within the meaning of that section.

There is a decision of the Full Bench of the High Court of Allahabad to the same effect; see *Ramhit Rai v. Satgur Rai* (I. L. R., 3 All., 247). In the present case we find that there was a petition of this kind filed by the

judgment-debtor on the 21st February 1879, and signed by his vakeel. Following the precedents above cited, we hold that the present application, made within three years of that one, is in time.

We accordingly dismiss the appeal, but under the circumstances we make no order as to costs.

Appeal dismissed.

NOTES.

[I. ACKNOWLEDGMENT—APPLICATION FOR EXECUTION OF DECREE—

To remove the conflict of cases like 9 Cal., 730 and 28 Mad., 40, the Legislature added Exp. III to sec. 19 of the Limitation Act 1908 whereby it is declared that for the purposes of this section an application for the execution of a decree or order is an application in respect of a right. See also 22 Bom., 722; 23 Cal. 374; 3 C. L. J., 347; 8 C. W. N. 470.

II. ACKNOWLEDGMENT—PLEADINGS—

The acknowledgment may be contained in the pleadings:—23 Cal., 374; 27 Cal., 1004 (1011) P. C.

III. ACKNOWLEDGMENT BY PLEADER—

Has been held to be valid:—26 All. 204; 2 C. W. N. 718; 18 All. 384; 22 Bom. 722; 10 Bom., 108.

IV. STEP-IN-AID OF EXECUTION, LEAVE TO BID—

For the general rule see 23 Cal. 690; 196; 10 C. W. N. 209; 3 C. L. J. 240; 88 P. R. 1884; 107 P. R. 1881. See also 35 P. W. R. 1912; 12 C. W. N. 621; 30 Cal. 761; 8 C. W. N. 261; 13 All. 211; 21 Bom. 331; 22 All. 399; 8 O. C. 161; 1 Bom. 261.]

[==13 C.L.R. 161 · 7 Ind. Jur. 649]

[733] ORIGINAL CIVIL.

The 7th May, 1883.

PRESENT:

MR. JUSTICE NORRIS.

Michael

versus

Ameena Bibi and others.

Service of summons—Service on Agent—Suit to obtain relief respecting immovable property—Civil Procedure Code (Act XIV of 1882), ss. 16, 77.

In a suit for foreclosure or sale of immovable property, it appeared that the mortgagor had conveyed the mortgaged premises to trustees. The summons to one of the trustees was personally served upon his duly constituted agent, who was at the time of service in charge of the mortgaged premises.

Held, that the service was sufficient, the suit being one to obtain “relief respecting immovable property” within the meaning of s. 16 of Act XIV of 1882.

Mr. Trevelyan for the Plaintiff.

THE facts of the case sufficiently appear from the **Judgment.**

Norris, J.—This is a mortgage suit. The plaint states that on 8th January 1881 the defendant No. 1 mortgaged certain premises to the plaintiff to secure the repayment of Rs. 12,000 with interest.

By an indenture of 21st January 1882 the defendant No. 1 conveyed the mortgaged premises, subject to the mortgage, to defendants Nos. 2 and 3 upon trust for certain charitable purposes.

The prayer of the plaint is “that an account may be taken of what is due to the plaintiff for principal and interest on the security of the said indenture of mortgage of 8th January 1881, and that in default of payment of the amount

to be found due, and of the plaintiff's costs of this suit by a short day to be appointed by the Court in that behalf, the defendants may be absolutely foreclosed of all equity of redemption of and in the said mortgaged premises or otherwise that the same may be sold under the direction of this Honorable Court."

A question arises as to the sufficiency of the service of the summons on defendant No. 2.

It appears from the affidavits that prior to the institution of the suit the plaintiff was informed that defendant No. 2 was residing [734] at Bombay; that after the institution of the suit, on making further inquiries, he was informed that the defendant had left Bombay; that he was unable to find him or to ascertain his correct address, or to find any agent empowered to accept service of the summons; that on 5th January 1883 a copy writ of summons was personally served upon one Hadjee Mahomed Osman, the lawfully constituted agent of defendant No. 2, who at the time of such service was in charge of the mortgaged premises, and was collecting the rents thereof.

Mr. Trevelyan asked me to hold that this was good service under s. 77 of the Civil Procedure Code, arguing that this was "a suit to obtain relief respecting immovable property."

As I was informed that this was the first case in which service had purported to be effected under this section, I took time to consider the matter. As far as I know there is no definition in the Code or elsewhere of "a suit to obtain relief respecting immovable property"; but a reference to s. 16 of the Code seems to show that this suit is such an one. Section 16 says: "Subject to the pecuniary or other limitations prescribed by any other law, suits—

"(a) for the recovery of immovable property ;

"(b) for the partition of immovable property ;

"(c) for the foreclosure or redemption of a mortgage of immovable property ;

"(d) for the determination of any other right to or interest in immovable property ;

"(e) for compensation for wrong to immovable property ;

"(f) for the recovery of movable property actually under distraint or attachment ;

shall be instituted in the Court within the local limits of whose jurisdiction the property is situate."

Then follows a proviso where instead of referring to the suits which in the section are lettered *a*, *b*, *c*, and *d*, by such lettering or as the first four suits above-mentioned or recapitulating them again in full, they appeared to be described collectively "as suits to obtain relief respecting immovable property."

I am, therefore, of opinion that the service is good, and that the case may proceed.

[736] ORIGINAL CIVIL.

The 22nd February, 1883.

PRESENT :

MR. JUSTICE NORRIS.

• Ramnarain Kallia

versus

Monee Bibee ;

and

Ramnarain Kallia

versus

Gopal Doss Sing.

Practice—Rule nisi to show cause why a person should not be made a party defendant—No grounds stated in or served with the rule—Rule granted during hearing of suit—Civil Procedure Code (Act XIV of 1882), s. 32.

During the hearing of a suit for recovery of immovable property it appeared from the evidence and certain documents put in, that the plaintiff had mortgaged his right, title and interest to a third person, by whom the suit was practically being carried on. On an application by the defendant for the mortgagee to be added as a party defendant, under the provisions of s. 32 of the Civil Procedure Code, the Court directed a rule to issue calling on him to show cause why he should not be added as a party defendant or give security for costs. The rule was not applied for on petition or affidavit and set out no grounds for the application at all. On an objection taken by the mortgagee at the hearing of the rule

Held, that the grounds should have been stated on affidavit or have appeared on the face of the rule, and that the mortgagee was entitled to know what he had to answer, and consequently, the rule being informal, it was discharged with costs.

THE plaintiff instituted these suits, which were heard together, to recover possession of a certain properties held by the defendants. Prior to the institution of the suits the plaintiff mortgaged his right, title, and interest in the properties to one Russick Lall Mitter. Some of the defendants in their written statements alleged that the plaintiff was a man of no means, and that the suits were being carried on and maintained by Russick Lall Mitter, and that the plaintiff had executed an agreement and a mortgage of his right, title, and interest over the properties in suit, besides other property, in favour of the said Russick Lall Mitter. In the course of the cross-examination of the plaintiff by Mr. *Palit*, who appeared for Monee Bibee, the above facts were proved, and the two deeds were put in as exhibits in the suit. It also appeared, on the face of these documents, that Mr. H. H. *Remfry*, who was acting as attorney for the plaintiff in the suit, had acted as attorney for Russick Lall Mitter in the matter of the execution of those two documents.

[736] On these deeds being proved and put in, Mr. *Pugh*, who appeared for Gopal Doss Singh, applied, under s. 32 of the Civil Procedure Code, to have Russick Lall Mitter added as a party to the suit, and in support of his application cited *Chunder Kant Mookerjee v. Ramcoomar Kundu* (13 B. L. R., 530) ; and the same case on appeal to the Privy Council, *Ramcoomar Kundu v. Chunder Kant Mookerjee* (I. L. R., 2 Cal., 233), and contended that being a mortgagee he was a necessary party.

The Court thereupon granted a rule, calling on Russick Lall Mitter to show cause why he should not be made a party, or why he should not give security for costs; and directed that service of the rule on Mr. H. H. *Remfry* should be deemed to be good service on Russick Lall Mitter.

The following rule was accordingly issued and served:—

"This Cause coming on this day for final disposal before the Hon'ble JOHN FREEMAN NORRIS, one of the Judges of this Court, in the presence of Mr. *Kennedy*, Advocate for the plaintiff in the above mentioned suits, of Mr. *Phillips*, Advocate for the defendants Monee Bihee Sreemalinney and Wonee Bibee, of Mr. *Pugh*, Advocate for the defendant Gopal Doss Singh, and of Mr. *Sale* for Mr. *Hill*, Advocate for the defendant Rakhal Dass; and upon the application of the Advocate for the said Gopal Doss Sing, it is ordered that Russick Lall Mitter, being served with the order, do, on Monday, the fifth day of February instant, show cause before this Court why he should not be added as party defendant to these suits, or why he should not give security for the costs of the defendants in the abovementioned suits: and it is further ordered that service of this order on Mr. H. H. *Remfry*, the Attorney for the said Russick Lall Mitter, be deemed good service on the said Russick Lall Mitter. Dated this second day of February in the year of our Lord one thousand eight hundred and eighty-three."

On the 5th an application was made for the postponement of the hearing of the rule, on the grounds of the illness of Russick Lall Mitter and of his inability to instruct Counsel to show cause against the rule.

[737] The Court granted the postponement asked for, on the understanding that if the order *nisi* were made absolute it would take effect from that date. Pending the hearing of the rule, the suits had been dismissed with costs. Subsequently affidavits were filed by Russick Lall Mitter, and the rule came on for hearing on February 22nd.

Mr. T. A. *Apcar* showed cause against the rule, and without referring to his affidavits contended that there was no ground for the rule, and nothing for him to answer. No grounds whatever were stated on the face of the rule, and it had not even been applied for on petition or affidavit, so that Russick Lall Mitter could not possibly be expected to know what he had to answer. As the proceeding was one in the same nature as that for contempt of Court, he submitted that he was absolutely entitled to have the materials upon which the rule was granted before him, and so be able to know what he had to answer before he could be called on to show cause. There was no rule contained in Belchambers' Rules and Orders bearing on the question; and as this was an entirely novel proceeding he submitted the rule should be discharged with costs. In support of his contention he cited Archbold, Vol. II, p. 1257, and Tidd's Practice, p. 479.

Mr. *Pugh*.—The application was merely one under s. 32 of the Civil Procedure Code, and, had he been in Court at the hearing, Russick Lall Mitter might have been added at once as a party defendant. [NORRIS, J.—Yes; if a substantive application was made, but then he would be cognizant of all that transpired, and I should always be inclined to hear what he had to say before adding him as a party.] I don't wish to prejudice him now in any way, but the rule was granted in its present form not at my instance, but at that of the Court, for I merely asked the Court to proceed under s. 32, and not to call on him to show cause why he should not give security for costs. [NORRIS, J.—I think every one on whom a rule is served should, unless he is in Court when the matter is heard, be furnished with the grounds on affidavit, and I will postpone the hearing of this rule for that purpose.]

[738] Mr. *Apcar*.—The rule being informal can only be discharged with costs. [Mr. *Pugh*.—But Russick Lall Mitter has filed affidavits in reply.] Your Lordship can't look at anything further than the terms of the rule, and there being nothing for him to answer you cannot go into my affidavit.

Norris, J.—I think this rule must be discharged. It states no grounds whatever, and in granting the rule I did not intend that it should be drawn up as it has been. If it had been properly drawn up I should have been in a position to hear it, but as it stands now it must be discharged and under circumstances discharged with costs. I will grant liberty to apply, on affidavit, for a fresh rule, and I direct that the decree in the suit be not drawn up until the rule is disposed of as I shall give Mr. *Pugh* every facility for bringing this matter to a hearing.

Rule discharged with costs.

Attorney for the Plaintiff : Mr. *H. H. Remfry*.

Attorneys for the Defendants : Mr. *E. J. Moses* and Baboo *Boley Chand Dutt*.

[9 Cal. 738 : 12 C.L.R. 395]

APPELLATE CIVIL.

The 11th April, 1883.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND
MR. JUSTICE MACPHERSON.

Gour Hari Sanyal.....Defendant

versus

Prem Nath Sanyal and others.....Plaintiffs.*

Practice—Right of respondent, who has filed cross objections, to appeal, where appellant withdraws his appeal.

No leave to appeal should be granted to a respondent who has filed cross objections, unless the Court is thoroughly satisfied upon affidavit that he was ready to appeal, and would have appealed within the proper time if the other side had not done so.

THIS was an application to withdraw an appeal on payment of the respondents' costs; the respondents, who had filed cross objections, submitted that if the appellant's application were granted, they (the respondents) ought to be allowed to appeal.

[739] The Court ordered the respondents to file an affidavit on the question, as to whether or not they were ready to appeal, and would have appealed, in due time, if the appellant had not preferred his appeal first.

The contents of this affidavit, and the facts necessary for the purpose of this report, are fully set out in the judgment of the Court.

Mr. *Evans* and Baboo *Grish Chunder Chowdhry* for the Appellant.

Mr. *Branson*, Baboo *Srinath Dass*, Baboo *Jogesh Chunder Roy*, Baboo *Kally Churn Mitter* and Baboo *Dwarkanath Banerjee* for the Respondents.

* Appeal from Original Decree, No. 89 of 1881, against the decree of Baboo Nobin Chunder Ghose, Subordinate Judge of Mymensingh, dated the 18th January 1881.

The **Judgment** of the Court (GARTH, C. J., and MACPHERSON, J.), was delivered by

Garth, C.J.—This appeal being set down for hearing on the Peremptory Board, the appellant on Friday last applied to us by petition to withdraw the appeal.

Mr. *Branson* for the respondents objected, that if the appellant was allowed to withdraw his appeal, the respondents, who had filed cross objections, ought to be allowed to prefer a cross appeal.

As, however, it did not appear under what circumstances the cross objections had been filed, we gave Mr. *Branson* an opportunity of satisfying us, upon affidavit, that his clients were ready to appeal, and would have appealed in due time if the appellant had not preferred his appeal first.

The case accordingly came on again on Monday last, when Mr. *Branson* produced an affidavit made by the two plaintiffs (the respondents), from which it appeared that they had brought the suit to recover a moiety of certain mouzahs; that their claim had been decreed as to two of those mouzahs, but dismissed as to the rest; whereupon the defendant appealed to this Court as to the part of the claim which was decreed, and the respondents filed cross objections as to the part of the claim which was dismissed.

The affidavit then proceeded to say that, after the lower Court's judgment had been given, the plaintiffs applied for attested copies [740] of the judgment and decree with an intention to file an appeal in this Court against that part of the decree which dismissed their claim; and that these copies were obtained on the 11th of February 1881, so that the last day for filing their appeal would have been the 11th of May following.

Meanwhile, however, the defendant (appellant) had also obtained copies of the decree, and he appealed to this Court on the 28th of April 1881, so that the respondents, instead of appealing themselves, filed cross objections to his appeal.

But what the respondents' affidavit does not state, and what it is essential that it should state, in order to entitle them to file a cross appeal now, is this: *that they were prepared to appeal on the 11th of May 1881, and would have appealed if the appellant had not done so.*

The Judges of this Bench some time ago, after consulting other Judges of the Court, came to this conclusion: that no leave to appeal should be given to a respondent who has filed cross objections, unless the Court is thoroughly satisfied, upon affidavit, that he was ready to appeal, and would have appealed within the proper time if the other side had not done so.

We are by no means satisfied of this in the present case. The respondents were well aware that they were bound to satisfy the Court upon this point, they had ample time for considering the form of their affidavit; and yet it is perfectly consistent with the affidavit now before us; that they did not mean to appeal if the defendant had been content not to do so.

It is true that they might have taken copies of the decree with the intention of appealing; but it does not at all follow that, having obtained the copies and taken advice, they were prepared to appeal three months afterwards.

The counter-affidavit which has been made by the appellant's son distinctly states that, before this appeal was filed, the respondents proposed to the appellant not to file any appeal, and agreed not to do so, provided that the appellant did not.

Under these circumstances we think that we should be contravening the rule, which guides us in these cases, if we were to allow the respondents now to file an appeal.

[741] Mr. *Branson* has applied to us to be allowed to file further affidavits to remedy the defect in his present one; but this would be, for obvious reasons, a very dangerous thing to allow. The respondents must have known the point perfectly well upon which they had to satisfy us; and they had ample time to bring before the Court all their available materials.

We think, therefore, that the appellant should be allowed to withdraw his appeal, as he has proposed to do, on payment of costs; and that the respondents should not be allowed to file a cross appeal.

Appeal withdrawn.

NOTES.

[See also (1899) 23 Bom., 692.]

[9 Cal. 741 : 7 Ind. Jur. 653]

APPELLATE CIVIL.

The 30th March, 1883.

PRESENT :

SIR RICHARD GARTH, K.T., CHIEF JUSTICE AND
MR. JUSTICE MACPHERSON.

Ram Chunder Sao.....Plaintiff

versus

Bunseedhur Naik.....Defendant.*

Evidence Act (I of 1872), s. 83--Measurement chittas.

Chittas made by Government for its own private use are nothing more than documents prepared for the information of the Collector, and are not evidence against private persons for the purpose of proving that the lands described therein are or are not of a particular character or tenure.

THE plaintiff was the purchaser at a sale for arrears of rent under Regulation VIII of 1819, of a certain patni taluk called lot Hurirampur.

In 1878 the plaintiff sued defendant to recover possession of one higha 19 cottas of land as appertaining to that taluk, on the ground that he (the defendant) held the land at a rental of Rs. 10. This suit was, however, dismissed, as the defendant denied the relationship of landlord and tenant.

The plaintiff thereupon brought the present suit for possession of this land, and also for a declaration that it belonged to mehal lot Hurirampur.

The defendant admitted the proprietary right of the plaintiff in the mehal, but pleaded that the suit was barred under s. 13, [742] Civil Procedure Code, and that the land did not form part of lot Hurirampur, but was the lakeraj land of one Domon, from whose vendee he, the defendant, obtained it by purchase

* Appeal from Appellate Decree No. 1950 of 1881, against the decree of Baboo Radha Krishna Sen, Additional Subordinate Judge of Hugli, dated the 3rd August 1881, reversing the decree of Baboo Behari Lall Mullick, Munsif of Haripal, dated the 27th September 1880.

The Munsif found, relying on certain Government chittas, that lot Hurirampur had been measured and resumed by Government in 1844 ; that the land in dispute appertained to mehal lot Hurirampur, and was not the lakeraj land of Domon, from whose vendee the defendant alleged that he had purchased ; that the judgment passed in the rent suit contained no adjudication on the issues raised in the present case, and therefore s. 13 of the Civil Procedure Code did not apply : he therefore decreed the case in favour of the plaintiff.

The defendant appealed to the Additional Subordinate Judge of Hughli, who held that the plaintiff had not sufficiently proved that he or his predecessors had ever been in possession of the land, and that the Munsif was wrong in relying on the chittas of 1844, as under s. 83 of the Evidence Act their accuracy could not be presumed, and that in any case they could not be used as conclusive evidence of title against a third party : he further found that the disputed land was lakeraj, and therefore allowed the appeal.

The plaintiff appealed to the High Court.

Baboo *Umbuca Churn Banerjee* for the Appellant.

Baboo *Srinath Dass* for the Respondent.

The **Judgments** of the Court (GARTH, C. J. and MACPHERSON, J., were as follows :—

Garth, C. J. I am of opinion that the chitta of 1844, which has been treated by the Subordinate Judge as no evidence against the present defendant, was not evidence, and that he was perfectly right in the view which he took.

As I understand, this was a chitta prepared by the Deputy Collector, with a view to resumption proceedings being taken, and the way in which that chitta was sought to be used in this case by the plaintiff, was that in that chitta the 1 bigha and 19 cottas of land in suit which has been found by the Subordinate Judge to be lakeraj, was not entered as lakeraj, but as rent-paying land.

[743] I think that having regard to the object of the chitta, and to the way in which it was prepared, it cannot be made evidence under s. 83 of the Evidence Act.

The maps and plans, which are mentioned in that section, are, as it seems to me, *maps and plans made by the Government for public purposes* ; I quite agree with the learned Judges, who decided the case of *Jannajoy Mullick v. Dwarkanath Mytee* (I. L. R., 5 Cal., 287) that a map or plan made by the Government for private purposes, or when the Government is acting otherwise than in a public capacity, is clearly not evidence.

Our attention has been directed to certain cases by the learned pleader for the appellant, in which Mr. Justice JACKSON and some other learned Judges appear to have considered that jamabandi papers and maps prepared by Government with reference to lands, which they were holding in their khas possession as proprietors, were evidence under this section of the Act.

But I confess I cannot accede to that view ; and if it should become necessary, I would refer the question, whether such documents are admissible, to a Full Bench.

I think it would be extremely dangerous to admit evidence of this kind under the guise of public documents. Such papers are merely prepared by the Government as landlords for the purposes of their estate, and they appear to me to be no more evidence against the tenants of that estate than similar documents would be, prepared by any other landlord.

I consider the chitta in this case to be nothing more than a document prepared for the information and guidance of the Collector; and that it is not evidence against private persons for the purpose of proving that the land described in it was or was not of a particular character or tenure. If the resumption proceedings had been put in, and it had been shewn that the defendant's ancestors claimed the land as lakeraj and were defeated, I quite agree that the chitta, coupled with the resumption proceedings, would have been admissible to prove that the land was not rent-free.

[744] But I think that the chitta *per se* is not evidence in this suit; and that the Subordinate Judge was right in so dealing with it.

The appeal will be dismissed with costs.

Macpherson, J. --I concur in dismissing the appeal. I think that the chitta, standing by itself, furnishes no proof that the particular land, which is the subject of this suit, was resumed by Government. If the plaintiff wished to prove the resumption of these lands, he ought to have filed the resumption proceeding itself.

Appeal dismissed.

NOTES.

[See also (1886) 14 Cal., 120 (122); (1889) 16 Cal., 586 (590); (1895) 23 Cal., 335 (338); (1897) 1 C. W. N., 538.]

[9 Cal. 744 12 C. L. R. 257]

FULL BENCH REFERENCE.

The 9th March, 1883.

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE MITTER,
MR. JUSTICE McDONELL, MR. JUSTICE PRINSEP, AND
MR. JUSTICE WILSON.

Mahomed Ali Khan and others.....Plaintiffs

versus

Khaja Abdul Gunny and others.....Defendants.

Possession Dispossession Adverse possession --Presumption --Onus

Probandi --Limitation-- Joint owners, Adverse possession between.

Under the former Limitation Act, the cause of action, and under the present law the event from which limitation is declared to run, must have occurred within the prescribed period, and it lies on the plaintiff to show this. Accordingly, where the suit is for possession, and the cause of action is dispossession, the plaintiff is bound to prove possession and dispossession within twelve years.

Possession is not necessarily the same thing as actual user.

When land has been shown to have been in a condition unfitting it for actual enjoyment in the usual modes, at such a time and under such circumstances, that that state naturally would, and probably did, continue till within twelve years before suit, it may properly be *presumed* that it did so continue, and that the previous possession continued also until the contrary is proved.

* Full Bench Reference made by Mr. Justice MITTER and Mr. Justice NORRIS, dated the 14th August 1882, in appeal from Appellate Decree No. 2378 of 1880.

Such a presumption is in no sense a conclusive one. Its bearing upon each particular case must depend upon the circumstances of that case.

Many acts which would be clearly adverse, and might amount to dispossession as between a stranger and the true owner of land, would, between joint owners, naturally bear a different construction.

[746] THIS case was referred to a Full Bench by Mr. Justice MITTER and Mr. Justice NORRIS, on the 14th August 1882, with the following opinion :—

“The facts of this case are briefly as follows :—At the time of the permanent settlement, Pergunnah Attea was divided into the following zamindaries, the *torzi* numbers of which are 10, 11, 12, 16, 5031, 5032, 5033, 5034, 5035, 5151, 5152 and 5153. The lands of these zamindaries were separate and distinct, with the exception of a large area of jungle land consisting of 491 mouzahs, which went by the name of Araipara. The dispute in this case relates to 50 khaddas of land alleged by the plaintiffs to lie within one of these mouzahs, *viz.*, Kazlah. The plaintiffs in this case are the proprietors of some of the zamindaries mentioned above. They alleged that they were in possession of the disputed lands, by receipt of their share of the rent derivable from the sale of timber, etc., *i.e.*, such rents as are recoverable from jungle lands. Then they further allege that gradually a portion of the disputed lands was reclaimed and ryots were settled upon it; but that the defendants, who are the owners of one of these zamindaries, *viz.*, 5032, dispossessed them on the 12th April 1868. The defendants, alleging that the land in dispute was not in Kazlah, but in mouzah Narina Alukdia, exclusively appertaining to their zamindari No. 5032, and further alleging that they have been in possession of the disputed lands for more than twelve years, amongst other pleas, pleaded limitation as a bar to the plaintiffs' claim. The Court of First Instance dismissed the plaintiffs' suit on the plea of limitation as well as on the merits. On appeal, the District Judge is of opinion that the decision of the Court of First Instance, on the merits of the case, was not correct. He says that, if it had not been for the fact that the claim was barred by limitation, he would have deputed an Amin to hold a local investigation upon the question, whether the land in dispute appertains to Kazlah or to mouzah Narina Alukdia. On the plea of limitation, he finds that Kazlah was thaked in 1859 as the joint property of the proprietors of all these zamindaries and as in their joint possession; but that the plaintiffs have utterly failed to prove their possession of the land in dispute within twelve years. Upon these findings of fact, the **[746]** District Judge has dismissed the plaintiffs' claim as barred by limitation. (1)

(1) The following is that portion of the District Judge's judgment which bears on the question of limitation: “I will now come to the issue as to limitation. In suit No. 61 (for about two-thirds of the whole claim), the plaint was filed on the 24th August 1878, in suit No. 12 it was filed on the 27th May 1879, in suit No. 639 on the 6th August 1879. In all, the cause of action, namely, forcible, fraudulent, unjust, and illegal dispossession, is said to have accrued on the 12th April 1868, so that by the admission of the plaintiffs, the earliest suit is within one year and eight months of being barred by possession admittedly adverse, and the latest suit is within eight months and a few days of being so barred. As to a 'forcible' dispossession, which apparently alludes to some specific act, there is not a word of evidence tendered. It clearly rests with plaintiffs to prove that a possession, which they admit to have been continuously adverse for upwards of ten years before the bringing of the first suit, did, during the preceding one year and eight months, not exist at all, or did not exist in adverse form: they must prove that a state of things different from what they admit to have existed for so many successive years did, as

[747] "It is now contended before us that, having regard to the nature of the land in dispute, which was jungly waste and uncultivated at the time of the defendants allege it, not exist at any time during the two previous years. On the inability of the plaintiffs to do this, I concur with the lower Court. I also concur with the lower Court in finding that defendants have not proved the lands in dispute to appertain to their separate zamindari.

"Plaintiffs are for the most part large and wealthy zamindars, by no means slow to assert their rights, yet they admit that they have unaccountably slumbered over these rights for upwards of ten years. Plaintiffs, mainly for the purpose of proving their possession (joint with defendants) prior to 1275 (1868), rely on an ijara kabuliati, which they have filed. This document the lower Court has discredited; but without looking to its genuineness, it is sufficient to say that it is dated 1271 (1864) and was for 1271, 1272, 1273, and 1274 (1864-1867); and that it, of itself, forms no evidence whatever that possession followed upon it, or continued into 1275 (1868). The plaintiffs also rely on some chalangas filed not in suit No. 61, the heaviest and most important one, but in suit No. 12 which was commenced many months afterwards. They purport to have been given by Ram Jiban Joypal, one of the ijaradars, and are for rent of 1271, 1272, 1273, and 1274 (1864-1867); but in his evidence this man states that his ijara only extended up to 1272 (1865), and that he never went to Kazlah after 1272. His subsequent answers to the contrary, when pressed by plaintiffs, appear to me deserving of no weight. Plaintiffs in suit No. 61 examined seven witnesses, and in No. 12 they examined three witnesses. These witnesses do not appear to know anything about Kazlah, a very small fraction of the whole group, although some of them assert that defendants, by settling ryots and clearing the lands, had dispossessed them.

"There can be no doubt that limitation in such a suit as this runs from the commencement of an adverse possession. The plaintiffs have distinctly alleged (and this position is admitted by their vakeel), that the exclusive actual possession of defendants has throughout its existence been of an adverse character. It is for them then to prove that this sort of possession only commenced within the twelve years prior to their suit. They allege that it commenced in the month of Bysak 1275 (April 1868). They have quite failed to prove that allegation.

"I find that the plaintiffs have failed to discharge the onus on them, and to prove even *prima facie* that the adverse possession of the defendants commenced within twelve years of any of these suits. There is no evidence that clearances and settlement of the ryots began only in 1275; they admittedly existed in 1275, and the evidence is to the effect that they existed before that. Moreover, the plaintiffs have set up a case of actual possession and enjoyment by the receipt of rents for jungle produce down to 1275. They therefore cannot, as they would wish to do, plead that this is a case in which possession must be taken to go with the right.

"Plaintiffs' vakeels have relied much on a ruling by MACPHERSON and MORRIS, JJ., *Shurfunmissa Bibee Chowdrain v. Koylash Chunder Gangopadhyaya* (25 W. R., 53), but that decision only defines the time at which possession by a co-sharer is to be held to become 'adverse.' It does not in any way say that a co-sharer cannot possess adversely, or that adverse possession by a co-sharer for twelve years is not a complete bar.

"Had I not held that plaintiffs were barred by limitation, and that, therefore, the appeals must be dismissed, I should have held that they, as ijmali sharers, were entitled to the joint possession they claim; and that the defendants having in no way established that they had expended a single rupee on

Thakbust measurement, the plaintiffs' claim should not be thrown out as barred by limitation, unless the defendants prove adverse possession for more than twelve years. If it were an admitted fact that the land in dispute is still unclaimed, we have no doubt that this contention would be right. But it is admitted that a portion of the land in dispute is now under culti-[748]vation. Having regard to this fact, the question raised before us, in our opinion, becomes one of peculiar difficulty, so far as the cultivated lands are concerned. The decision bearing upon this point—*Narab Nazir Sidhee Ali Khan v. Womesh Chunder Mitter* (2 W. R., 75); *Boolee Singh v. Harobuns Narain Singh* (7 W. R., 212); *Lall Singh v. Baboo Modhoosoodun Roy* (8 W. R., 426); *Busseerounnissa Chowdhram v. Rajah Leelanund Singh* (14 W. R., 135); *Syud Ameer Ali v. Maharajah Underjeet Kooer* (15 W. R., 43); *Gossain Dass Koondoo v. Siroo Koomaree Debia* (12 B. L. R., 219; 19 W. R., 192); *Niljaree v. Mujeeboolah* (19 W. R., 209); *Shaukh Ozeer Ali v. Shaukh Mukbool Ali* (19 W. R., 282); *Kalee Narain Bose Anund Moyee Goopta* (21 W. R., 79); *Gokool Kristo Sen v. David* (23 W. R., 413); *Lutchoo Khan v. Foley* (24 W. R., 273); *Mahomed Kabeer v. Abdool Azeem* (24 W. R., 315); *Khoda Newaz Chowdhry v. Brojendro Coomar Roy Chowdhry* (24 W. R., 417); *Koomar Ranjit Singh v. Schoene Kilburn & Co.* (4 C. L. R., 390); *Rodha Gobind Roy v. Inglis* (7 C. L. R., 361); *Kally Churn Sahoo v. Secretary of State* (1. L. R., 6 Cal., 725); *Mahomed Ibrahim v. Morrison* (1. L. R., 5 Cal., 36); *Mano Mohun Ghose v. Mothura Mohun Roy* (1. L. R., 7 Cal., 225); *Pandurang Gobind v. Bal Krishna Hari* (6 Bom. H. C., A. C., 125); *Maharajah Koomar v. Baboo Nand Lall Singh* (8 Moore's I. A., 199 at p. 220)—appear to us to be contradictory. We therefore refer the following question to the decision of the Full Bench:—

“It being assumed by the lower Appellate Court, for the purpose of deciding the question of limitation, that the land in dispute at the time of the Thakbust was jungle and in the joint possession of all the zamindars of Pergunnah Attea, including the plaintiffs predecessors in title, and it being found that the plaintiffs have failed to prove their possession of the disputed land, which is partly jungle and partly under cultivation, within twelve years from the date of suit, whether the plaintiffs' claim is barred by limitation.”

[749] Mr. Evans, Baboo Srnath Das, Baboo Joyesh Chunder Roy, and Moonshi Serajul Islam for the Appellants.

Baboo Chunder Madhub Ghose, Baboo Rash Behari Ghose, and Baboo Kaloda Kunker Roy for the Respondents.

The following **Judgments** were delivered:

The **Judgment** of MITTER, McDONELL, PRINSEP, and WILSON, JJ., was delivered by

Wilson, J. In these suits the plaintiffs sought to have their rights declared to shares in 50 khaddas of land, and to be put in possession of them jointly with the defendants. The defendants denied the plaintiffs' title and also pleaded limitation. The lower Appellate Court has decided in favour of the plaintiffs on the question of title, holding them entitled to be put into possession, but for limitation. It has, however, held that their claim is barred by limitation. The question before us is whether the rule of limitation has been correctly applied.

reclamations, are in no way, in equity, entitled to defeat that right of the plaintiffs and to hold exclusive possession of even the cleared portion of the lands in suit. I should also have held that there was no private arrangement proved, whereby the other sharers consented to allow the defendants to hold exclusive possession of the lands in suit.”

The facts found or admitted, so far as they are material for the present purpose, seem to be these: The plaintiffs and the defendants have a good title to the lands in question jointly. At the date of a Thakbust in 1859 they were in joint possession. The whole of the lands were then jungle, yielding, however, some kind of profit, which has been variously described.

At some time or times subsequent to that date, but more than ten years ago, a portion of the lands was brought under cultivation, and of the lands so reclaimed the defendants have been in possession from the time of their reclamation. It would appear that the amount reclaimed is some 10 or 12 khadas out of 50, though perhaps what the District Judge says on that point does not amount to an actual finding.

With regard to the law, the District Judge says: "It clearly rests with plaintiffs to prove that a possession, which they admit to have been continuously adverse for upwards of ten years before the bringing of the first suit, did, during the preceding one year and eight months, not exist at all, or did not exist in adverse form. They must prove that a state of things different from what they admit to have existed for so many successive [750] years did, as defendants allege it, not exist at any time during the two previous years." And again: "The plaintiffs have distinctly alleged (and this position is admitted by their vakool) that the exclusive actual possession of defendants has throughout its existence been of an adverse character. It is for them to prove that this sort of possession only commenced within the twelve years prior to their suits." And he concludes: "I find that the plaintiffs have failed to discharge the onus on them, and to prove even *prima facie* that the adverse possession of the defendants commenced within twelve years of any of these suits."

It appears to us that the application of the law of limitation to cases such as the present, requires considerable care.

There is no doubt as to the general rule: That under the former Limitation Act the cause of action, and under the present law the event from which limitation is declared to run, must have occurred within the proscribed period, and that it lies on the plaintiff to show this. Accordingly, where the suit is for possession, and the cause of action is dispossession, it has more than once been held by the Privy Council that the plaintiff is bound to prove possession and dispossession within twelve years *Maharajah Koowar Singh v. Nund Lal Singh* (8 Moore's L. A., 199, at p. 220); *Raja Saheb Perhlad Sein v. Budhu Singh* (12 Moore's L. A., 275, 337; s.c. 2 B. L. R., P. C., 111); *Beer Chunder Jobraj v. Deputy Collector of Bhullooah* (13 W. R., P. C., 23).

We think further that as a general rule the plaintiff cannot, merely by proving possession, at any period prior to twelve years before suit, shift the onus to the defendant. In the case already cited, *Maharajah Koowar Singh v. Nund Lal Singh* (8 Moore's L. A., 199, at p. 220), the plaintiff had adduced evidence to show possession earlier than twelve years before suit; but the Privy Council treat it as immaterial, saying at page 220: "The lands in question may have been part of mouzah Gopalpur, and, as such, may have been enjoyed by his (the plaintiff's) ancestor, and yet he may have lost, by lapse of time, his right to recover them." To this extent we are unable to concur in the view indicated by the Chief Justice in *Kally Churn Sahoo. The Secretary of State for India* (1. L. R., 6 Cal., 725).

[751] But possession is not necessarily the same thing as actual user.

The nature of the possession to be looked for, and the evidence of its continuance, must depend upon the character and condition of the land in dispute. Land is often either permanently or temporarily incapable of actual enjoyment in any of the customary modes as by residence or tillage or receipts of a

settled rent. It may be incapable of any beneficial use, as in the case of land covered with sand by an inundation; it may produce some profit, but trifling in amount, and only of occasional occurrence as is often the case with jungle land. In such cases it would be unreasonable to look for the same evidence of possession as in the case of a house or a cultivated field. All that can be required is that the plaintiff should show such acts of ownership as are natural under the existing condition of the land, and in such cases, when he has done this, his possession is presumed to continue as long as the state of the land remains unchanged, unless he is shown to have been dispossessed.

Lands again may by natural causes be placed wholly out of reach of their owners; as in the case of diluvion by a river. In such a case, if the plaintiff shows his possession down to the time of the diluvion, his possession is presumed to continue as long as the lands continue to be submerged. *Kally Churn Sahoo v. Secretary of State for India* (I. L. R., 6 Cal., 725); *Mono Mohun Ghose v. Mothura Mohan Roy* (I. L. R., 7 Cal., 225).

When lands which have been in such a condition as to be incapable of enjoyment in the ordinary modes are reclaimed and brought under cultivation, the change is in many instances gradual and difficult of observation while in progress. Diluviated land may take years to reform. Jungle land is often brought under cultivation furtively by squatters clearing a patch here and a patch there at irregular intervals of time. So that it may be a matter of extreme difficulty to prove as to any piece of land, the exact date at which its condition became altered. And as the plaintiff, who has complied with the conditions we have indicated, is in the absence of dispossession presumed to continue in possession as long as the state of the land remains [752] unchanged, it is essential to inquire on whom the burden of proof of the date of the change lies.

The true rule appears to us to be this: That where land has been shown to have been in a condition unfitting it for actual enjoyment in the usual modes at such a time, and under such circumstances that that state naturally would, and probably did, continue till within twelve years before suit, it may properly be presumed that it did so continue, and that the plaintiff's possession continued also, until the contrary is shown. The presumption seems to us to be reasonable in itself, and in accordance with the legal principles now embodied in s. 114 of the Evidence Act.

It remains to consider the case of *Rudha Gobind Roy v. Inglis* (7 C. L. R., 364) decided by the Privy Council. We do not understand that case as establishing the broad proposition contained in the head note, which would be in conflict with the earlier decisions of the same tribunal. The land in dispute in that case had formed part of the bed of a bhil or lake; the title to the bhil and its bed was found to be in the plaintiff, and he had been in possession so long as the land was covered with water. The bhil gradually dried up and the defendant occupied the land so formed. The date of the drying up of the land and of its occupation by the defendant were in controversy, but these things had certainly happened recently. Their Lordships, having disposed of the other questions which were raised, say: "The question remains, whether the disputed land had or had not been occupied by the defendant for twelve years before the suit was instituted, so as to give him a title against the plaintiff by the operation of the Statute of Limitation. On this question, undoubtedly the issue is on the defendant. The plaintiff has proved his title; the defendant must prove that the plaintiff has lost it by reason of his, the defendant's adverse possession. And immediately below it is said: "The Subordinate Judge does not appear to have had his attention directed to the very important question when the new land formed." The present case is in its facts closely

[753] analogous to that case; and the view which we take of the law certainly accords with the decision of the Privy Council.

The presumption of which we have spoken is in no sense a conclusive one. Its bearing upon each particular case must depend upon the circumstances of the case; and it is always liable to be rebutted by evidence. But having regard to the time at which the whole land was jungle, and the comparatively small quantity which up to the time of suit seems to have been cleared, we think that it ought to be considered in this case together with all the evidence; and we remand the case to the lower Appellate Court in order that the question of limitation may thus be again considered.

We desire to abstain from saying anything that might seem to fetter the judgment of the learned Judge in dealing with the question upon the whole materials before him; but there are two matters which may have an important bearing upon the case, and to which we think it right to draw attention. In the first place the nature of the profit derived by the joint owners from the land as jungle should be considered. If it should be that they were in receipt of a settled rent, regularly paid like an agricultural rent, the presumption in question might have little, if any, bearing on the case; if the profit was of a different description, the result might be materially different. Secondly, in considering any transaction prior to the time from which the plaintiff admits the defendants possession to have been adverse, it should be borne in mind that the case is one between joint owners, and many acts which would be clearly adverse and might amount to dispossession as between a stranger and the true owner of land, would, between joint owners, naturally bear a different construction.

Garth, C.J.—I am sorry that I cannot concur entirely with the view which has been taken of the law by my learned brothers.

So far as the result of this particular case is concerned, and the order which my learned brothers have made in remanding it to the Court below, I am quite content to defer to their judgment. It may be, and I trust that in the generality of cases it will be, that the difference of opinion which exists between us may not [734] tend to much diversity of practice. But what I cannot regard as sound law, (although I shall of course dutifully accept it after this judgment as our rule of action), is the principle which has been laid down by the rest of the Court upon the subject of presumption.

We are agreed that under the old, as well as the present, law of limitation, the plaintiff is bound in cases of this nature to prove a possession and a dispossession within twelve years before suit; and we are also agreed, as I understand, that this proof need not always consist of evidence of acts of possession on the one hand, or of the act of dispossession on the other.

Thus it is admitted that in the case of jungle land, or of land covered by water, the Court may, and generally, should presume in the absence of evidence to the contrary, that a possession enjoyed by the plaintiff before the twelve years, has continued until within the 12 years; and in the same way, when the plaintiff has proved his possession within the twelve years, and the defendant has been afterwards found upon the land, the act of dispossession by the defendant may be properly inferred.

But what I do not understand, and what I confess I cannot bring myself to believe is, that there exists in this country an arbitrary rule of law, applicable to *jungle land* or to *land covered by water*, or in fact to *land of any particular kind or character*, which does not also apply, according as the circumstances of each case may render it necessary, to *land of all kinds*.

I know of no law in this country, whether statutory or otherwise, which lays down or justifies such an arbitrary rule; the Privy Council, so far as I am aware, have never suggested such a rule, and it seems to me that the true solution of the question is to be found in the well-known principle of law, which, so far as I know, prevails, and may be applied here as properly and beneficially as it is in England, that a seisin or possession of land, which is once proved to exist in a particular person, may be, and often should be, presumed to continue until the contrary is shewn.

This is only one branch of the still more general rule, which is laid down in s. 142* of the Evidence Act,—that a state of things once proved to exist is presumed to continue—(See Taylor on Evidence, s. 98 and s. 123, Edition of 1848). The [755] particular rule, as applied to seisin or possession of land, is thus shortly laid down by Mr. Best in his book on Evidence, page 505: "Where seisin of an estate has been shown, its continuance will be presumed."

Of course this is only a disputable presumption, and one which is entitled to more or less weight, according to the circumstances of each case; and it must be applied at all times with discretion and caution. Where land is actually used and occupied, and the occupier, whoever he may be, is well known in the neighbourhood, there is rarely any occasion to resort to presumption.

And where the Court has every reason to believe, that the plaintiff would have no difficulty in proving by direct evidence a possession, if it had been really enjoyed, it would naturally attach little or no weight to any rule of presumption. But if it is shewn on the other hand, even in the case of cultivated land or house property, that the plaintiff, who had formerly been in undisputed evidence, had died, or had left the country, or for other reasons was unable, or unlikely to be able, to produce actual evidence of possession, the presumption might then legitimately be resorted to, and entitled to more or less weight according to circumstances.

This I understand to be the view of Mr. Justice MELVILL in the case of *Pandurang Govind v. Bal Krishna Hari* (6 Bom., H. C. A. C., 125 at p. 128) in which, after affirming what we all admit to be the law, that the burthen of proof in cases of this kind is upon the plaintiff, that learned Judge says: "The burthen of proof being upon the plaintiff, what is he required to prove? Simply, that the cause of action accrued within the period of limitation made applicable to the suit. This is by no means equivalent to saying that a plaintiff in an action of ejectment must prove that he has been in possession within twelve years. He may not have been in possession within twelve years, and yet the cause of action may have accrued within that period. If a man buy a piece of open ground, he is not bound to enclose it or to build upon it, or formally to take possession of it; nor, if he do formally take possession of it, is he bound by subsequent acts to proclaim the continuance of his possession. So long as the land remains unoccupied, his rights are not interfered with, [756] and he is not called upon to assert them. He has no cause of action, and there is no person whom he could sue. His cause of action accrues when another person takes possession of the land, and not before. If he has omitted to take possession of the land himself, he may not be able to treat the intruder as a trespasser; but he can bring an action to eject him at any period within twelve years from the date of the

*[Sec. 114:—The Court may presume the existence of any fact which it thinks likely to have happened regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case.]

intruder's occupation of the land." I do not understand these expressions to apply exclusively to waste land, or to land of any other special character; but to all cases where the production of direct evidence of possession is either difficult or impossible.

I observe that Mr. Justice MELVILL in a later case, *Moro Desai v. Ramchandra Desai* (I. L. R., 6 Bom., 508 at p. 510) seems to consider that the Privy Council in the case of *Radha Gobind Roy v. Inglis*, had proceeded upon a view of the law, which was inconsistent with some earlier decisions of that learned tribunal, and also with what had been the practice in the Indian Courts for many years.

I am sorry to say that I myself fell into a similar mistake, if it was a mistake, in the case of *Kally Churn Sahoo v. The Secretary of State for India* (I. L. R., 6 Cal., 725) which has been alluded to in the judgment of my learned brothers. I supposed, but on a closer examination of the cases I think I erroneously supposed, that there was some difficulty in reconciling their Lordships' view in *Radha Gobind's* case with that which they had laid down in the case of *Maharajah Koowur Singh v. The Secretary of State for India* (8 Moore's I. A., 199) and other cases alluded to by my brother WILSON.

I endeavoured in the case of *Kally Churn Sahoo* to explain this apparent inconsistency, but I think I was wrong, and for this reason: this last case, as I now believe, proceeded upon the well-known rule to which I have alluded, that a title and seisin when once established must be presumed to continue in those cases at any rate where there is no direct evidence of possession, and where such evidence is, from the nature of the case, either difficult or impossible to obtain. In *Radha Gobind's* [757] case the defendants, who apparently had first brought the bed of the bhil in question into cultivation, were presumably better able than the plaintiffs to prove when and how the cultivation had commenced; and the case, when one looks at the circumstances of it, was just one of those in which the legal presumption with which I have been dealing might be usefully and properly applied.

On the other hand, in the case of *Maharajah Koowur Singh*, we find that so far from evidence of possession not being forthcoming, a considerable body of evidence was adduced on both sides. No less than eight witnesses were examined on that subject for the plaintiff, and nine or ten for the defendant, and their Lordships, after considering that evidence and the balance of probabilities on either side, decided in favour of the defendant. It is obvious that this was not a case in which the sort of presumption, which I have described could properly or reasonably have been applied, and I may observe before leaving the consideration of that case that I do not read one part of their Lordships' judgment in the sense that has been attributed to it by my learned brothers—I allude to the sentence: "The lands in question may have been part of mouzah Gopalpur, and, as such, might have been enjoyed by his ancestor, and yet he may have lost by lapse of time his right to recover them." I do not understand this to mean, and upon looking at the context I think it clearly does not mean, that in the view of their Lordships the plaintiff's ancestor *had ever in fact been in possession*. They meant to say that even if he had been in possession, he might have lost, by lapse of time, his right to recover the property.

And I think also that the two other cases decided by the Privy Council, *Rajah Sahib Perhad Sein v. Budhoo Singh*, (12 Moore's I. A., 275: s.c., 2 B. L. R. P. C., 111), and *Beer Chunder Jobraj v. Deputy Collector of Bhulloah* (18 W. R., P. C., 25) must be looked at in the same light. In Both of those cases

we find that evidence was called on both sides; and that their Lordships came to a distinct conclusion upon that evidence. There was no necessity, therefore, and no reason, so far as I can see, for acting upon the principle for which I am now contending.

[758] But in *Railha Gobind's* case there was reason for acting upon that principle, and it appears indeed to have been the first case, amongst all those to which our attention has been called during the argument, in which it became necessary for their Lordships to resort to that principle. It will be found that in the generality of cases of this kind, the parties as a rule can and do produce more or less direct evidence of possession, and when they do so, the Court naturally and properly acts upon that evidence without resorting to any principle of presumption.

For these reasons I hope, as I stated in the first instance, that the difference which exists in this case between my learned brothers and myself will prove to be one rather of principle than of practice.

NOTES.

[I. POINTS ON WHICH THIS CASE IS ERRONEOUS—

(1) The statement at p. 750 that mere proof of anterior possession is not sufficient—see the Notes to 9 Cal., 39.

(2) The statement at p. 751 that “if the plaintiff shows his possession down to the time of the deluvion, his possession is presumed to continue as long as the lands continue to be submerged, citing 6 Cal., 725. This is wrong, unless the plaintiff is also the owner; 6 Cal., 725 was overruled by the Privy Council in 29 Cal., 518, P. C.

II. EJECTMENT—PROOF OF TITLE AND POSSESSION

In an ejectment suit, the plaintiff must establish not only his title but his possession within twelve years before suit—8 M. I. A. 199; 12 M. I. A., 337; 10 Cal., 374; 577 (580); 16 Cal., 473; 17 Cal., 137; 23 Mad., 10.

The possession will be *prima facie* presumed to accompany the title in the case of jungle lands, etc.—9 Cal., 744; 19 Cal., 660; 26 Cal., 114 (118); 27 Cal., 25; (1901) P. R., 105 and when the evidence as to possession is conflicting, the title will prevail:—20 W. R. 25; 12 Cal. 38; 19 Cal. 661 (666); 27 Cal. 25; 8 C. W. N. 876; but this will not apply when the evidence on both sides is equally worthless:—27 Cal. 25.

Possession may be established constructively but only by the rightful owner:—24 Cal. 256; 1 C. W. N. 304; 29 Cal. 518; but even that must be shown to fall within 12 years before suit:—(1907) 12 C. W. N. 273; 7 C. L. J. 414 (it is not enough that the land was jungle some long time before suit).

As to when possession of part amounts to possession of the whole, see 9 Mad, 285; 16 L. C. 39, as to effect of isolated possession such as fishing, see (1910) 13 C. L. J. 625; 6 I. C. 392; as regards symbolical possession delivered by Courts, see 35 Bom. 79; 12 Bom. L. R. 95; 8 I. C. 639.

III. PREVIOUS POSSESSION ALONE SUFFICIENT:—

One is entitled to succeed on the strength merely of his previous possession.. To this extent, the second of the series of propositions laid down by the Full Bench in this case at 9 Cal., p. 750, should be modified, and the authorities on the point are collected in our Notes to 9 Cal. 39 *supra*.

It may be noted in this connection that the previous possession, *when unaccompanied by proof of title*, should be *actual* and not *ideal*.

The rule and its limits may be illustrated thus:—*A* is the owner of the land *X*, having title thereto. *B* is a trespasser; subsequently to the trespass, the land is under water for six years; and after six years, land re-forms on the site. *B* now occupies it for four years when he is dispossessed by, suppose, (1) *A*, the owner; (2) *C*, a stranger.

B can eject *C* on the strength of his previous possession for four years.

In a suit by *B* against *A*, the question depends on the length of his possession prior to the submersion. If that possession had lasted for 12 years, *A*'s title became extinguished; 3 Cal. 796; but if it continued for less than that period, then, by the submersion, the true

owner's possession was restored :—3 Cal. 796. 29 Cal. 518, and it prevails against the subsequent dispossession, although there was, say, 11 years possession previous to the submersion and four years possession subsequent thereto.

IV. WHEN CO-OWNER IS DISPOSSESSED—

On this point, see 9 Cal. 744 (753, 754) ; 3 C. W. N. 774 ; 31 Cal. 970 ; 32 Cal. 827 ; 1 C. L. J. 437 ; (1907) 6 C. L. J. 735 (742) ; 35 Cal. 961 12 C. W. N. 127 ; 4 I. C. 298 ; 5 L.B.R. 112 ; 1 I. C. 252 ; 19 Cal. 254 ; 21 Mad. 153 ; 27 All. 88.]

[9 Cal. 758—12 C.L.R. 352—7 Ind. Jur. 855]

APPELLATE CIVIL.

The 17th April, 1883.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE
MACPHERSON.

Anund Chundra Mundul and another.....Defendants

versus

Nilmony Jourdar.....Plaintiff.*

*Hindu Law—Inheritance—Descent of lands purchased by widow out of
income of life-estate.*

Land purchased by a Hindu widow with money derived from the income of her life-estate passes, when undisposed of by her, to the heirs of her husband as an increment to the estate, and not to her heirs as property over which she had absolute control.

Baboo Mohiny Mohun Roy for the Appellants.

Baboo Shoshee Bhusan Dutt for the Respondent.

THE facts of this case sufficiently appear from the **Judgment** delivered by

Macpherson, J.—The question raised in this appeal is, whether land purchased by a Hindu widow with money derived from the income of her life-estate, passes, when undisposed of by her, to [759] the heirs of her husband as an increment to the estate, or to her heirs as her own property over which she had absolute control.

It arises in this way : Gourmoni, a widow of one of three brothers, inherited her husband's one-third share of the family property. Being dispossessed by the other two brothers, she obtained against them decrees both for possession and for mesne profits, and in execution of the latter brought to sale and herself purchased their two-third share of the same property. Both Courts have found, and the fact is not now disputed, that this was an acquisition made out of the income of the property, in which she held a widow's life-estate, the purchase-money representing the usufruct of which she had been wrongfully deprived. Gourmoni was, however, under the necessity of borrowing money to carry on the litigation alluded to, and the lenders, who are the first two defendants in the case, obtained against her a decree for the amount lent. This they executed after her death, not against the heirs of her husband, but against those who were her heirs and who would take the property if it

* Appeal from Appellate Decree, No. 2008 of 1881, against the decree of Baboo Upendro Chunder Mullick, Subordinate Judge of Jessore, dated the 27th June 1881, affirming the decree of Baboo Behari Lal Mukerjee, Munsif of Jhineeda, dated the 14th February 1881.

was her own, by attachment and sale of the two-third share which Gourmoni had bought, and they became themselves the purchasers. The plaintiff claims as purchaser prior to the last execution sale, from two of the three reversionary heirs, all of whom are parties to the suit. The contest, therefore, is between him as representing the reversioners, the undoubted owners of the one-third share which Gourmoni took as widow of her husband, and the first two defendants claiming under their purchase at the execution sale subsequent to the death of Gourmoni. It may be, as appellants' pleader contends, that the law is unsettled as to the power of a Hindu widow to alienate, beyond her own life interest, immoveable property purchased by her from the income of her life-estate; but it is unnecessary to determine this, as no question of any such alienation here arises. The point was discussed, though not decided, in the case of *Hunsbutti Keram v. Ishri Dutt Koer* (I. L. R., 5 Cal., 512). It may be noted that though both the learned Judges, before whom that case came, entertained doubt as to the particular question before them, they seemed to have no doubt that such property, when undisposed of by the widow, [760] passes on her death not as stridhan to her heirs, but to the heirs of her husband as an increment to the parent estate. And whatever her power of alienation may be, it seems clear that such is the law as regards the succession to property of which she made no disposition, the presumption being, in the absence of proof of intention to sever it from the bulk of the estate and appropriate it to herself, that she intended it to be an accretion to her husband's property and it would pass as such. This is the principle followed by the Privy Council in the case of *Gouda Koer v. Koor Oodey Singh* (14 B. L. R., 159). That was, it is true, a case governed by the Mitakshara law, but there seems, in this respect, no ground for distinction between the Mitakshara and the Dayabhaga. The case of *Chundrabullee Debia v. Brody* (9 W. R., 584) (a Bengal case) is also a direct authority on the point. It was there held that savings made by a widow, while enjoying the widow's estate, and undisposed of by her, would form part of the estate and go with it to the next heirs of her deceased husband. In that case the holder of a decree against a Hindu widow attempted after her death to take out execution for certain mesne profits which had been decreed to her, and which represented the usufruct of her estate. He was opposed by the heirs of her husband, and it was held that he could not execute unless he showed that the debt for which he held a decree was contracted by the widow for legal necessity and for the benefit of the estate—a question which in that stage of the case (*viz.*, in the course of execution proceedings) could not be decided. That decision was followed in the case of *Chowdry Bholanath Thakoor v. Bhagabutti Deyi* (7 B. L. R., 93; 15 W. R., 63), to which the Mitakshara law was applicable, but this having been reversed by the Privy Council [*Bhagabutti Deyi v. Chowdry Bholanath Thakoor* (L. R., 2 I. A., 256)], is no authority. The remarks, however, of their Lordships in that case tend to show that, if the widow had taken, as supposed by this Court, a widow's estate, and not, as they held, a life-estate under a family settlement with power to appropriate the profits, the decision as to the succession to the property [761] acquired by the widow out of the savings of the husband's estate would not have been wrong.

The only authority cited as supporting a contrary view is the case of *Soorjeemoney Dossee v. Dinobundhoo Mullick* (9 Moore's I. A., 123), where a widow was declared *absolutely entitled in her own right* to all such interest and accumulations as since the death of her deceased husband had arisen from the one-fifth part of certain accumulations which she had before been declared entitled to hold and enjoy as a Hindu widow in the manner prescribed by Hindu law. There, however, no question was raised as to the succession to

the property on the widow's death, and the reversionary heirs of the husband were no parties to the case. On that, among other grounds, the Privy Council refused to treat that case as an authority in the case which I have before quoted of *Gonda Koer v. Koor Oodey Singh* (14 B. L. R., 159). Another ground certainly was that the case of *Soorjeemoney Dossee v. Dinobundhoo Mullick* (9 Moore's I. A., 123), was governed by law current in Bengal, while the Mitakshara law applied to the other case, but as I have already said no distinction has, in this respect, been pointed out in the law applicable to the two schools.

It has been broadly contended, that as the widow had in her life-time absolute control over the income of her husband's estate, that income and whatever property she acquired with it was her stridhan or separate property, and must devolve as such. It is open to doubt whether such property is, properly speaking, stridhan at all, but on the principle already enunciated it could only become so, or at least be regarded as her property, when she had shown an intention to appropriate it to herself and to sever it from her husband's estate. This answer therefore is sufficient, that whatever disposing power she may have had over such property, (and this it is not necessary in the present case to decide) she made no disposition and showed no intention of treating it as her separate property; the presumption therefore already alluded to arises, that she intended it to be an accretion to her husband's property, and it would pass as such to his heirs.

[762] As, therefore, the plaintiff represents the reversioners, and the appellants by their purchase acquired no title, I would dismiss the appeal with costs.

Garth, C.J.—I quite agree that this appeal must be dismissed.

The case may seem a very hard one upon the defendants Nos. 1 and 2. They appear to have advanced their money to Gourmoni in good faith for the protection and recovery of her share of the property, and they might fairly look to that property for the payment of their advances.

And if they had taken the proper course, I think they might have done so. After obtaining a decree against Gourmoni they might either, if they had used due diligence, have enforced it by execution during her life, or they might have proceeded against the property in the hands of the reversionary heirs after her death.

But for some unaccountable reason, they chose to execute their decree, and to sell the property in execution, as belonging to Gourmoni's sisters, who had nothing whatever to do with it.

They, therefore took nothing by their purchase under that execution, and they must, in this suit at least, take the consequences of their ill-advised proceedings.

It is possible that they may still have a remedy against the property in the hands of the reversionary heirs, if they are not barred by limitation; but in this suit they must fail.

The appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[See (1888) 10 Cal., 324 and the Notes thereto in the Law Reports Reprints.]

[==42 C.L.R. 556.]

[763] APPELLATE CIVIL.

The 30th March, 1883.

PRESENT:

SIR RICHARD GARTH, KT. CHIEF JUSTICE,
AND MR. JUSTICE MACPHERSON.

Haranund Mozoomdar.....Plaintiff

versus

Prosunno Chunder Biswas and others.....Defendants.*

Misjoinder—Parties—Suit to recover property sold in execution of decree.

Certain properties were sold to A by private contract. Subsequently the properties were attached in execution of a decree against A's vendors and sold in execution to various purchasers. A instituted a suit against his vendors, the decree-holders, and the purchasers, to set aside the execution sale.

Held, that the suit was not defective by reason of misjoinder of parties.

Rajaram Tewari v. Luchman Prasad (B. L. R., Sup. Vol., 731: 8 W. R., 13) distinguished.

THE plaintiff in this case alleged that the defendants 4 to 6 were the owners of certain lands, and that on the 1st Bysack 1286 (13th April 1879) they sold these lands to him; that after sale the defendants 1 to 3, in execution of a decree against the defendants 4 to 6, attached the lands and put them up to sale; that the plaintiff preferred a claim which was disallowed, and the properties were sold and purchased separately by the defendants 7 to 11. The plaintiff now sued to set aside the sale in execution, and to establish his right to the lands by virtue of the conveyance to him of the 1st Bysack 1286. The defendants 7 to 11 contended that the properties having been separately purchased at auction by different individuals, the plaintiff should have brought separate suits for the property purchased by each of them, and that the suit was wrongly framed. Both the lower Courts, on the authority of the case of *Rajaram Tewari v. Luchman Prasad* (B. L. R. Sup. Vol., 731: 8 W. R., 13) dismissed the suit.

The Plaintiff appealed to the High Court.

Baboo *Mohini Mohun Roy* for the Appellant.

Baboo *Rajendro Nath Bose* for the Respondents.

[764] The Judgment of the Court (GARTH, C.J., and MACPHERSON, J.), was delivered by

Garth, C.J.—We think it clear that the lower Courts have made a mistake in this case.

They have dismissed the suit upon the ground that there was a misjoinder of defendants; or, in other words, that instead of bringing one suit against all the defendants, Nos. 7 to 11, who purchased at the execution sale different portions of the property in question, they ought to have brought five different suits, one against each of those defendants.

The plaintiff's case is, that before the execution sale, under which the defendants 7 to 11 purchased these properties, they were purchased by him from the execution-debtors by private contract, and that he took possession of them. These properties were afterwards attached in execution under a decree

* Appeal from Appellate Decree No. 1981 of 1881, against the decree of F. W. U. Peterson, Esq., Judge of Jessore, dated the 12th August 1881, affirming the decree of Baboo Prosunno Coomar Ghose, Munsif of Magoora, dated the 24th January 1881.

obtained against the judgment-debtors by the defendants Nos. 1 to 3, whereupon the plaintiff preferred a claim to the whole property in the execution proceedings, but the Court decided against him; and so it was sold and bought by the defendants 7 to 11.

The plaintiff then brought this suit against the defendants 7 to 11 to set aside the execution sale, and to establish his right to the property under the private sale to himself; and as the judgment-creditors and the judgment-debtors were both interested in the subject of the suit, he very properly made them parties.

The only point raised by the defendants upon the merits is, that the alleged sale to the plaintiff was not *bona fide*, but void as against defendants Nos. 1 to 3 and 7 to 11; and this, so far as we can see, is really the only question in the cause. But the defendants have raised the preliminary point, upon which the suit has been dismissed by the Courts below, that the plaintiff, instead of bringing one suit, should have brought five separate suits one against each of the defendants 7 to 11.

In support of this objection a Full Bench case has been referred to, *Rajaram Tewari v. Luchman Prasad* (B. L. R., Sup. Vol., 731 : 8 W. R., 13), in which Sir BARNES PEACOCK in giving judgment observed upon the inconvenience of one suit being brought against several defendants, *each of whom [766] had a distinct and separate interest, and each of whose cases depended upon different points and different evidence.*

That case appears to us to be very clearly distinguishable from the present; and in order to understand the distinction, it is only necessary to pay a little attention to the Full Bench judgment. It will be observed that the defendants in that case claimed under different titles, and that their respective cases depended upon wholly diverse evidence and considerations.

The case of each defendant was a separate contest. There was therefore ample reason for the remark of Sir BARNES PEACOCK at the close of the case: "The necessity of separating all these different cases in delivering judgment in appeal shows the difficulty and annoyance to which defendants must be put by being joined in one action in respect of different causes of action, to set aside various deeds executed under different circumstances, and in respect of which they have no common interest."

The present is a case of a totally different character. The plaintiff has but one object, namely, to establish his private purchase as against the sale in execution; and the defendants, who contest his claim, *have but one defence, which is common to them all, viz., that the plaintiff's purchase is invalid.*

The plaintiff might, as a matter of strict law, if he had been so advised, have brought five different suits instead of one, each to try the self-same question; but if he had done so, he would probably have incurred a good deal of blame, and not without good reason, for multiplying suits and expense to no good purpose.

There is also another consideration in this case, which does not appear to have occurred to either of the Courts below, namely, that by dismissing this suit upon the preliminary point they were depriving the plaintiff for ever of trying his case against the defendants upon the merits. If, as the defendants contend, the plaintiff had but one year after the order in the execution proceedings to bring his suit, the effect of the dismissal of the suit upon this technical ground would have been to bar the door of justice against him for ever.

Courts of law should be specially careful in dealing with technical objections to see what effect their decision will have in defeating substantial justice.

[766] The case must go back to the Court of First Instance for retrial upon its merits.

The respondents must pay to the appellant the costs of the proceedings in all the Courts so far as they have gone, inasmuch as it was at their instance that the preliminary objection has been allowed.

Appeal allowed.

NOTES.

[See (1899) 13 C. P. L. R. 9 (11); (1910) 4 S. L. R.; 152 - 8 I. C. 926.]

[9 Cal. 766 - 10 I.A. 32 : 13 C.L.R. 30 : 4 Sar. P.C.J. 411 : 7 Ind. Jur. 218]

PRIVY COUNCIL.

The 17th November and 9th December, 1882.

PRESENT :

LORD FITZGERALD, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH,
AND SIR A. HOBHOUSE.

Janoki Debi.....Plaintiff

versus

Gopal Acharjia Goswami and others.....Defendants.

[On appeal from the High Court at Fort William in Bengal.]

Hindu Law—Endowment - Succession to the management of a religious endowment, as sebit—Usage of the institution.

On a claim to succeed to the management, as sebit, of a religious institution endowed with property, it was contended that in the absence of prescribed rule, or of established usage, succession took place according to the ordinary rules of the Hindu law of inheritance, where the sebit led a family life.

Held, that, where owing to the absence of documentary or other direct evidence, it does not appear what rule of succession has been laid down by the endower, it must be proved by evidence what is the usage. In the present instance the usage did not support the claim ; and, upon the evidence, the claimant, who was out of possession, failed to make a title.

APPEAL from a decree of the High Court (29th January 1877), upholding a decree of the Subordinate Judge of Manbhoom (31st August 1874), whereby appellant's suit was dismissed.

The appellant claimed to succeed to the management of a religious endowment, as sebit, and set up a title relying on the application of the ordinary rules of the Hindu law of inheritance.

Whether those rules were applicable to the succession to the management of this institution, and also, whether a title under them had been made out, were questions decided, among others, in the judgment of the High Court (*Janokee Debi v. Gopal Acharjea*, I. L. R., 2 Cal., 365), forming the subject of this appeal.

[767] The endowment, of which the appellant claimed to have inherited the maurasi right of management, with possession, comprised 57½ villages, described in the plaint as brahmottar and debattar lands, in Pergunnah Chaurian in Manbhoom, valued at more than 2½ lakhs of rupees.

These had been granted by former Rajahs of Panchkot or Pachit, for maintaining the Séba, or worship, of Keshab Rai, a local deity worshipped at Bero by the gurus of the family of the Rajah for the time being. The principal respondent who asserted his right to the guddi of the institution was Sri Gopal Acharjia Goswami, the natural father of the appellant's deceased husband, Bijai Lakhan. According to the appellant's case, Bijai had been duly adopted in infancy by Lakhan, formerly a sebaite of the institution, who died in 1859. Bijai died in 1863, a minor and childless, leaving the appellant his widow, also then a minor, on whose behalf, as she now alleged, the Déb Séba was performed by her relations; and according to a ruffanama, with which she now declined compliance, part of the income of the institution was set apart for her.

As to the validity of the adoption of Bijai Lakhan, which had been disputed on the ground of his having been the eldest son of his natural father, there was no appeal preferred against so much of the judgment of the High Court (I. L. R., 2 Cal., 366) (MARKBY and MITTER, JJ.), as held the adoption not to have been thereby invalidated.

As to another question, *viz.*, whether, inasmuch as the institution at Bero had been endowed by the Pachit Rajahs, the title of any sebaite was complete without confirmation of it by the Rajah of the day (the present Rajah having intervened as a defendant), both the Indian Courts had found against the Rajah's having any such right.

All the facts material to this report are stated in their Lordships' judgment.

On this appeal, -

Mr. Cowell appeared for the Appellant.

Mr. C. W. Arathoon for the Respondents.

[768] For the appellant it was argued that, where (as here) the sebaite led a family life, in the absence of any rule prescribed for the succession to the headship of the institution by those who had endowed it, and also in the absence of any established usage in the matter, the office of sebaite descended in the family according to the ordinary rules of inheritance of Hindu law. Reliance was placed on the words of Sir T. Strange (1 Strange, Hindu Law, Chap. VI p. 151), who, after distinguishing lands endowed for religious purposes as not inheritable at all, as private property, adds: "Though the management of them, for their appropriate object, passes by inheritance subject to usage, as in the case of many of the religious establishments in Bengal, where the superintendence is, by custom, on the death of the incumbent, elective by the neighbouring 'mohants' * or principals of other similar ones." In the case of this institution the right of management of the property forming the endowment was not severed from the religious office; and no such usage as was referred to in the above, and in *Greedharce Doss v. Nundokissore Doss Mohant* (11 Moore's I.A., 403), had been proved. Without such proof of special usage the widow's claim, founded on the ordinary rules of inheritance, could not be defeated, and her title was complete. The burden of proving either prescribed rule, or special usage, was on the defence, and neither of them having been proved the canon of descent by Hindu law must prevail.

* In the evidence in this case the Bengali word "sebaite," and the Hindustani "mohant" were used indifferently.

Reference was also made to Strange's Hindu Law, Vol. I, Chap. IX; and to Vol. II, appendix to Chap. IX, a note by Colebrooke; Mayne's Hindu Law and Usage, s. 364; *Widow of Rajah Chutter Sein v. Younger Widow* (1 Sel. Rep., 180); *Jotindro Mohun Tagore v. Ganendro Mohun Tagore* (9 B. L. R., 377); *Rajah Chundernath Roy v. Koor Gobindnath Roy* (11 B. L. R., 86); *Mussamut Jai Bansi Kunwar v. Chattardhari Singh* (5 B. L. R., 181); *Rajah Ramalinga v. Perianayagam Pillai* (the Ramnad case) (L. R., 1 I. A., 209); *Neelkisto Deb Burmono v. Beerchunder Thakoor* (12 Moore's I. A., 523: 3 B. L. R., P. C., 13).

[769] For the respondents Mr. C. W. Arathoon argued that the ordinary rules of the Hindu law of inheritance were not applicable in this case; and that, had they been so, the appellant had failed to show a good title according to them. If the ordinary rules of inheritance prevailed, a title traced through four succeeding daughters could not be said to accord with any rule of Hindu law. But both the Courts in India had found that the succession in this case was not regulated by the Hindu law of inheritance, and thus the claim was not maintainable. As a general rule, moreover, a woman could not hold the office of sebit; and, if this institution was to be considered an exceptional one, proof of its being so should have been given by the plaintiff. On the contrary, however, the weight of the evidence showed that no one except the Raj Guru of the Pachit family could be the sebit of the institution at Bero. Again, the defendant Sri Gopal Acharjia had a title supported by family arrangement, and equity favoured such arrangements, when made *bonâ fide*, as this had been. On the question, how the office of sebit should be disposed of, where, from circumstances, there could be no recourse to any rule of the foundation, reference was made to *Mahdo Das v. Kamta Dass* (1 L. R., 1 All., 539); *Niranyan Barthi v. Padarnath Barthi* [1 S.D.A. (N.-W.P.) 1864, p. 512].

Mr. Cowell replied.

Their Lordships' Judgment was delivered by

Sir R. Couch.—The appellant in this case brought a suit to recover possession of certain properties which she alleged in the plaint to be partly brahmottar and partly debattar, the latter being dedicated to certain deities of the names of Keshub Rai and others, and also for the possession of the deities themselves from the hands of the first defendant, Sri Gopal Acharjia Goswami. Although the plaintiff described part of the properties claimed as her own brahmottar, which had devolved upon her by right of inheritance, it appeared on the hearing before the first Court, and was admitted by both parties, that the whole of the properties claimed belonged to the deities.

The plaintiff's case was that the properties were in the possession of Lakhan Acharjia Goswami as sebit of the idols; that he [770] having no son of his body, took the plaintiff's husband, Bijai Lakhan Acharjia, in adoption, and died in October or November 1859; that Bijai Lakhan being then a minor, his mother took possession of the properties on his behalf, the right of sebitship having devolved upon him in the same way as any other property of the deceased would have devolved upon him by right of inheritance; that the idols were established by a remote ancestor of her husband, and the right had devolved from one person to another, following the rule which governs the succession of an ordinary heritable property.

The plaintiff further alleged that the mother remained in possession, on behalf of her minor son, up to 1863, when he died, and the right of sebitship devolved upon the plaintiff, as his widow, but she being then a minor her mother-in-law managed the Dêb Séba for her up to the time of her death,

which occurred in March 1864; that upon the death of her mother-in-law, the first defendant, Gopal Acharjia, one of the respondents in this appeal, who was the natural father of Bijai Lakhan, attempted to take possession of the properties along with the Déb Séba, and was opposed on her behalf by her father and maternal uncle, the second and third defendants and also respondents, and that a compromise was effected between them, which the plaintiff sought to set aside as collusive. As the father and uncle do not appear to have had any legal authority to act as the plaintiff's guardians, and the compromise has not been relied upon, it is unnecessary to notice it further.

The defence of Gopal Acharjia was, that the suit was barred by the law of limitation; that the adoption of the plaintiff's husband was not valid according to Hindu law; that the plaintiff, being a female, was not competent to perform the duties which ordinarily devolve upon a sebait, and to fill the office; and that, according to the usage of the family, and the rules regulating the appointment of mohants to the guddi, he was entitled to succeed to the Déb Séba estate on the death of Bijai Lakhan, and the plaintiff had no right whatever; that originally the Dob Seba was founded by an ancestor of the present Raja of Pachit, and the title of sebait was not complete unless he was confirmed in his appointment by the Rajah of Pachit for the [771] time being; and that Raja Nilmoni Singh Deo, the present Rajah, had made the confirmation in his favour. Rajah Nilmoni Sing Deo was added as a defendant, and put in a written statement to the same effect as the last allegation.

The first Court decided the question of limitation in the plaintiff's favour, and the defendants did not appeal from that decision. It then found that the plaintiff's husband Bijai was duly adopted by Lakhan Acharjia, and the customary ceremonies of adoption were performed, but that, he being the eldest son of Gopal Acharjia, his adoption by Lakhan was invalid.

The suit was dismissed, and the plaintiff appealed to the High Court, which held that the lower Court was wrong in holding that the adoption of the plaintiff's husband was invalid by reason of his having been the eldest son of his natural father; but upon the question whether the plaintiff was entitled upon the death of her husband to succeed as sebait, the Court held that although there was no satisfactory evidence that the appointments of sebait had been made by the Rajah of Pachit, the evidence did not establish the plaintiff's right to succeed under the Hindu law of inheritance. The appeal was therefore dismissed.

The plaintiff has appealed to Her Majesty in Council, and it has been contended on her behalf that, in the absence of prescribed rules, or usage, the ordinary law of inheritance applies.

It appears to follow from the judgments of their Lordships in *Creedharree Doss v. Nundokissore Doss Mohant* (11 Moore's I. A., 428), *Rajah Mutta Ramalinga Setupati v. Perianayagum Pillai* (L. R., 1 I. A., 209), and *Rajah Vurmah Valia v. Rajah Vurmah Mutha* [L. R. 4 I. A., 76 (see p. 83): s.c., I. L. R., 1 Mad., 235], that when, owing to the absence of documentary or other direct evidence, it does not appear what rule of succession has been laid down by the endower of a religious institution, it must be proved by evidence what is the usage.

The greater part of the villages in dispute were dedicated to the idols more than a century ago, by the then Rajah of Panchkot or Pachit, and from time to time other villages have been added to the endowment. The first sebait was Rungraj [772] Goswami, who left an only daughter, Auchuma, who married, and had issue an only daughter, Bencooma; she married, and her only issue was a daughter, Lukhipria, and according to the plaintiff's case Lukhipria had

an only daughter, Kedro Bibi, who married Lakhan Acharjia, and had a son, Srinibash, the grandfather of the plaintiff's husband. The plaintiff asserted that the four daughters succeeded each other as sobaits; the defendant Gopal on the contrary asserted that their husbands were the sobaits. It appeared, however, that Lukhipria held the guddi for nearly 60 years, her husband having died first, which is inconsistent with the latter contention. Now, whether the four daughters succeeded each other or their husbands were the sobaits, the succession was not according to Hindu law, as a daughter's daughter is not an heir except in certain cases of stridhan, and a son-in-law has no right of succession. There is no doubt considerable difficulty in ascertaining what is the rule of succession to this office, but it is certain that the usage has not been according to the ordinary rules of inheritance under Hindu law. Not only does the usage not support the plaintiff's claim, but it is opposed to it. It is not for their Lordships to consider whether there is any infirmity in the title of the respondent Gopal, who has been in possession many years, with the consent, if not by the appointment, of the Rajah. The plaintiff being out of possession must recover upon the strength of her own title, and not on the weakness of that of the defendant. Their Lordships have, therefore, only to consider whether the appellant has made out her title, and they are of opinion that the High Court was right in holding that she had not. They will humbly advise Her Majesty to confirm the judgment of the High Court, and to dismiss the appeal. The costs will be paid by the Appellant.

Appeal dismissed.

Solicitors for the Appellant: Messrs. Barrow and Rogers.

Solicitors for the Respondents: Mr. T. L. Wilson.

NOTES.

[RELIGIOUS ENDOWMENT—SUCCESSION—]

See the Notes to 11 M. I. A., 105 in the Indian Reports Reprints Vol. III (1910); also the following cases:—1 Mad., 235 (250); 13 Mad., 521 (531); 15 Mad., 41; 7 Mad., 499; 16 Mad., 490; 29 Mad., 283; 7 C. W. N., 115; 9 All., 1 (8); 13 All., 256; (1909) 3 I. C., 408; 11 C. L. J., 2.]

[7 Ind. Jur. 650]

[773] ORIGINAL CIVIL.

The 7th July, 1882.

PRESENT:

SIR RICHARD GARTH, KNIGHT, CHIEF JUSTICE, AND MR. JUSTICE CUNNINGHAM.

Sreenath Roy.....Plaintiff

versus

Radhanath Mookerjee.....Defendant.

Appeal—Administration suit—Order directing an account—Civil Procedure Code (Act X of 1877), s. 244.

An order directing an account is not an order in the nature of a final decree, and is unappealable: such an order merely directs certain proceedings to be taken, in order that a final decree may thereafter be made.

By a decree, dated the 3rd September 1877, in an administration suit between *Sreenath Roy v. Radhanath Mookerjee and others*, it was, amongst other things, ordered that Sreenath Roy was entitled to recover from the estate of Jogendronath Mookerjee a sum of Rs. 18,000 with interest, and the further hearing of the suit was adjourned for the taking of accounts, the Receiver of the Court being appointed Receiver to the estate of Jogendronath Mookerjee; and the consideration of further directions was reserved until after the account and enquiries directed should be taken and made, liberty being reserved to all parties to apply as they might have occasion.

In 1874 and 1875 two suits, Nos. 67 of 1874 and 307 of 1875, between *Radhanath Mookerjee, an infant (son and heir of Jogendronath Mookerjee) by his mother and next friend v. Chunder Kant Mookerjee and others*, and *Koosum Coomaree Dabee, widow of Ramnarain Mookerjee v. Chunder Kant Mookerjee and others*, were instituted for the partition of the joint family estate of Ramnarain Mookerjee; and on the 13th September 1880, an order was passed in these two suits (which had been amalgamated), directing that the accounts filed by the defendants in the first suit should be taken as they stood up to the death of Jogendronath, and that the defendants Chunder Kant and Prankristo should pay to the infant plaintiff, Radhanath, in that suit, Rs. 5,000 in full of the said account; and that they should, out of the infant plaintiff's share in the joint estate, when the value of the same should have been ascertained, make provision for the payment [774] of the costs of the suits to administer the estate of Ramnarain and Jogendronath Mookerjee and for the payment of the debts of the said Jogendronath and the legacies left by Ramnarain.

The defendants Chunder Kant and Prankristo, under the provisions of rule 594 of the High Court, paid into the hands of the Court Receiver, in pursuance of the order last mentioned, Rs. 5,000 to the credit of the infant Radhanath.

The plaintiff in the administration suit, Sreenath Roy, then applied to the Court for an order, directing the Court Receiver to transfer the said sum of Rs. 5,000, after deducting his usual commission and charges, to the credit of the administration suit, and for the application of that sum in payment of the debt due to him and the other creditors of the estate of Jogendronath who had proved their claims: and further asked that the Receiver might be directed to sell the properties then in his possession for the above purposes.

The grounds for the application were (1), that the Receiver had not as yet made any provision for the payment of the debts of Jogendronath, and that there was ample property belonging to the estate of Jogendronath which had come to the hands of the infant defendant, and which was in the hands of Receiver to satisfy these debts; (2), that the debt due to Sreenath Roy, under the decree of the 3rd September 1877, had been outstanding for more than four years, and that interest was running on it both to his detriment and that of the infant Radhanath Mookerjee.

Nobin Chund Boral, attorney on behalf of the infant Radhanath Mookerjee, opposed the application and put in an affidavit, stating that on the 13th September 1877, the cause in which their present application was made was set down on the reference board, and that Mr. Justice WILSON, after going through the accounts, and on being informed that the bulk of the property belonging to the estate of Jogendronath Mookerjee, deceased, consisted of one undivided fifth share in certain landed property, which formed the subject-matter of the partition suits numbered 67 of 1874 and 307 of 1875, which had been amalgamated for the purpose of taking the accounts, directed the reference to stand over until the accounts were taken; that he had a large claim for [775]

costs which had been already ordered to be paid to him out of the joint estate; and he submitted that the relief sought could not be granted on the present application inasmuch as the suit should have been set down for further directions and the application then made.

Mr. *Allen* for the Plaintiff.

Mr. *Threllyan* for the Defendant.

On the 16th March 1882, Mr. Justice WILSON refused the application with costs.

The plaintiff appealed.

Mr. *R. Mitra*, for the Respondent, objected that no appeal would lie.

Mr. *Allen* for the Appellant contended that the order passed by the Court must be taken as an order made under s. 244 of Act X of 1877, it being a question relating to the "execution, discharge and (partial) satisfaction" of the decree in the administration suit; and that under s. 2 of the same Act, "an order," determining any question mentioned or referred to in s. 244, but not specified in s. 588, is defined to be "a decree," and is therefore appealable: and, further, that an appeal lay under s. 15 of the Charter from the judgment of a single Judge of the High Court: and he submitted that on one or other of these grounds an appeal did therefore lie.

The following **Judgments** were delivered by the Court (GARTH, C.J., and CUNNINGHAM, J.)

Garth, C.J.-- I am of opinion that the preliminary objection must prevail, and that no appeal lies in this case.

Mr. *Allen* has contended that the order which is appealed against is one made under s. 244 of the Civil Procedure Code, and is therefore appealable under s. 2 of that Act, as amended by Act XII of 1879.

The suit in which the order was made is an administration suit brought by the plaintiff, a creditor, for administering the estate of Jogendronath Mookerjee, and for having the plaintiff's debts ascertained, and paid out of the assets. A decree was obtained, declaring the plaintiff entitled to the sum which he claims, and directing an account to be taken in the usual way.

[776] The party to the suit who represents the estate is an infant, who appears by guardian, and an attorney named *Nobin Chund Boral* acts for the guardian.

It then appears that in another suit a sum of Rs. 5,000 has been placed in the hands of the Receiver, on account of the infant defendant in this suit; and an application was made to the Judge in the Court below that this Rs. 5,000 should be paid over to the credit of this suit, and that it should be applied in payment of the debts to the plaintiff and the other creditors of the intestate, who have proved their claims in the suit; and that the said Receiver should sell the properties in his possession and apply the proceeds towards payment of the said debts *pro tanto*.

This application, so far as it concerned the Rs. 5,000, would seem to have been a reasonable and a necessary one; but it was objected to on the part of the infant; and the learned Judge refused the application, not (so far as I can judge from the note which was made by the officer of the Court), because there was no ground for making it, but because it was not made in proper form.

However this may be, the plaintiff did not apply again, as suggested by the learned Judge. If he had done so, and if the sum of Rs. 5,000 had really belonged to the estate, the application would probably have been successful. But he took the course of appealing to this Court, and has insisted upon his

right of appealing upon the ground that the order of the learned Judge was a decree made under s. 244 of Act X of 1877, as being "a decision upon a question which related to the execution of the decree."

I am clearly of opinion, looking at what I conceive to be the true meaning of the word "execution" in that and the preceding sections of the Code, that the order in this case is not appealable.

The section forms part of Chapter XIX of the Code, comprising ss. 223 to 343, which all relate "to the execution of decrees," and from the tenor of those sections it seems clear to me that the words "execution of decrees" at the heading of the chapter mean the enforcement of the decrees of the Courts, by what is generally known as "*process of execution*." The different kinds [777] of execution dealt within those sections are against the person and property of the judgment-debtor, or for the restoration of any specific property, land, or goods, or for compelling the judgment-debtor, by attachment, to obey the decree of the Court.

But the order with which we are dealing is of a totally different character.

The order for accounts is not in the nature of a final decree. It only directs certain proceedings to be taken, in order that a final decree may hereafter be made; and the application by Mr. Allon was only an interlocutory one, made in the course of those proceedings, and certainly not for the purpose of enforcing the decree of the Court by a process of execution properly so called.

Mr. Allen contends that his application was one in aid and execution of the decree which the Court has already made; now, if an order of this kind can be appealed against, it seems to me that all the numerous interlocutory orders made in the course of taking accounts or otherwise carrying out the directions of the Court would be equally appealable.

I think therefore that upon this ground the appeal should be dismissed with costs on scale 2.

Cunningham, J.—I am of the same opinion. I would only add that the reasons that my Lord has given seem to be reinforced by the language of s. 213 and the form No. 130 of the fourth schedule of the Code of Civil Procedure, which show that in the view of the framers of the Code what is called an administration decree is not really a decree at all, but merely a preliminary order.

Appeal dismissed.

Attorney for Plaintiff: Messrs. *Swinhoe Law & Co.*

Attorney for Defendant: Bahoo *Nobin Chund Boral.*

NOTES.

[ORDER DIRECTING ACCOUNTS—DECREE—

The order directing accounts became appealable by the amending Act of 1879.—*See also* 24 Cal. 725; 23 Cal. 406 (409); 3 Bom. 161; 18 Mad. 73.]

[43 C.L.R. 146]

[778] ORIGINAL CIVIL.

The 27th January, 1883.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND
MR. JUSTICE CUNNINGHAM.

Gopal Chunder Mukerjee and others.....Plaintiffs

versus

Juddoo Lall Mullick.....Defendant.

Right of way—Extent of user—Purpose for which right claimed is strictly identical with original purpose contemplated at commencement of right.

Where a right of way for a particular purpose is proved to have existed for upwards of 20 years, the Court is not bound to confine the right to the precise number of times in the year that it has been exercised, but may construe it as a right to use the road at all convenient times for the particular purpose.

THIS was a suit brought by two infants, by their next friend, to have their right to an alleged passage over the defendant's land declared, and to have certain obstructions to such passage, and also certain alleged obstructions to the grating of a drain running under the land, removed, and for damages and for an injunction.

The plaintiffs alleged that they were the owners of a certain house, to which was attached a privy which, before the construction of the underground drainage by the Municipality, used to be drained as of right by, and through, a small drain which ran between their own house and the house of the defendant, finally discharging itself into the large Municipal drain, and that their privy had been at all times as of right cleaned by their servants, who, for such purpose passed and repassed over the drain, and that this right of way both they and their predecessors in title had enjoyed for more than forty years; that in 1879 the Municipality constructed an underground drain in the place of their large drain, and stopped the large drain up, and that they (the plaintiffs) at their own expense opened out a communication, by means of pipes, between this underground drain of the Municipality and their own small drain, the privy since that date being drained through the pipes so laid down. That they then filled in their original small drain, and made a path over it, which was used both by themselves and their servants in passing and repassing to the privy; that in December 1880 the defendant obstructed this pathway by placing rubbish upon it, and [779] thus prevented them (the plaintiffs) and their servants from using the same, and at the same time the defendant also blocked up the grating of a certain surface drain belonging to the plaintiffs and thereby obstructed the discharge of water into their pipes.

The plaintiffs did not claim any ownership in the soil of the pathway, but brought this suit for the purposes abovementioned.

The defendant claimed to be absolute owner of the land claimed as the plaintiffs' right of way, and denied the plaintiffs' claim to the right of way, asserting that it had not been enjoyed as of right since February 1877. He further stated that the filling up of the drain took place in December 1877 and not in 1879.

Mr. *Palit* for the Plaintiffs.

Mr. *Branson* and Mr. *Phillips* for the Defendant.

Mr. Justice WILSON found that the soil of the place in question was in the defendant, and that the plaintiffs had not satisfactorily shown that they exercised, for twenty years, the right they claimed; that it was impossible for the plaintiffs to have exercised their right of way during the time the small drain was in existence; and that the fact that it had been filled in, and made into a passage about ten or twelve years back, made it impossible for the plaintiffs to have used the right of way for twenty years; and, further, considering that the user of the Municipal mehters was not such as to furnish evidence of previous user, he dismissed the suit.

The plaintiffs appealed.

Mr. *Evans*, Mr. *Bonnerjee* and Mr. *Palit* for the Appellants.

The Advocate-General (Offg. Mr. *Phillips*) and Mr. *Branson* for the Respondent.

Mr. *Phillips*.—The ordinary practice at the time that the alleged user of the plaintiffs began, was to clear the privies three or four times a year, but now they are cleaned out every day; I don't, however, restrict them to the three or four times, but I restrict them to the user they had before the sudden change in the practice, in [780] consequence of the Municipality taking up the work, in other words, to the ordinary and reasonable user at the commencement of the user. It is in such a user that the defendant is assumed to have acquiesced, and although he may have acquiesced, for the last four or five years in a larger user, this will not enlarge the right, unless continued for 20 years, although it might, if known, have been evidence to show that the increased user was in accordance with the right. A user cannot be increased. *Allan v. Gomme* (11 A. and E., 759) was a case of an increased or altered user in consequence of the conversion of a wood house into a cottage. In *Henning v. Burnit* (8 Exch., 187) PARKE, B., says, "A right of way to a cottage ceases if the cottage is turned into a tan yard." These were cases of grants, but they show that if you have a limited right of way you cannot increase the user to make it a general right of way. In the case of *Williams v. James* (L. R., 2 C. P., 577) the defendant, who was entitled to a right of way by user over the plaintiffs' land from field N, honestly and without the intention of increasing the right of user, used the way for the purpose of carting from field N some hay stacked there, which had been grown partly there, and partly on land adjoining, and it was held not to be an excess user in the user of the right of way; the principle is, however, clearly laid down that the right is measured by the actual user. In *Bazendale v. McMurray* (L. R. 2 Ch. App., 790) the defendant had obtained the prescriptive right to discharge into a river washings arising from the manufacture of rags in the manufacture of paper; he afterwards made his paper from vegetable fibre and discharged the refuse as before into the river; it was held in a suit to restrain the defendant from polluting the river to a greater extent than it was polluted before the change in the system of manufacture, that the easement to which he was entitled was a right to discharge into the river the washings produced by the manufacture of paper in the reasonable and proper course of such manufacture, using any proper materials for the purpose, but not substantially increasing the pollution; and that the onus lay on the plaintiff to show any increase of pollution.

Where an easement to land is granted, the use of it will be restricted to a reasonable use for the purpose of the land in the [781] condition in which it was when the grant was made or the user took place. *Wood v. Saunders* (L.

R., 10 Ch. App. 582) was the case of a grant; there *A* demised to *B* a house with the right to the free passage of water and soil in and to the existing cesspools, and to certain drains then in existence. *B* was not at liberty to alter the buildings without the lessor's consent, which was never obtained. *B* in 1872 bought the house, and at that time part only of the drains from the house ran into a moat which belonged to *A*. *B* in 1873, enlarged his house and turned it into lunatic asylum with 150 inmates and discharged the whole drainage of the house into the moat. *A* threatened to stop the drains, and *B* filed a bill to restrain him from so doing, and the plaintiff obtained an order protecting him in the reasonable use of the cesspool, to the extent to which the same was used prior to the demise to him. See also *Wimbledon and Putney Commons Conservators v. Dixon* (L. R., 1 Ch. D., 362).

The case of *Finch v. Great Western Railway Co.* (L. R., 5 Ex. D., 254) recognizes the principle that the extent of a right by user is to be measured by the extent of the user. But there are other objections to the plaintiffs' claim.

The user alleged is in its nature likely to escape observation, and it is not shown to have been open, or such as would be likely to attract any attention. Moreover, from the situation of the buildings, there would be very little opportunity to observe the plaintiffs' mehters. A burden ought not to be imposed upon another, upon such a user as this—see *Bhuban Mohun Banerjee v. Elliot* (6 B. L. R., at pp. 98 and 104). Again the plaintiffs claim a right for themselves and their servants: the Municipal mehters are not their servants nor under their control. At any rate, even if they could exercise their right through them, the plaintiffs could not acquire such a right by their choosing to come to the defendant's house over the plaintiffs' land.

But there is a fatal objection, and that is, that according to the evidence all that the Municipal mehter did was to come to plaintiffs' privies, clean them and then go on to the defendant's. [782] This took place for about the last three years, and there is no other evidence as to their proceedings. This, however, is not a user of the way at all: the mehter came on the defendants' land not in exercise of any right of the plaintiffs, but for the purpose of cleaning the defendant's privy, and he merely went on from there for his own convenience, and not in the exercise of any right of the plaintiffs'. Then, if this is so, there is no user within two years of suit, as required by s. 27 of the Limitation Act. User ought to be proved in every year, or at any rate, in the first and last years of the term. *Parker v. Mitchell* (11 A. & E., 788); *Lowe v. Carpenter* (6 Ex., 825).

The following **Judgments** were delivered:—

Garth, C. J.—I regret very much that the parties in this case should not have been able to adopt the suggestion of the Court, and settle their differences out of Court; but as they have failed to do so, it is necessary that we should give our judgment; and I feel bound to say that I cannot take the same view of the case as the learned Judge in the Court below.

I quite think that the plaintiffs' evidence is not as precise as it might have been, either as to the number of years, during which the right claimed has been exercised, or as to the particular mode or times of the alleged enjoyment.

It very rarely happens in my experience that the evidence of native witnesses in cases of this kind is very accurate. But on the whole I think it sufficiently appears that a right, such as the plaintiffs' claim, has been exercised from time to time for upwards of 20 years before suit; and the probabilities of the case seem to me greatly in favour of that view.

Certain facts giving rise to those probabilities are almost beyond dispute. The plaintiffs' house has existed substantially in its present state for a great number of years; the western wall of that house abutted upon the defendant's

premises ; and certain privies, habitually used by the inmates of that house, were situate in the south-west corner of the plaintiffs' compound.

Before the new sanitary rules were made by the Calcutta Municipality, these privies were used and managed in the same way as [783] most others in the native quarters of Calcutta ; that is to say, their contents were received into cesspools sunk in the ground, and were then emptied and carried away from time to time as convenience or necessity required.

There also seems no doubt that the fall of the ground, on which the plaintiffs' house was built, was from south to north, and that from these privies there was a passage enclosed by two walls running from south to north along the western boundary of the plaintiffs' premises, by means of which all the refuse water from the cesspools flowed away to the north-west corner of those premises, where there was a door opening out upon a drain, into which certain privies, used by the defendant's family, emptied themselves.

This drain, the soil of which belonged to the defendant, was an open one. It received through the door, which I have just mentioned, the refuse water of the plaintiffs' privies ; and it then continued to run from south to north into Prosunno Coomar Tagoro's Street, receiving also in its way the contents of other privies.

The plaintiffs' case is, that from time to time their cesspools were emptied by mehters in the usual way, and their contents carried along the passage between the two walls, and so along this open drain into Prosunno Coomar Tagore's Street. It is clear that if the privies were used, about which there seems to be no doubt, their contents must have been emptied somewhere ; and it is neither proved nor suggested by the defendant that there was any other mode by which their contents were removed, except that which has been deposed to by the plaintiffs' witnesses. And it is very difficult to understand for what purpose the inner wall forming the passage from south to north could have been built, except for carrying off the contents of the cesspools.

The only real question of fact, as it seems to me, is, whether there is sufficient proof that the plaintiffs have used the open drain for the purpose alleged for the period of 20 years before suit. Now it certainly seems highly probable that if the house itself has existed in its present condition for some 30 or 40 years, the same means has been always adopted for emptying the cess-[784] pools ; and it is certainly proved to my satisfaction that the door at the north-west corner of the plaintiffs' premises, through which it is said that the mehters passed, is a very old door ; and it is difficult to see for what purpose that door could have been placed there or used, except that of cleaning out the cesspools.

The durwan, who has been in the plaintiffs' service for from 20 to 25 years, says that he has known that door ever since he was in their service ; and that it was an old door when he came there. He tells us that mehters used always to come through it for the purpose of removing the night-soil ; that when they came, they used to call to him to open the door, and that when they went away they used to call to him to lock it ; and that he invariably kept the door locked from the inside. He says this was always done three or four times a year ; and he has also done the same for the Municipal mehters since they have cleaned the privies.

The evidence of this man is confirmed by that of Oghore, the sweeper, who tells us that he has been in service of the plaintiffs and their father for 16 or 17 years ; that he employed the mehters to wash the privies and clean the drain ; and that he used to bring mehters of his own for the purpose, whom

he paid with his master's money. He describes clearly enough the way in which they used to clean the cesspools, and carry out the contents, along the west side of the plaintiffs' premises into the open drain beyond.

I confess I see no sufficient reason for doubting the truth of what these men have stated, and their evidence is certainly corroborated by Tarrabullub Chatterjee, an attorney of this Court, who know the premises upwards of 25 or 30 years ago, and speaks to the way in which the mehters used to come and cleanse the privies ; and also by Dwarkanauth Banerjee, who lives in an adjoining house, and who says that he has known the drain between plaintiffs' and defendant's premises for upwards of 25 years.

The only point which the defendant has attempted to make in opposition to this evidence of the plaintiffs is, that the open drain along which it is said the mehters passed, was generally [785] in such a filthy state from the quantity of foul matter which flowed into it, that it was impossible for mehters to pass down it in the manner described by the plaintiffs' witnesses.

In support of this view the defendant himself, Baboo Juddoo Lall Mullick, was called as a witness. He describes the dirty state in which the drain was, partly from his own privies and partly from those of his tenants being emptied into it. He says it was choked with filth and weeds, and that he never saw any one pass down there ; and Mr. Edwards, who is the Road and Conservancy Overseer under the Municipality, says that he has known the drain since 1875, and that it was in a very foul state and very full of night-soil. He states, however, that while the drain was being cleaned, he did go up it himself, but not beyond a certain distance.

I observe that the learned Judge in the Court below, in dismissing the plaintiffs' case, has laid some stress upon the evidence of these two witnesses. Now I have no doubt it is quite true that Baboo Juddoo Lall Mullick, who is a gentleman of good fortune and position, may never have seen the mehters going backward and forward to plaintiffs' privies, because they did not go there often, and when they did, it was very early in the morning, and I can quite understand that Mr. Edwards would naturally be disinclined to walk through a quantity of night-soil, unless pressed by some urgent necessity to do so. But this was all part of the mehters' business, and it appears, moreover, that there were certain seasons in the year when Baboo Juddoo Lall Mullick's privies were cleaned out, and it is probable that these seasons, were selected by the plaintiffs' servants to employ mehters to clean out their master's cesspools.

On the whole it appears to me that the evidence adduced by the plaintiffs shows a user of the right which they claim for upwards of twenty years before suit ; and I see nothing in the defendant's evidence to rebut it.

The only difficulty which I feel is, *as to the extent of the plaintiffs' right.* Are they entitled to the use of the drain only three or four times in a year, which, according to the evidence [786] of the durwan, was as often as they were in the habit of using it ; or ought we to give the evidence of user a more liberal construction, and say that they had a right to the drain for the purpose of cleansing their privies as often as necessity required ?

I confess I have had some doubt about this and I have found no direct authority upon the subject ; but I have come to the conclusion that the latter is the more reasonable view to adopt. The times at which the plaintiffs' cesspools were cleansed were (according to the evidence) no particular stated periods. The cesspools were emptied, according to native custom, as many times in the year, as they became full ; and I cannot doubt that if the number

of the plaintiffs' family had increased, so that it became necessary to empty them more often, the plaintiffs would have had a right to use the drain for that purpose.

It has now become necessary, in consequence of the new Sanitary Rules of the Municipality, to cleanse the privies every morning; and if the true construction of the plaintiffs' right was, as I conceive it to be, to use the drain as often as was necessary for cleansing the privies, it follows that they may now use them every morning.

The times at which they should do this should of course be proper and convenient times. The evidence is that the filth was removed in the early mornings; and probably this would be the most convenient time now for its removal.

It has been strongly urged upon us that if we put this construction upon the plaintiffs' right, we shall be imposing upon the defendant, as the owner of the servient tenement, a much heavier burthen than according to the ancient user of the drain he ought to bear. But it must be borne in mind that, so far as *the quantity* of sewage is concerned, no larger quantity will be carried down the drain now than has always been carried heretofore. It will only be carried more frequently, and in much smaller quantities, and, so far as health is concerned, I suppose that the present system is likely to be more healthy than the former one.

I think, therefore, that the judgment of the Court below should be reversed, and that the plaintiffs should be declared entitled to use the drain in question, for the purpose of carrying away their night-soil at all convenient times in the year.

[787] The defendant will be restrained from interfering with the plaintiffs' proper user of the drain; but as the suit was brought to try what was a question of right, we do not consider that there is any ground for awarding substantial damages.

The plaintiffs will be entitled to their costs in both Courts on scale 2.

Cunningham, J.—I concur in holding that the enjoyment of an easement for twenty years prior to the suit is established by the evidence, and also in the view that the easement must be taken to have been a right of way for the purpose of cleansing the plaintiffs' privies at all such times as the plaintiffs could reasonably claim to exercise such a right. Several cases were cited before us in support of the contention that, as in cases of rights which depend on user, "the right acquired must be measured by the extent of the enjoyment which is proved," we ought in this instance to limit the plaintiffs' right of way to the number of occasions in the year on which it could be shown that the way had been used: but the cases do not appear to me to justify such a restriction. It is no doubt the rule that where there is a right of way proved by user, the extent of the right must be proved by the extent of the user. *Wimbledon and Putney Commons Conservators v. Dixon* (L. R., 1 Ch. D., 362); *Finch v. G. W. Railway* (L. R., 5 Ex. D. 254) but neither these cases nor the others cited, *Williams v. James* (L. R., 2 C. P., 577), *Allan v. Gomme* (11 A. and E., 759), *Henning v. Burnet* (8 Exch., 187), appear to me to justify the view that, where a right of way for a particular purpose is proved, the number of occasions on which it may be enjoyed must be limited to the number of occasions on which it can be shown to have been exercised. The "extent of user," which the Courts have had occasion to consider in these cases, has had reference rather to some departure from the original purpose, or the application of the right to some matter other than that contemplated at

the commencement of the right, than to frequency of the occasions on which the right may be enjoyed. In the present instance the purpose for which the right is claimed is strictly identical [788] with the original purpose, though inclination, custom, or a change of the law may lead to its more frequent exercise. On these grounds I concur in admitting the appeal with costs throughout.

Appeal allowed.

Attorneys for the Appellants : Messrs. *Swinhoe & Co.*

Attorneys for the Respondent : Messrs. *Beeby & Rutter.*

NOTES.

[This case was affirmed by the Privy Council in (1886) 13 Cal. 136.]

[9 Cal. 788 — 12 C.L.R. 390]

APPELLATE CIVIL.

The 26th February, 1883.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE WILSON.

Ishan Chunder Bandopadhyia.....Defendant

versus

Indro Narain Gossami.....Plaintiff.*

Sale in execution of decree—Payment not certified to Court—

Fraud—Setting aside sale—Cause of action—Regular suit.

A obtained a money decree against B and others jointly for Rs. 112; and in consideration of a payment of Rs. 25 made by B agreed to release B from all liability under the decree. This payment was not certified to the Court, and A afterwards in execution of the decree had certain immovable property belonging to B put up for sale, and this property he purchased himself.

Held, that a suit would lie by B to set aside the sale and to recover the property from A.

THE facts of this case are stated as follows by the Judge of the lower Appellate Court :—

“On the 19th of April 1873 the defendant, Ishan Chunder Bandopadhyia, obtained a decree against Nuffer Chunder Gossami and four others jointly, by which the debtors were directed to pay to the decree-holder Rs. 112. An application for execution was made on the 28th of February 1876, but without any satisfactory result. The application appears to have been removed from the file in March 1876. The next application for execution was made on the 20th of December 1878. Notice was served on the debtors on the 14th of Magh 1285 (29th January 1879), and returned on the 3rd of February 1879. On the very next day Indro Narain Gossami came in and objected to the execution, saying that he had paid Rs. 25 to the decree-holder, and that the decree-holder [789] had absolved him from all liability under

* Appeal from Appellate Decree No. 1614 of 1881, against the decree of Baboo Brojendro Coomar Seal, Judge of Bankoora, dated the 3rd June 1881, affirming the decree of Baboo Jogendro Nath Bose, Munsif of Gangajal Ghat, dated the 22nd March 1880.

the decree. As the fact of payment on the said arrangement had not been certified to the Court, it was not at liberty to enter into the matter in the execution proceedings. The decree-holder, however, was asked as to whether or not he had received the said Rs. 25 and whether he had released Indro Narain from liability under the decree. The decree-holder admitted having received the amount, but denied having expressed his intention of not taking out execution against him. There the matter ended. The order of the Court directing execution to issue against Indro Narain bears date the 25th of February 1879." Under this order the property of Indro Narain was sold and purchased by the decree-holder, Ishan Chunder Bandopadhyaya. The plaintiff then brought the present suit to have the sale set aside on the ground of fraud. The learned Judges of the lower Appellate Court having gone through the evidence said: "I agree with the Court below in finding that the decree-holder had released the plaintiff from all liability under the decree, and that therefore his conduct in taking out execution against him was fraudulent. The sale must, therefore, be set aside." The defendant appealed to the High Court on the grounds (1), that the alleged adjustment having been set up in the execution proceedings could not be again brought forward in a subsequent suit; (2), that the suit was barred by the provisions of s. 244 of the Civil Procedure Code; and (3), that the alleged promise to release the plaintiff was a *nudum pactum*.

Baboo *Rash Behary Ghose* for the Appellant.

Baboo *Nil Madhub Sen* for the Respondent.

The **Judgment** of the Court (PRINSEP and WILSON, JJ.) was delivered by

Prinsep, J.—It has been found by the lower Appellate Court that the defendant, who held a decree against the plaintiff and others, agreed to take, and did take, from plaintiff Rs. 25, as representing his liability under this joint decree, and at the same time undertook to abstain from further proceedings, but that notwithstanding he persisted in executing the decree and sold certain property belonging to the plaintiff.

The only question raised before us is, whether under the Code of Civil Procedure now in force, a suit will lie to set aside the [790] sale of plaintiff's property as having been held fraudulently, and in breach of the undertaking on receipt of the money paid out of Court in satisfaction of the liability of the plaintiff judgment-debtor under the decree, whether the law (s. 258) having placed it in the power of a judgment-debtor making such a payment to obtain the assistance of the Court, within a certain specified period, to require the decree-holder to certify that payment, any suit brought practically for the same purpose is not barred.

As an authority that the present suit will not lie, the case of *Patankar v. Devji* (I. L. R., 6 Bom., 146) has been cited. On the other hand, we find that in the case of *Guni Khan v. Koonjo Behary Sein* (3 C. L. R., 414), it has been held by a Division Bench of this Court that the law is unaltered by the Code of 1877, re-enacted by Act XIV of 1882. In respect of the matter now before us we find no material difference between s. 11, Act XXIII of 1861, now repealed, and s. 244 of the Code of Civil Procedure which has taken its place, and we observe that it was after full consideration of the effect of s. 11, Act XXIII of 1861, on a payment in satisfaction of a decree made out of Court that the judgment of a Full Bench of this Court in the case of *Guna-mune Dasi v. Prankishori Dasi* (5 B. L. R., 223; 13 W. R., F. B., 69), was delivered.

Nor do we think that the terms of the last sentence of s. 258 have altered the law as thus expounded. No doubt it has been declared: that "no such

payment or adjustment shall be recognized by any Court unless it has been certified" according to s. 258, but in our opinion this refers to any Court of execution, either the Court which itself passed the decree and is executing it, or any Court to which the decree may have been transferred for purposes of execution. It seems to us that whenever the Legislature has intended that any matter shall not be re-opened in any subsequent suit or proceeding, it has indicated that intention by more definite terms by either declaring that no subsequent suit shall lie, or that the particular order shall be final.

In this view on the findings of the lower Appellate Court, the plaintiff is entitled to a decree, and this appeal must be dismissed with costs.

Appeal dismissed.

NOTES.

[UNCERTIFIED PAYMENTS—

Owing to a conflict of cases like this case and 11 Bom. 6 ; 10 Bom. 155 ; 11 Mad. 469, the Code of 1882, sec. 258, was amended in the last paragraph. This case, which was followed in 10 Cal. 354 ; 15 Cal. 172 ; 187, was held to have been overruled by the Privy Council in 19 Cal. 683 ; see 20 All. 254 ; 21 Cal. 437 ; 17 Cal. 769 ; 31 Cal. 480 ; 8 C. W. N. 396.]

[=8 Ind. Jur. 42]

[791] SMALL CAUSE COURT REFERENCE.

The 1st March, 1883.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE WILSON.

Juggernaut Sew Bux and another.....Plaintiffs

versus

Ram Dyal and others.....Defendants.

*Contract for sale of Government Securities—Time bargain—Contract Act,
ss. 23 and 30—Evidence Act (1 of 1872), s. 92—Tender—
Readiness and willingness.*

The question whether an unambiguous written contract for the sale and purchase of Government paper is a contract or agreement by way of wager, must be decided on the expressed terms of the contract itself, and parol evidence is not admissible to vary or contradict those terms.

Where a contract for the sale and purchase of Government paper provides for the delivery of the paper on a subsequent date, it is not necessary, in order to sustain an action against the buyer for non-acceptance on the due date, that the plaintiff should have taken the Government paper contracted for to the place of business of the defendant and then and there made an actual tender of it.

THIS was a case stated for the opinion of the High Court under s. 7 of Act XXVI of 1864, by Baboo Koonjo Lal Banerjee, one of the Judges of the Calcutta Court of Small Causes. The case referred was as follows:—

"This was a suit brought by the plaintiffs to recover Rs. 1,000, after abandoning an excess of Rs. 93-12, being the amount of damages or loss sustained by him on a contract for the sale of Rs. 25,000 Government Securities. The contract is dated 1st July 1881, and delivery was to have been taken on the 1st or 2nd September following. The rate at which the paper was sold was Rs. 104-13 per cent. The rate on due date was Rs. 100-7 ; the

difference or loss was therefore Rs. 4-6 per cent., the total amount being Rs. 1,093-12; the excess Rs. 93-12 has been abandoned in order to bring the case within the jurisdiction of this Court. The defendants admitted the contract, but denied damages, and a further objection was raised to the suit, *viz.*, that the transaction was of a wagering character, and, as such contrary to public policy, and was therefore void under ss. 23* and 30 of the Indian Contract Act.†

[792] "It appeared from the evidence that the plaintiffs are up-country dealers in country produce; and that they occasionally sent up four or five bales of piece goods to the North-West Provinces; that about eight months ago they were induced by certain brokers of Government Securities to enter on the purchase and sale of Government Securities; and that the present one is one of their first transactions. The evidence further disclosed that the plaintiffs were at no time possessed of any Government Securities, but when the due date arrived, plaintiff Juggernaut went to his nephew Dann Mull, a broker in the firm of Peel Jacob and Company, and told him that he had sold Rs. 25,000 Government Paper to Ram Dyal and Chobnauth, the defendants, which would be due two days after, and that the broker in the transaction had promised to bring about a settlement, if not, he would have to tender the paper to the purchaser, and he asked Dann Mull to lend him Government Securities to that amount for the purpose of making a formal tender. No arrangement having been come to, the plaintiff Juggernaut, on due date, called on Dann Mull, who sent his durwan with him to Badul Chunder Dutt, with a request to accommodate him with Government securities of the value he wanted, which, if not used, would be returned to him. Juggernaut, accompanied by the durwan, went to Badul Chunder Dutt, who handed him the Government Securities required. Badul Chunder Dutt's evidence was that he did not sell the Government Papers to plaintiff; he therefore mentioned no price or rate to him, but merely lent the papers to him by way of accommodation.

"Without any endorsement he handed over the papers at 10 A.M. and got them back at 2 P.M. on the same date.

"The facts connected with the alleged tender of the papers proved in evidence were, that the plaintiff, accompanied by Dann Mull's durwan, called at the office of Mr. C. F. Pittar, an attorney, and got a letter from him addressed to the defendants, tendering the papers, and Dann Mull's durwan, Dew Sing, and the plaintiff, proceeded to the Broker's Exchange in New China Bazar, where they had expected to find the purchaser. They did not, however, find

*[Sec. 23 :—The consideration or object of an agreement is lawful, unless it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another; or the Court regards it as immoral or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful.

Every agreement of which the object or consideration is unlawful, is void.

†[Sec. 30 :—Agreements by way of wager are void, and no suit shall be brought for recovering anything alleged to be won on any wager or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.

This section shall not be deemed to render unlawful a subscription or contribution, or agreement to subscribe or contribute, made or entered into for or toward any plate, prize or sum of money, of the value or amount of five hundred rupees or upwards, to be awarded to the winner or winners of any horse-race.

Section 294 A of the Indian Penal Code not to be affected. Nothing in this Section shall be deemed to legalize any transaction connected with horse-racing, to which the provisions of Section 294A of the Indian Penal Code apply.]

them there. The papers, however, were shown to one Tincoury, who sat in the same room, but who was [793] in no way connected with the buyers. The parties, thereupon, came back with the papers and at once returned them to their owner. All this happened on the 2nd September last, the due date. On the next day the plaintiffs caused an attorney's letter to be written to the defendants demanding the difference. The defendants in reply to this communication denied the tender altogether, and put forth a statement that the loss, if any, incurred by the plaintiffs had been fully made up by subsequent transactions between them, a statement which was not proved by evidence.

"The most important evidence in this case was that given by one of plaintiffs' own witnesses, Brindabun Chobay, which fully disclosed the real character of the transaction, and I have chiefly relied upon the testimony of this witness in taking the view which I have taken of the case, although he is father of the defendant Chohnauth. This witness is a respectable person and a broker of Government Securities of 33 years standing; his evidence was that about five to seven lacs worth of such transactions take place daily, in which what was chiefly looked for was the difference on the market value of the securities between the date of purchase and that of delivery, and that in most instances there is no *bond fide* intention of taking delivery of the paper, and that the present was one of those transactions. If the transactions in Government Securities go up to forty or fifty lacs, about four lacs would only change hands and that on the remainder of the transactions the parties are content with paying and receiving the difference, and that these transactions are like the bids upon the Government opium sale, popularly known as "Tazi Mandi," which is nothing more than gambling. That the inevitable consequence of these gambling transactions is, that a few persons become rich men while a very large number become boggars.

"I may add that, during my experience in this Court for the last twelve years, I have often found that men not possessed of any, or of only a very small amount of capital, recklessly enter into these dealings to the extent of lacs of rupees without possessing a single piece of Government Paper, and that it is very seldom that any paper is actually delivered or accepted, and all [794] that is done is that a certain amount of difference, amicably settled, is paid and accepted, and that when the parties are unable to come to terms the squabble has found its way into the Small Cause Court. The question which I have the honour to submit for the decision of the High Court has never been distinctly raised in any of these cases so far as I am aware, both parties having been willing to treat these contracts as ordinary commercial transactions. In this particular case, the intention clearly was not a *bond fide* sale, on one side, or a purchase on the other. The object was to speculate on the rise and fall of the market. Such being the real character of the transaction I have held it to be a gambling or wagering transaction, and as such opposed to public policy and have held, under s. 23 of the Contract Act, that it is a contract void in law. In expressing my opinion of this particular transaction, I ought to say that I do not desire to be understood as saying that there might not be a *bond fide* sale of shares or securities or goods with a condition for future delivery, even when the seller was not possessed of the article at the time the contract was made. Such a sale is distinctly recognised by s. 88 of the Contract Act. These cases, however, in my opinion, stand altogether on a different footing. In this case I found, as a fact, that there was no real intention to complete the purchase, but merely to seek the difference, and that there was no legal tender of the securities. Having regard to these facts I am of opinion that the case clearly comes within the scope of ss. 23 and 30 of the Indian Contract Act, and

Grizewood v. Blane (11 C. B., 538). I have accordingly directed judgment to be entered for the defendants. But having regard to the importance of the point of law raised for the first time in this Court, I have made my judgment contingent upon the opinion of the Hon'ble Judges of the High Court upon the following questions, which I respectfully submit:—

"1st.—Whether upon the facts, as found by me, the contract was an agreement by way of wager, and, therefore, void within the meaning of s. 30, and contrary to public policy under s. 23 of the Indian Contract Act.

"2nd.—Whether the tender was a good legal tender."

[795] Mr. T. A. Apcar, for the plaintiff, contended that the contract was not a wagering contract, and referred to *Grizewood v. Blane* (11 C. B., 538); *Thacker v. Hardy* (L. R., 4 Q. B. D., 685); *Hilton v. Eckersley* (24 L. J., Q. B., 353); *Ram Lall Thacoorsej Dass's case* (4 Moore's I. A., 339).

Mr. Sale for the defendant cited *Higginson v. Simpson* (L. R. 2 C. P. D., 76).

The **Opinion** of the Court (GARTH, C.J., and WILSON, J.), was delivered by

Garth, C. J.—The contract in this case, as I understand, was in writing; there was nothing ambiguous about its terms, and it appeared upon the face of it to be a contract for the sale and purchase of Rs. 25,000 Government Securities, to be delivered on the 1st or 2nd of September following.

The Judge of the Small Cause Court appears to have gone into the question upon oral evidence, whether the contract between the parties was really what it purported to be, or whether it was merely a wagering contract for differences without any intention by either party to carry out the sale and purchase of the securities.

Upon this question the Judge has decided that it was a wagering contract, and as such void under s. 30 of the Indian Contract Act, or contrary to public policy under s. 23 of that Act; and the first question submitted to us by the reference is, whether he was right in so holding.

Now, if it was competent to the Judge to determine *upon oral evidence* what the nature of the contract was, I should consider that we had no right to question his finding upon the facts; but it seems to me that under s. 92 of the Evidence Act it was not competent for the defendant to go into oral evidence for the purpose of varying or contradicting the express terms of the contract. There was no ambiguity about it, and I do not see why evidence was admissible to vary or contradict its terms.

In the case of *Grizewood v. Blane* (11 C. B., 538), to which we have been [796] referred, the contract upon which the plaintiff declared was not for the sale and purchase of the share in question, but for differences in the price of the shares on a given day; and the contract was of such a nature upon the face of it that the jury might well find, as they did, that it was nothing more or less than a gambling transaction. It has since been doubted by very high authority, see *Thacker v. Hardy* (L. R., 4 Q. B. D., 685), whether the Judge and Jury in *Grizewood v. Blane* (11 C. B., 339) did not take an erroneous view of the transaction; but considering the view which they did take of it, it was undoubtedly a void contract under the English Gaming and Wagering Act.

And the same observation applies to another case which was cited in argument before us—*Higginson v. Simpson* (L. R., 2 C. P. D., 76). In that case the language of the contract was ambiguous and it was certainly consistent with its terms that it was intended to be a gaming transaction.

Then it was argued by Mr. Sale that, although evidence is not admissible to alter or vary the terms of a written contract, it is admissible for the purpose of showing illegality; but a contract by way of gaming and wagering is in this country, as in England, *void and not illegal*. It is expressly made void by s. 30 of the Act; and it therefore cannot, in my opinion, be said to be illegal as being contrary to public policy. I have also considerable doubt whether oral evidence is admissible for the purpose of showing that the contract is in its nature illegal. So long as there is no ambiguity about it, the question whether it is illegal or not depends, as it seems to me, upon the terms of the contract itself.

I think, therefore, that evidence was not admissible for the purpose of varying the terms of the contract, and that the first question which is referred to us should be answered in the negative.

The second question is apparently founded on some misapprehension. It seems to have been taken for granted in the Court below, that a legal tender of the securities was absolutely [797] necessary; but this was not so. If the plaintiff was ready and willing to perform his part of the contract, that is to say, if he was in a position to transfer the securities on the 2nd of September, and did his best to inform the defendant by going to his place of business, that he was so, that would be sufficient, in the absence of evidence to the contrary, to constitute readiness and willingness.

If the plaintiff had the stock in his possession, as he says he had, there would seem every reason to suppose that he would be prepared to carry out the transaction.

No man, one would think, would ordinarily find any difficulty in completing such a lucrative bargain.

As this point however has not been decided by the Court below, the case, must go back for that purpose.

The costs in this Court will abide the result of the judgment of the Court below.

NOTES.

[This case was **overruled** in (1905) 32 Cal. 437 : 1 C.L.J. 155; 9 C.W.N. 305, F.B., and had been dissented from in (1888) 12 Bom. 585; (1894) 17 Mad. 480; (1898) P.R. 85; (1898) U.B. R. (1897-1901), Vol. II, 399.]

[9 Cal. 797 : 10 I.A. 113 : 13 C.L.R. 22 : 7 Ind. Jur. 216 : 4 Sar. P.C.J. 421]

PRIVY COUNCIL.

The 1st Decemeber, 1882.

PRESENT:

LORD FITZGERALD, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH,
AND SIR A. HOBHOUSE.

Radhapersad Singh.....Plaintiff

versus

Ram Parmeswar Singh and others.....Defendants.

[On appeal from the High Court at Fort William in Bengal.]

Costs—Set-off of costs ordered on the disposal of a preliminary point against costs awarded at the final disposal of the suit—Costs of party successful appeal.

It is not the usual practice, when costs of an interlocutory proceeding have been disposed of, to consider that an award of the general costs of the suit interferes with the order as

to the partial costs. A prior decree having given the costs incurred on the disposal of a preliminary point to the party successfully raising it, a later decree without expressly referring to the former, gave the costs of the suit, generally, to the opposite side. *Held*, that the costs due under the prior decree should be set off against those due under the later.

Although an appellant only partly succeeded in his appeal, the whole of his claim having been opposed in the Courts below on an untenable ground, *Held*, that there was no reason for departing from the general rule that the defeated party should pay the costs.

[798] APPEAL from a decree of a Divisional Bench of the High Court (24th February 1879), reversing a decree of the Judge of the Shahabad District (3rd August 1878).

A suit (for land) dismissed by the Subordinate Judge of the Shahabad district, upon the defence of limitation, was remanded (26 April 1869) for hearing on the merits; and it was ordered in the same decree that the defendants, respondents, should pay to the plaintiff, appellant, a certain sum for costs, with the costs incurred in the lower Court. The result of the hearing having been a decree in favour of the plaintiff as to part only of his claim, with proportionate costs to each party, another remand was obtained from the High Court, on this occasion to the District Judge, who also decreed partly in favour of the plaintiff, directing that each party should recover costs from the other in proportion to the success of each. To that decree was annexed a schedule of costs, including the costs recoverable by the plaintiff under the High Court's decree of 26th April 1869. The defendants then appealed successfully to the High Court, and on the 10th January 1874 the High Court reversed the decree of the District Judge, ordering that the plaintiff, then respondent, should pay to the defendants, then appellants, a certain sum for costs, and also costs incurred in the lower Court. Upon a further appeal to Her Majesty in Council, although the decree of 1874 was in part modified, this order for costs was in effect confirmed; the order in Council setting forth the amount of the costs of the appeal.

On the defendants' petition for exemption as to all costs, the plaintiff objected that he was entitled to set-off the sum decreed to him by the High Court on the 26th April 1869; and by the District Judge of Shahabad, Mr. A. C. Brett, this set-off was allowed. But the High Court (AINSLIE and BROUGHTON, JJ.), held that the decree of 1874 had dealt with the whole question of costs in the suit as an open one; and on the construction of that decree, held that costs generally, and in the whole suit, had been given to the defendants. They, therefore, disallowed the set-off.

The present appeal was accordingly proffered.

The orders of the Indian Courts, necessary to be referred to in this report, fully appear in their Lordships' Judgment.

[799] Mr. J. F. Leith, Q. C., and Mr. R. V. Doyne, appeared for the Appellant.

Mr. C. W. Arathoon for the Respondents.

The argument for the appellant traced the orders as to costs throughout the present litigation, and it was contended that the order of 26th April 1869 never having been reversed, required that effect should be given to it. Reference was made to s. 360 of Act VIII of 1859, the Code of Civil Procedure in force in 1869.

For the respondents reliance was placed on what had been done, and the orders made in the suit on and since the 10th June 1874. The construction placed on the decree of 1874 by the judgment now under appeal was correct.

Mr. J. F. Leith, Q. C., replied.

Their Lordships' Judgment was delivered by

Sir A. Hobhouse.—In this case there have been changes of parties, as frequently happens when a litigation extends over many years; but they have made no difference to the present question, and it will be convenient to speak of the appellant and respondents as if there was no change. So speaking of them, the appellant has been ordered to pay to the respondents the costs of a litigation with them. He now seeks to set-off against those costs the costs of a prior part of the same litigation which were awarded to him; and the question is whether his right to those prior costs has been displaced by a subsequent decree in the later part of the litigation. In the Court below the appellant was the plaintiff and the respondents were the defendants. The suit was for the recovery of certain lands; and the respondents set up a defence of the law of limitation. That issue was decided in their favour by the Subordinate Judge on the 31st July 1868, and in consequence the appellant's suit was dismissed. An appeal was presented to the High Court, who delivered judgment thereon on the 26th of April 1869. By their decree they reversed the decree of the Subordinate Judge, disallowed the defence of limitation, and ordered that the respondents should pay to the appellant the sum of Rs. 2,499-13-5, being the amount of costs incurred by [800] him in the High Court with interest; and further ordered that the respondents should pay to the appellant the costs incurred by him in the lower Court with interest. With that order the suit was remanded. The litigation was then carried on with various fortune, and came up twice to the High Court. On the second occasion the High Court gave a final decree in favour of the respondents. That decree was pronounced upon the 10th June 1874, when the appellant's suit was dismissed, and he was ordered to pay the costs of the suit generally. The decree has been, so far as regards costs, affirmed by Her Majesty in Council; but the construction and effect of it is not in any way altered by that affirmation.

The respondents applied to the Subordinate Court for execution for their costs, and the appellant then claimed to set-off against the costs claimed by the respondents the costs which were due under the decree of the 26th April 1869. It may be well to mention that an application had been made by the appellant for payment of those costs soon after they were awarded to him, but it appears to have been thought proper that the question should stand over until the final determination of the suit. The amounts claimed for costs by the appellant were, first, the sum found by the High Court itself on the 26th April 1869 to be due for expenses in that Court; and, secondly, an amount of Rs. 5,806 odd, which were found by the Subordinate Court on a previous occasion to be due in respect of the regular suit, as it is called, disposed of by the Court of the Subordinate Judge on the 31st July 1868. Mr. Brett, the Judge of Shahabad, allowed those amounts to be set-off by the appellant against the claim of the respondents, and he made an order to that effect on the 3rd August 1878. The respondents presented an appeal to the High Court, and on the 24th February 1879 the High Court reversed the order of the Subordinate Judge, and disallowed the claim of the appellant to set-off the costs awarded to him in the decree of the 26th April 1869; and they gave to the respondents the costs of that appeal.

The ground taken by the High Court seems to be that the decree made on the 10th June 1874, giving the whole costs of the suit, overrode the decree of the 26th April 1869, which gives the costs [801] of a portion of the suit in which the respondents had failed. Their Lordships think that there is no ground for so construing the decree of 1874. The question of costs awarded by the decree of

April 1869 was not before the Court in 1874 ; nor is it the usual practice, when costs of an interlocutory proceeding have been disposed of, to consider that an award of the general costs of the suit interferes with the order disposing of those partial costs. If there were any mistake in the prior order it ought to have been the subject of some review or rehearing, in which the Court should have had the subject brought to its mind. That was not the case, and their Lordships consider that it is neither the intention nor the effect of the decree of the 10th June 1874 to interfere with the costs awarded by the order of the 26th April 1869.

It has been mentioned that there were two amounts claimed by the appellant under the decree of 1869. With regard to the first, the costs incurred in the High Court on the appeal decided in 1869, their Lordships considered that the appellant is entitled to set those off against the costs now claimable by the respondents.

With regard to the second amount, questions arise as to the items composing it. The first of those items, and the most considerable of them, is a sum of Rs. 3,245, which is the Court-fee. The Court-fee applies not only to the hearing in 1869 but to the whole of the litigation ; and, inasmuch as the general costs of the suit are awarded to the respondents, it would be improper that they should have to pay the Court-fee on account of their failure in the first stage of the suit.

The next item is a sum of Rs. 2,490 for pleader's fee ; and it may be that a portion of that should be referred to the general costs of the suit, and not to the costs of the hearing of 1869. Their Lordships are not in a position to say how that matter is.

Under those circumstances their Lordships conceive that the proper order to be made will be : To discharge the order of the 24th February 1879 ; to declare that the appellant is entitled to the costs properly recoverable under the decree of April 1869 ; to declare that those costs consist of the sum of Rs. 2,499-13-5 mentioned in the decree of April 1869, and also such costs in the Court below as were occasioned by the defence of the law of limitation, and the costs of the trial and hearing [802] thereon, and of the decree of the 31st July 1868 ; that it be referred to the Court of the Subordinate Judge of Shahabad to assess the last-mentioned costs upon that footing ; and that the cause be remitted with a declaration that the costs when so assessed, together with the said sum of Rs. 2,499-13-5, are to be set off against the costs found due to the respondents. Interest should be charged as ordered by the decree of the 26th April 1869.

Their Lordships will make an humble recommendation to Her Majesty to that effect.

With regard to the costs of these latter proceedings, their Lordships have had considerable doubt, because the appellant does not wholly succeed ; but having regard to the fact that the whole of the appellant's claim was opposed in the Court below upon a ground which their Lordships think entirely wrong, they do not see sufficient reason for departing from the sound general rule that the party who is defeated in the controversy that is raised shall pay the costs.

They, therefore, think it right that the appellant should have the costs of this appeal, and also the costs in the High Court.

Appeal allowed.

Solicitors for the Appellant : Messrs. *Burton, Yeates, Hart, and Burton.*
Solicitors for the Respondents : Messrs. *Henderson & Co.*

NOTES.

[See (1887) 11 Mad. 269 (271).]

The 19th March, 1883.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE FIELD.

Mohiny Mohun Das.....Plaintiff

versus

Krishno Kishore Dutt and others.....Defendants.*

Onus probandi --Suit for possession of land—Presumption of possession and ownership.

If, in a suit for possession of land which was covered with water more than twelve years before the institution of the suit, the plaintiff proves that he exercised acts of ownership, as by letting out the julkur to [803] tenants, that is *prima facie* evidence of possession and ownership, and unless the defendant can make out a twelve-years' statutory title by adverse possession, the plaintiff's possession must be presumed to have continued, and it is not necessary for him to show a possession by acts of ownership within the twelve-years.

Baboo Chunder Madhub Ghose and Baboo Lal Mohun Das for the Appellant.

Baboo Guru Das Bannerjee and Baboo Bykanto Nath Das for the Respondents.

THE facts of this case sufficiently appear from the **Judgment** of

Garth, C.J. --In this case the Subordinate Judge has unfortunately taken an erroneous view of the law.

The subject of the dispute was a piece of land between two estates. It is admitted that one of these estates belonged to the plaintiff, and the other to the defendants. The question was, to which of the two the piece of land in question belonged.

Between these two estates there was a baor or water channel; and it seems to have been found by the Courts below that the land in question was formed by the silting up of this baor. Evidence was called on both sides to show at what time the silting up took place, or in other words, at what time the land in question, which was originally covered with water, became dry.

Upon that point the Subordinate Judge appears to have believed the defendants' witnesses in preference to those of the plaintiff. The defendants' witnesses said that the land became dry *more than twelve years before suit*; and the plaintiff's witnesses said that it became dry *within twelve years before suit*. It was upon the point of limitation that this evidence was offered.

Then, the only evidence adduced on either side as to the possession of the land during the time that it was covered with water, was given by the plaintiff. His witnesses proved that he had let out the julkur, or right of fishing in the water, which then covered the land in question, to certain tenants; and that under that letting they had exercised the right of fishing; and so far as appears this evidence was not contradicted.

* Appeal from Appellate Decree, No. 698 of 1881, against the decree of Baboo Nobin Chunder Ganguli, Second Subordinate Judge of Furreedpore, dated the 31st January 1881, reversing the decree of Baboo Rosik Chunder Roy, Second Munsif of Moolputgunge, dated the 11th March 1880.

Now, as regards these two points, namely, that of possession [804] and that of limitation, the Subordinate Judge has dealt with the case in this way.

As to the question of possession, he finds, as I understand him, that there is no evidence to show that the land ever belonged to the plaintiff; because he says: "I cannot find that the land below the water of the baor belonged to the plaintiff, merely because he was in possession of the water by letting it out to tenants as julkur. This fact may show that he had an interest in the julkur superior to that of those tenants, or that he was the proprietor of the julkur; but this fact I do not consider sufficient for the purpose of finding that the land covered by water belongs to him. I cannot, therefore, find that the land belongs to the plaintiff."

Now, if the plaintiff really did give reliable evidence that he had let out the julkur to tenants, and that they under that letting had exercised the right of fishing there, I think that was clearly evidence, and strong evidence too, that the land covered by the water, over which the right of fishing was enjoyed, belonged to the plaintiff.

Prima facie, in the case of land covered by water, the water belongs to the person to whom the land belongs; *cujus est solum, ejus est usque ad cælum*. The owner of land is entitled, *prima facie*, to everything either over or under it; and the ordinary, if not the very best means, of proving the ownership of land covered by water, is to show that rights of fishing have been exercised in and over the water. There are few other means of proving ownership over such land, except perhaps by working minerals, or carrying on other works below the surface of the soil.

And if the plaintiff in this instance proved such acts of ownership by fishing, they would clearly be *prima facie* evidence of his possession and ownership unless it could be shown that his taking the fish was referable to some other right or title.

And yet I understand the Subordinate Judge to say: "Assuming what the plaintiff's witnesses say with regard to these acts of ownership to be true, I consider it *no evidence of possession at all*, because it may be referable to some other right." He does not say to what right, nor is it even suggested that the plaintiff had any other right which would account for his ownership of the fishery.

[805] I think, therefore, that the Subordinate Judge in this respect was clearly wrong. Unless there is some good reason for disbelieving the plaintiff's evidence, or unless it can be shown that these acts of ownership, which were exercised by the plaintiff in the julkur, are referable to some other right than the ownership of the soil itself, the Subordinate Judge was bound to give full and proper effect to the plaintiff's evidence.

But then the Subordinate Judge says: "Even assuming that I were to consider these acts of ownership as proving that the land covered by water belonged to the plaintiff, he is nevertheless barred by limitation; because he has not shown that the land which was covered with water has silted up and become dry within twelve years before suit; and it is therefore not shown that he has exercised any acts of ownership over the land within the twelve years."

Upon this point also I consider that the Subordinate Judge has taken a wrong view. In a case decided by a Full Bench of this Court only a few days ago *Mahomed Ali Khan v. Kajah Abdul Hunny* (ante p. 744), the law upon this subject has been laid down very clearly.

In that case the question arose (with reference to the law of limitation), how far it is necessary for the plaintiff, in cases of this kind, to prove a possession by acts of ownership within twelve years before suit. There is no doubt

that he is bound to satisfy the Court that he has had a possession, and that he has lost that possession within the 12 years. The question is, how far it is necessary for him to prove *that possession by positive acts of ownership*, or how far the Court may presume in his favour from the fact of previous title and possession.

This is a question upon which some difference of opinion has prevailed in this Court, but which is now, I trust, satisfactorily settled. I regret that I was obliged to differ to some extent from my learned brothers of the Full Bench, but the difference is not one which affects the present suit. In such a case as this we were all agreed that possession ought to be presumed in favour of the plaintiff.

[806] The principle laid down in that case by my learned brothers is as follows :—I will read from their judgment :

"The true rule appears to us to be this, that where land has been shown to have been in a condition unfitting it for actual enjoyment in the usual modes—at such a time and under such circumstances that that state naturally would, probably did, continue, till within twelve years before suit, it may properly be presumed that it did so continue, and that the plaintiff's possession continued also, until the contrary is shown. This presumption seems to us to be reasonable in itself, and in accordance with the legal principles now embodied in s. 114 of the Evidence Act."

Now, applying that rule to the present case, it may be that, so long as the land was covered by water, the plaintiff might, as, in fact, he did prove acts of ownership over it by the exercise of the right of fishing.

But it was proved to the satisfaction of the Subordinate Judge that previous to the twelve years the land emerged from the water, that is, the baor silted up, and from that time it, of course, became impossible for the plaintiff to prove acts of ownership over it by fishing.

Then it seems to have been found by the Munsif—and there is nothing to the contrary found by the Subordinate Judge—that the land was waste, and did not become fit for cultivation until within six or seven years before suit.

This is, therefore, just one of the cases which are alluded to in the Full Bench judgment, and it discloses almost the same state of things which occurred in the case of *Radha Gobind Roy v. Inglis* (7 C. L. R., 364), decided by the Privy Council. In that case the land in question had formerly been covered by a bheel or lake, and after the bheel became dry the defendants took possession of it. The plaintiff proved, *prima facie*, his title to the bheel and possession of it in one of his ancestors, but he gave no proof of acts of ownership within the twelve years before suit. It did not appear clearly when the bheel became dry, and the defendants failed to prove possession of the land for twelve years before suit. Under these circumstances the Privy Council held that, as the plaintiff had proved a title to, and possession of, the bheel, his possession [807] must be presumed to have continued, unless the defendant could make out a twelve years' statutory title by adverse possession.

Unfortunately in this case the Subordinate Judge has taken a view (which my brother FIELD tells me he has erroneously taken in other similar cases), that no such presumption can be made in favour of the plaintiff, but that he must show a possession by acts of ownership within the twelve years.

Here, again, therefore he is wrong. If it was shown that the plaintiff exercised acts of ownership over the land when covered by water, and that when the land became dry it was in such a state that it would be very difficult, if not impossible, to prove any acts of ownership over it, the Court might, and

ought to, presume (according to the rule laid down in the Full Bench case), that the plaintiff's possession continued until the contrary was shown.

I think, therefore, that the case should be remanded to the Court below to be considered, with due regard to the law laid down by this Court.

The costs in this Court and in the lower Appellate Court will abide the result.

Field, J.— I am of the same opinion on both points.

With reference to the question of limitation I shall merely refer to one more case in addition to those quoted by the very learned Chief Justice, that is the case of *Rao Karan Singh v. Raja Bahar Ali Khan* (L.R. 9 I.A., 99).

Then, with reference to the evidence as to the enjoyment of the julkur being evidence of title, I desire to add that, under the special circumstances of this particular case, it appears to me that the evidence of possession and enjoyment of the julkur ought, if believed and un rebutted, to be taken to be good evidence of the title to the land. I say under the special circumstances of this particular case, because there are cases in this country in which it might be impossible to consider evidence of the ownership and enjoyment of a julkur to be evidence of the title to the land covered by the water, for example, the case of a julkur in a deep and navigable river. In the present case, the water which forms the julkur is a small piece of water in a small estate. The [808] enjoyment of that julkur would presumably belong to the owner of the estate, unless he had leased it out to tenants. It would follow that if the owner of the estate could show that he had enjoyed the julkur, this would be good evidence that the land under the julkur belonged to him, that is, in the absence of any suggestion, which has not been made in this case, that this enjoyment of the julkur was referable to a lease of an incorporeal right taken from a third party.

NOTES.

[See the Notes to 9 Cal. 744 *supra* and 3 Cal. 796 in the ' Law Reports Reprints, ']

[9 Cal. 808 : 12 C.L.R. 389]

APPELLATE CIVIL.

The 19th February, 1883.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE O'KINEALY.

MusyatullaDefendant

versus

Noorzahan.....Plaintiff.*

Landlord and tenant—Ejectment—Right of occupancy—Forfeiture—Beng. Act VIII of 1869, s. 52.

The mere omission to pay rent for five years does not of itself amount to forfeiture of a ryot's right of occupancy, and will not be sufficient to sustain an action by the landlord for the recovery of the ryot's holding.

A ryot having a right of occupancy cannot be legally ejected, unless under an order regularly obtained under s. 52 of the Rent Law, that is, under a decree for arrears of rent unsatisfied within fifteen days from the passing of the decree.

* Appeal from Appellate Decree, No. 661 of 1882, against the decree of F. Comley, Esq., Judge of Purnea, dated the 21st January 1882, affirming the decree of Baboo Lall Bohary Dey, Munsif of Kissengunge, dated the 19th September 1881.

THIS was a suit for ejectment and khas possession. It was found as a fact that in 1882 (1875-76) the defendant had a right of occupancy in the lands in dispute; that he paid no rent for the years 1283, 1284, 1285, or 1286; and that a notice to quit had been served upon the defendant on the 28th of Pous 1286 (11th January 1880), requiring him to give up possession by the end of Cheyt 1286 (i.e., before the 12th of April 1880). The Court of First Instance gave the plaintiff a decree on the authority of *Hem Nath Dut v. Ashgur Sirdar* (I.L. R., 4 Cal., 894), and this decree was affirmed on appeal. The defendant appealed to the High Court on the following grounds, amongst others:—

That under s. 22 Beng. Act VIII of 1869, the learned Judge below appears to have erred in holding that your petitioner's [809] right of occupancy was terminated by the notice to quit, alleged to have been served upon your petitioner.

(2) That the right of occupancy once acquired cannot be lost for the omission to pay rent for some years.

(3) That the plaintiff having not brought his suit under s. 52, Beng. Act VIII of 1869, upon the ground of your petitioner's omission to pay rent, the lower Appellate Court was wrong in law in relying upon it for deciding the case in favour of the plaintiff.

Mr. *Twidale* for the Appellant.

Baboo *Saligram Singh* for the Respondent.

The **Judgment** of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

Prinsep, J.—The plaintiff sues to eject the defendant, stating that he has no occupancy rights, and that notice to quit has been regularly served on him.

It has been found by the lower Appellate Court that the defendant and his father have been actual cultivators for many years, and that the defendant in 1282 had acquired rights of occupancy; but the District Judge goes on to find that inasmuch as, on the defendant's own admission, he has paid no rent to any one for five years, he has lost those rights of occupancy, and consequently is liable to be dispossessed after notice.

It has been settled by the judgment of Division Bench of this Court in the case of *Duli Chand v. Rajkissore* (*ante*, p. 88: 11 C. L. R., 326), and we agree in that judgment, that a ryot having a right of occupancy cannot be legally ejected unless under an order regularly obtained under s. 52 of the Rent Law, that is to say, under a decree for arrears of rent unsatisfied within fifteen days from the date on which it was delivered. The suit in its present form therefore is bad and must fail.

We think it necessary also to point out to the District Judge that even if a ryot who has acquired a right of occupancy fails to pay rent for five years, he does not necessarily forfeit that right unless it can be proved that he has abandoned the land, [810] or a decree for ejectment, which would be operative under s. 52, has been passed against him.

The decrees of the lower Courts will be set aside, and the suit dismissed with costs in all the Courts.

Appeal dismissed.

[9 Cal. 810 : 12 C.L.R. 453]

APPELLATE CIVIL.

The 2nd March, 1883.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE O'KINEALY.

Sharat Chunder Ghose and others.....Plaintiffs

versus

Kartik Chunder Mitter and anotherDefendants.*

Suit by minor—Infant—Minor—Compromise of suit—Leave of Court.

Where a compromise of a suit is entered into on behalf of an infant defendant, the approval of the Court to such compromise must be express, and will not be inferred from the subsequent passing of a decree in terms of such compromise. Without such approval, the compromise will not bind the infant, and will be set aside at his instance.

Rajagopal Takkaya Naiker v. Subramanya Ayyar (1. L. R., 3 Mad., 103), cited and followed.

THE facts of this case are as follows :—Some time previously to the year 1860 one Raj Kristo Bose died, leaving him surviving one son, Khetter Nath Ghose, and one daughter, Modhumoti Dasseo. Khetter Nath died in 1861, and was succeeded by his widow and heiress Showrobini, who died in 1875. The plaintiffs, are the three sons of Modhumoti Dasseo. On the 25th of November 1873 Showrobini executed a bond in favour of the defendant Kartik Chunder Mitter for Rs. 1,500, who, on the 10th of March 1877, filed a suit for the recovery of the amount of the bond and interest—in all, Rs. 2,388, against Modhumoti as guardian of the plaintiffs, who had succeeded to the estate of Khetter Nath on the death of Sowrobini in 1875. (Modhumoti, it should be mentioned, had been appointed guardian of the minors by the Judge of the District Court under the provisions of Act XI. of 1858). On the 13th of March 1877, Modhumoti's pleader filed a deed of com-[811]promise, by which Modhumoti agreed to pay in full satisfaction of Kartik Chunder Mitter's claim a sum of Rs. 1,600, payable in three instalments, and a decree was passed in accordance with the terms of this deed. The present suit was filed by the plaintiffs to have it declared that that decree was not binding on the plaintiffs nor on the estate inherited by them from their uncle Khetter Nath.

On the merits the Subordinate Judge fixed the following issues :—(1), whether the deed of compromise on which the decree was founded was filed *bona fide* on behalf of plaintiffs' mother and with her permission ; and, if so, whether it was for the benefit of the minors ; (2), whether Showrobini contracted the debt for the benefit of Khetter Nath's estate, and whether she was legally competent to do so ; (3), whether the act of Showrobini, who had a life interest, is binding on the reversioners the plaintiffs ; (4), whether the plaintiffs are entitled to the relief sought for, namely, a declaration to set aside the decree. The Subordinate Judge found all the issues in the plaintiffs' favour, and he decreed the suit with costs. On appeal the District Judge reversed the Subordinate Judge's finding on the first issue, and dismissed the suit, citing *Lekraj Ray v. Mahtab Chand* (10 B. L. R., 35 : 14 Moore's I. A., 393). The plaintiffs appealed to the High Court.

* Appeal from Appellate Decree No. 869 of 1882 against the decree, of T. Smith, Esq., Judge of East Burdwan, dated the 1st March 1882, reversing the decree of Baboo Bhupotty Roy, Subordinate Judge of that District, dated the 27th December 1880.

Baboo Bhowany Churn Dutt and **Baboo Chunder Madhub Ghose** for the Appellants.

Baboo Tarruck Nath Sen and **Baboo Rashbehary Ghose** for the Respondents.

The **Judgment** of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

Prinsep, J.—On the 10th of March 1877 Kartik Chunder Mitter brought a suit against the present plaintiffs, as represented by their mother and guardian Modhumoti Dasse, to recover a sum of money said to have been borrowed by Showrobini, a Hindu widow then in possession of the estate, which has since passed from her hands. Three days later, and before any proceedings had been taken on the plaint to that suit, in fact before even summonses had been issued, Modhumoti's pleader filed a petition [812] of *ekbaljamah*, consenting to a decree in favour of Kartik Chunder for a portion of the amount sued for. A few days later a decree was passed in accordance with this petition. One of the three minor defendants in that case has now attained majority, and for himself, and also on behalf of his minor brothers, sues to get rid of the effect of that decree in consequence of its having been put into execution against him by the attachment of some of his property.

The District Judge on appeal has merely considered the manner in which the compromise was effected in which the decree was passed. On the facts, which have been stated, and also because he considered that the minors were sufficiently advised by their maternal uncle Brojendro Ghose and their relative Bishembur Bose, the District Judge has held that the decree was binding against them.

Whatever may have been the practice of our Courts regarding their duty in accepting compromises on behalf of minors in pending suits, and in embodying them in the terms of the decree, it is quite clear to us that since July 1871, that is to say since the decision of the Privy Council in the case of *Abdul Ali v. Mozuffer Hossem Chowdhry* (16 W. R., P. C., 22), the procedure of our Courts should have been guided by the rule laid down by their Lordships in that case. Their Lordships state that, "if there really had been an honest compromise made, the practice of the Court is quite plain as to how that compromise ought to have been carried out. It ought to have been carried out by proper deeds and filed in Court, particularly where infants were concerned, so as to have had the assent of the Court at the time instead of its being totally concealed from them." The rule laid down in that case has since been adopted by the legislature in enacting s. 462 of the present Code of Civil Procedure. It has been laid down by the Madras High Court in *Rajagopaul Takkaya Naiker v. Subramanya Ayyar* (I. L. R., 3 Mad., 103), that the approval of the Court of a compromise thus effected must be express, and cannot be inferred from the subsequent passing of a decree in accordance with the terms of the compromise. We agree with that judgment [813] and in applying it to the present case we think that the decree of the 27th March 1877 is inoperative as against the plaintiffs in the present case. The parties consequently will be placed in the position that they occupied before that decree was passed, but with the consent of the pleader for the respondents, we think that the liability of the plaintiffs to the debt incurred by Showrobini, which can be conveniently tried in the present suit on the second and third issues, should be so tried. Those issues have been determined by the Court of First Instance, and therefore it remains for the lower Appellate Court to come to a distinct finding on them. For this purpose we direct that

the case be remanded to the lower Appellate Court for trial on its merits.* We would add that, in the event of the debt being found binding on the present plaintiffs, they will be liable for the whole amount, and not merely for the amount stipulated on their behalf in the compromise.

Costs will abide the result.

Case remanded.

NOTES.

[COMPROMISE—SANCTION OF COURT—

The provisions as to compromise contained in the Civil Procedure Code when minors are parties, should be strictly complied with :—28 All. 585 ; 33 I.A. 128 ; 36 Bom. 53 ; 13 Bom. 137 ; 7 C.W.N. 90 ; 6 O.C. 175 ; 15 Bom. 594 ; 3 C.L.J. 119. *Contra* 12 Mad. 483.

The sanction of Court obtained subsequently to the compromise was held insufficient :—34 Mad. 314 *dissenting* from 20 All. 98.

These principles apply to arbitration proceedings :—31 All. 572 ; 36 I. A. 168. As regards reference of suit to arbitration, *see* 28 All. 35 ; *contra* 17 C.P.L.R. 147 ; 35 Bom. 153 ; 19 Cal. 334 ; abandonment of issue, *see* 22 Mad. 538. Even where the compromise would be binding on the minor, as that effected by a Hindu father, so long as the minor is a party to the suit, these provisions should be complied with :—(1913) 40 I. A. 132 ; 13 C.W.N., 163. When a compromise is set aside in a separate suit as not binding on the minor, the effect is to revive the original suit :—(1910) 10 I. C., 355.]

[9 Cal. 813 : 12 C.L.R. 475]

APPELLATE CIVIL.

The 2nd March, 1883.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE O'KINEALY.

Bacharam Mundul.....Defendant

versus

Peary Mohun Banerjee.....Plaintiff.*

Onus probandi—Resumption, Suit for— Lakheraj— Rent-free lands—Landlord and Tenant.

In suits for the resumption of lands alleged by the defendant to be lakheraj, the burden of proof is in the first instance on the plaintiff to show that the lands are *mal*. The fact that the defendant is a tenant of the plaintiff is a matter to be taken into consideration by the Court in determining whether, on the facts of the case, the plaintiff has made out a *prima facie* case ; but unless the Court finds that the plaintiff has made out a *prima facie* case, judgment should be given for the defendant.

Lurryhur Mukhopadhyaya v. Madhub Chunder Baboo (8 B. L. R., 566 ; 14 Moore's I. A., 153) ; *Akbar Ali v. Bhuja Lal Jha* (I. L. R., 6 Cal., 666) ; and *Neraj Bundopadhyaya v. Kali Prasunno Ghose* (I. L. R., 6 Cal., 543) cited.

* Appeal from Appellate Decree No. 708 of 1882, against the decree of Baboo Promotho Nath Mukerjee, Subordinate Judge of Burdwan, dated the 27th March 1882, reversing the decree of Baboo Chunder Coomar Das, Munsif of Boodbood, dated the 4th January 1881.

[814] IN this case, the plaintiff who is the talukdar of mouzah Bhuri, pergunah Bhuga, in the district of Burdwan, sued one Bacharam Mundul, and nine others, named Pal. These latter defendants had been holders of a jote within the plaintiff's taluk, which jote yielded a jama of Rs. 30-5-6½, and was registered in the name of one Manikram Pal, deceased. In 1879 the plaintiff obtained a decree for rent against all the Pal defendants. In execution of that decree he attached the tenure under s. 59 of the Rent Law, and gave a schedule of all the lands comprised in the jote. The defendant Bacharam preferred a claim to three of those plots, alleging that they were lakheraj lands, and that he had purchased them as such from five of the Pal defendants, the owners thereof. This claim was allowed on the 17th of January 1880; and on the 1st of July 1880, the plaintiff brought the present suit for a declaration that the lands were not lakheraj but were comprised in the tenure registered in the name of Manikram Pal; and for possession. Bacharam Mundul's defence was that the lands claimed are lakheraj, and that he is in possession of the same.

The Court of First Instance found that each party had failed to prove the case set up by him, and, throwing the onus on the plaintiff, dismissed the suit with costs. On appeal the Subordinate Judge said: "The evidence on both sides has been held by the lower Court to be equally unsatisfactory. The decision of the case therefore hinges on the question of onus. It seems to me the lower Court has wrongly placed the onus on the plaintiff under the rulings of the High Court *Akbar Ali v. Bhy Ea Lall Jha* (I. L. R., 6 Cal., 666); *Newaj Bundopadhyaya v. Kali Prasunno Ghose* (I. L. R., 6 Cal., 543).

The Subordinate Judge then referred to *Sheeh Narain Roy v. Chidam Doss Byrayer* (6 W. R. (Act X), 45); *Gungadhar Singh v. Bimola Dossce* (5 W. R., (Act X), 37); *Ram Narain Singh v. Bistoo Thakoor* (15 W. R., 299); *Khoshed Ali v. Dhoondharee Singh* (20 W. R., 457), which had been cited for the defendant, and, holding that the onus lay upon the defendant to prove his lakheraj title, reversed the judgment of the Court of First Instance [815] and gave the plaintiff a decree. The defendant appealed to the High Court.

Baboo Kaly Churn Banerjee for the Appellant.

Baboo Rash Behary Ghose for the Respondent.

The **Judgment** of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

Prinsep, J. The plaintiff in this case sued to recover possession of certain lands as *mal*, on the ground that his title had been impugned by an adverse order in the case No. 1654 of 1879. The defendants denied that the lands were *mal*, and claimed them as their rent-free holding.

The first Court dismissed the suit. On appeal the Subordinate Judge was of opinion that the onus of proving that the land was lakheraj lay upon the defendants, and finding that they had not proved it to be so, he decreed the claim. The findings of fact upon which his decision is based are—first, that the defendants are the plaintiff's tenants in respect of certain *mal* lands; and, second, that the lands which are alleged to be lakheraj, and which form the subject of this suit, are within the ambit of the plaintiff's zamindari. In the case of *Hurryghun Mukhopadhyaya v. Madhub Chunder Baboo* (8 B. L. R., 566; 14 Moore's I. A., 153), their Lordships of the Privy Council declared that in suits for the resumption of lands alleged to be held as lakheraj the onus lies on the plaintiff. They said: "The only other point to be decided on this appeal is, whether there is any peculiarity in this case, which ought to take it out of the general rule. Their Lordships are of opinion that there is not. Mr. *Doyle* argued that the defendants had admitted that the lands in question, with the exception

of the small quantity no longer claimed, were within the appellant's estate; but such an admission is obviously not sufficient to meet the burthen of proof thrown upon the plaintiff. It was at most an admission that the lands were within the ambit of the estate, not that they had ever been *mal* lands—in fact the defendants strenuously asserted the contrary. The appellant, therefore, having failed to give any evidence on the second trial in support of his amended plaint, [816] the decree dismissing his suit was right." In this case, as in that, the lands are within the ambit of the plaintiff's zamindari, and as there, so here, the defendants assert that the lands are lakheraj. The Privy Council decision just quoted is binding on this Court, and has been followed by the decisions in *Arjunnessa v. Peary Mohun Mookerjee* (I. L. R., 1 Cal., 378), and *Koylash Bashing Dossee v. Cocool Moni Dossee* (I. L. R., 8 Cal., 230).

It has, however, been argued before us that where a tenant holds lands in a zamindari, if he claims any other lands as lakheraj, the onus is shifted from the plaintiff to the defendant, and in support of his contention two cases have been brought to our notice. The first is the case of *Akbar Ali v. Bhy Ra Lall Jha* (I. L. R., 6 Cal., 666). In that case if we take certain paragraphs by themselves, it certainly would appear that something in the nature of the proposition now contended for was laid down, but when we turn to the decision of the Chief Justice Sir RICHARD CARTER, we find in his statement of the facts that the land in dispute was included within the ambit of the *mal* land held by the defendant, and he came to the conclusion that under the whole circumstances of the case the onus was on the defendant. The next case cited is that of *Neraj Bundopadhya v. Kali Prasanno Ghose* (I. L. R., 6 Cal., 543) reported in 8 C. L. R., p. 7. There the Judges laid down that the onus lay upon the defendants; but no doubt the decision turned on the special facts of the case, and these are not given in the report.

In neither of these cases was the judgment of the Privy Council, to which we have already referred, or the subsequent case which followed it *Arjunnessa v. Peary Mohun Mookerjee* (I. L. R., 1 Cal., 378) quoted. We do not understand these cases to decide that if in an estate a man held one piece of land in one corner and another piece in another corner, because he paid rent for the former the onus would lie on him to prove his lakheraj title to the latter. Indeed this would be distinctly opposed to the view laid down by the Judicial Committee of the Privy Council. What their Lordships held was that the onus lay on the plaintiff, and he must prove that the land in dispute was part of the *mal* land of his estate, and that he could do, either by proof of receipt of rent or that its proceeds were taken into account at the perma-[817]nent settlement, or by any other sufficient means. And they distinctly declared that, unless plaintiff could make out a *prima facie* case, that is a case in which he would be entitled to a decree if the defendant did not produce evidence, his suit should be dismissed.

In the present case it appears from the schedule to the plaint that the land in dispute is surrounded by other lands held by the defendants for which rent is paid. This is a matter which should be taken into consideration in dealing with the case. If it be true, as stated in the plaint, that the land is so surrounded by ryotti lands of the defendants, it is some evidence to go before a jury or Judge to show that the land forms part of the tenure of the defendants, and is not their lakheraj holding. But no decree can be passed adversely to the defendants on it, unless the Judge is of opinion that it establishes a *prima facie* case of the nature already described.

The case will be remanded to the Subordinate Judge in order that he may decide whether the land belongs to the tenure of the defendants, or, as is asserted by them, is their lakheraj holding.

Costs will abide the result.

Case remanded.

NOTES.

[ONUS OF PROOF—LAKHERAJ—

See 1 Cal. 378 ; 5 Cal. 919 ; 8 Cal. 230 ; 12 Cal. 182 ; 10 C.W.N. 434 ; (1912) 14 I. C. 90 *contra* 6 Cal. 666 ; 4 C.L.J. 548.]

[9 Cal. 817 12 C. L. R. 356]

APPELLATE CIVIL.

The 9th March, 1883.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE O'KINEALY.

Upendra Narain Myti.....Plaintiff

versus

Gopee Nath Bera and others.....Defendants.*

*Hindu widow—Reversioner—Declaratory decree—Waste by Hindu widow
Compromise by Hindu widow—setting aside compromise—Joint
family—separation—Partial separation.*

Where the next reversioner after a Hindu widow sues, during the lifetime of the widow, for a declaration that a compromise made by her is not binding on him, it is no sufficient ground for refusing the declaration that the plaintiff may not succeed for many years to the possession of the property, or that some of the property is of a perishable nature.

The separation of one member of a joint Hindu family does not necessarily create [818] a separation between the other members nor cause the general disruption of the family.

Radha Churn Dass v. Kripa Sindhu Dass (I. L. R., 5 Cal., 474) dissented from.

IN this case the judgment appealed from is as follows :—

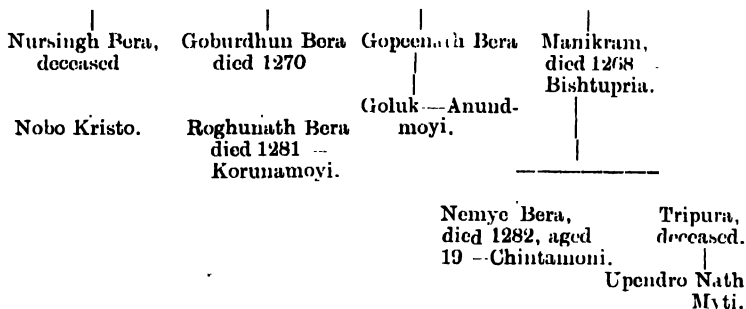
The plaintiff brought a suit for declaration under Act I of 1877 to declare a certain deed of compromise executed by the defendants void as regards his rights as reversionary heir. He obtained a decree, against which the defendant has appealed. It appears that Madhub Bera died leaving four sons, who lived together as an undivided family till 1264 (1857). In that year, as the plaintiff alleges, Nursingh Bera separated himself, but the other three went on living as an undivided family till 1284 (1877). The defendants deny this, and say that the four brothers lived together till 1264, and then separated, and were never re-united.

In February 1878, Korunamoyi instituted a suit against Gopeenath and Chintamani for the share of the whole property which came to her through

* Appeal from Appellate Decree, No. 339 of 1882, against the decree of F. W. Badcock, Esq., Officiating Judge of Midnapore, dated the 27th December 1881, reversing the decree of Baboo Jodu Nath Roy, First Subordinate Judge of that district, dated the 27th September 1880.

her deceased husband Roghunath. This suit was compromised by the solehnama to which the plaintiff now objects. The defendant Gopeenath in the solehnama agrees to give Chintamoni 15 bighas of land and Korunamoyi 25 bighas, and Korunamoyi for herself, and Bishtupria as guardian of Chintamoni, agree to give up all rights to the property of their deceased husbands.

MADHUB BERA.



The plaintiff alleges that Gopeenath, in collusion with Bishtupria, executed the solehnama with the object of injuring his reversionary right to the property left by Nemyc Bera. This appears to me to be an allegation of fraud on the part of Bishtupria, and part of the relief the plaintiff asks for is that the solehnama may be declared fraudulent.

The principle points raised in appeal are as follows: *First*.—The plaintiff is the next reversionary heir, and therefore, cannot bring any suit. *Second*.—This is not a case where, in the exercise of sound discretion, a declaratory decree should be made. *Third*.—The plaintiff should have brought a suit for appointing a Manager to the estate, and not having [819] done so, the provision in Act I of 1877, s. 42,* precludes him from suing for a declaratory decree. *Fourth*.—The plaintiff alleges that Nursingh Bera separated in 1864. As no partial separation of a Hindu family can take place, the plaintiff should have proved that the remaining three brothers formally re-united. He has not done this, and therefore the family must be considered as divided. *Fifth*.—The lower Court's finding on the evidence that the plaintiff's account of the separation of the family was not correct.

As regards the first point, I have not been able to find any precise definition of the term reversionary heir, but it appears to me that the plaintiff is the heir, because on the death of Chintamoni and Bishtupria, he will be entitled to the property as the heir of Nemyc. Even supposing, however, that he is not the next reversionary heir. I should, on the authority of the cases of *Shama Sundari Chowdrain v. Jumona Chowdrain* (24 W. R., 86), and *Retoo Raj Panday v. Lalljee Panday* (24 W. R., 399), consider that he had the right to institute a

* [Sec. 42 :— Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief.

Discretion of Court as to declarations of status or right.

Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Bar to such declaration.

Explanation.—A trustee of property is a 'person interested to deny,' a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee.]

suit. It is quite true that in those two cases, the grounds on which a remote reversionary heir can sue are that the holder of the property as committed waste and fraud, and that the lower Court has not in this case found that Bishtupria acted fraudulently, but I think the nature of the compromise, supposing the plaintiff's account of the separation to be true, shows that Bishtupria must have acted fraudulently. If it is true, that in 1284 the family was joint, then Bishtupria could have claimed some 60 bighas, and abandoned all her claims. I think this can hardly be considered as a mere act of waste, and the plaintiff himself distinctly alleges it to be fraudulent. I, therefore, consider that the plaintiff was justified in bringing a suit, though whether he is entitled to a declaratory decree will be considered further on. The next point is that this is not a case in which the Court would, in the exercise of a sound discretion, grant a declaratory decree. The plaintiff is a minor and Chintamani is also a minor, and it may, therefore, be reasonably supposed that many years may elapse before the plaintiff can inherit the property, and it is, of course, quite possible that he may not inherit at all. The case of *Hunsbutti Kerain v. Ishri Dutt Koer* (1. L. R., 5 Cal., 512), is the latest case that has been brought to my notice, and that lays down very clearly the cases where declaratory decrees should not be granted. The case of *Sri Narayan Mitter v. Krishna Sundari Dasi* (11 B. L. R., 171), quoted in the above case, shows that the granting of such decrees is entirely within the discretion of the Court. The lower Court in its judgment says: "Her (Bishtupria's) assent is prejudicial to the plaintiff's cause which he may not be in a position to substantiate after all the evidence shall have been taken away or destroyed by lapse of time." From this it appears that the lower Court considered that a decree should be granted, because there is no power to entertain a suit to perpetuate evidence, but in the passage quoted at 1. L. R., 5 Cal., p. 519, the Privy Council appear to have held that this is not a proper reason for making such decrees. In this case, indeed, as the separa-[820]tion, according to the plaintiff, took place so late as 1281, there is as yet certainly no ground for thinking that the evidence will be destroyed for some time. The inconvenience of granting such decrees is evident from the concluding part of the lower Court's order, where the plaintiff is declared to be entitled on the death of Chintamani and Bishtupria, to a one-third share of some cattle and paddy. This part of the order is, I think, quite useless, as by the time the plaintiff inherits, the cattle and paddy will probably not be in existence: if they are, their value will have decreased. Under all the circumstances, I do not think that this is a case where a declaratory decree should be passed.

The next point is that the plaintiff could have brought a suit for the appointment of a manager, and that as he has not done so, he is not entitled to a declaratory decree. On the authority of the two cases previously quoted, *Shama Soonduree Chowdhram v. Juvooona Chowdhram* (24 W. R., 85) and *Retoa Raj Panday v. Lalljee Panday* (24 W. R., 399), I think the plaintiff might have brought such a suit.

The Subordinate Judge also appears to have been of the same opinion, as he apparently only abstained from appointing a manager, because the plaintiff had only asked for a declaratory decree, and had brought the suit on a stamped paper sufficient for that purpose only. The remarks of the Subordinate Judge on the seventh issue lead me to suppose that, had the plaintiff brought a suit for the appointment of a manager on a properly stamped paper, the lower Court would have given him a decree, appointing a manager. Whatever view, however, the lower Court might have taken of a suit for appointing a manager, it was, I think, quite within the power of the plaintiff to bring such a suit; and

as he has omitted to do so, I do not think that the lower Court could make a declaratory decree. The terms of the proviso in s. 42 of Act I of 1877 are explicit, and do not leave the Court any option in the matter.

As regards the fourth point, the lower Court appears to have found that the plaintiff's account of the separation of Nursingh Bera in 1264 is true, and that a division of the property of the family took place then. If that is so, I think that the cases of *Ramhari Surma v. Trihi Ram Surma* (7 B. L. R., 337: 15 W. R., 442) and of *Radha Churn Das v. Kripa Sindhu Das* (I. L. R. 5 Cal., 474), show that proof of subsequent reunion by agreement is necessary. It appears that the division of the joint property breaks up the family, and makes the usual presumption regarding members of a family living together fail, and that the party wishing to show that members of a family who continued to live together, after such division, are joint, must adduce proof that the members by agreement have reunited themselves into a joint [821] family; and that mere proof of commensality is not sufficient. There is certainly no proof of any such agreement, and, therefore, the plaintiff's contention that the three other brothers continued to live together as a joint family, after Nursingh's separation, is not properly established.

The District Judge then reversed the decision of the Court of First Instance and dismissed the plaintiff's suit with costs. The plaintiff appealed to the High Court.

Mr. *Twidale* and Mr. *Mendies* for the Appellant.

Baboo *Mohun Mohun Roy* and Baboo *Saroda Persad Roy* for the Respondents.

The **Judgment** of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

Prinsep, J.—Madhub Bera died leaving four sons, who admittedly formed a joint Hindu family. In 1264 Nursingh the eldest separated from his brothers. In 1878, Korunamoyi, the widow and heiress of the son of the second brother Goburdhun, sued the third son Gopeenath, the third brother, and Chintamani, the widow and heiress of the son of the fourth brother Manikram (deceased), for her share of the family property. That suit ended in a solehnama or compromise under which Gopeenath, on the one hand, agreed to give up 25 bighas to Korunamoyi and 15 bighas to Chintamani, while Korunamoyi for herself and Bishtupria, the mother-in-law and guardian of Chintamani, on the other hand, agreed to give up all rights to any family property of the brothers whom they represented.

The plaintiff, a minor, being the son of a daughter of the fourth son Manikram the fourth brother as reversionary heir after Chintamani and Bish-tupria Hindu widows having only a life interest, sues to have it declared that this solehnama was collusively obtained, and is therefore inoperative as against him and that he is entitled on the death of these ladies to obtain a one-third share of the family estate held by the three brothers jointly after Nursingh had separated from them.

The District Judge in appeal has, in exercise of his discretion, refused to give plaintiff a declaratory decree, first, because, as he remarks many years may elapse before plaintiff can inherit the property, and it is, of course, quite possible that he may not [822] inherit at all. He next seems to think that the object of giving a declaratory decree in a case of this description is to perpetuate evidence, and that this is not a valid ground for exercising the discretion vested in him by law. Lastly, he thinks that, owing to the perishable nature

of the moveable property claimed, a decree, which is not likely to be operative until that property has disappeared or altered in value, should not be passed.

It appears to us that the District Judge has not exercised a proper discretion in refusing to give plaintiff a declaratory decree, if he has established his right to set aside the compromise.

The perishable nature of some of the moveable properties claimed, and the consequent improbability that they would all be in existence or in their present form when the plaintiff's right to inherit may accrue, is not a valid reason for refusing to set aside any deed or decree which interferes with his right as reversioner.

The District Judge has, however, proceeded to hold that the present suit is untenable, because the plaintiff has not sued for the appointment of a manager to take charge of his share of the family property in consequence of the waste committed by the widows. But, as has been already pointed out, this is not a suit to restrain the widow from committing waste, but to set aside a compromise which is, if at all, only voidable by the plaintiff.

Lastly, the District Judge, in concurrence with the first Court, has held as Nursingh the eldest of the four brothers separated in 1264, "a division of the family then took place;" that there is no proof of any agreement on the part of the other three brothers to reunite; that mere proof of commensality is not sufficient; and that consequently the plaintiff's suit must fail on this ground also.

The first point then for our consideration is, whether the separation of one member of a joint Hindu family necessarily creates a separation between the other members, and causes the general disruption of that family.

If this be so, then it will be for us to determine whether any specific agreement between the other members is absolutely necessary for proof of their reunion, and whether it cannot be presumed from their subsequent conduct.

[823] On the first point we have been referred to the case of *Radha Churn Dass v. Kripa Sindhu Dass* (I. L. R., 5 Cal., 474), as an authority for deciding it in the affirmative.

On the other hand, we have considered the observations of their Lordships of the Privy Council in the cases of *Rewan Persad v. Mussamut Radha Bibee* (4 Moore's, I. A., 137), and *Mussamut Cheetha v. Mihcen Lall* (11 Moore's I. A., 369) (*see* p. 380), neither of which cases were laid before the Division Bench, which decided the case first mentioned. The judgment of their Lordships in the case of *Rewan Persad* (p. 168) is in the following terms:—

"We think that it may be admitted that, the *prima facie* presumption where there are no circumstances to affect it, is that every Hindu family of this class was an undivided family, and, consequently, this presumption must prevail, unless the circumstances of this case lead to a contrary conclusion. We must, therefore, consider the circumstances, having, however, first directed our attention to some points of Hindu law which may have a bearing upon the conclusion to be drawn from the facts.

"First: We apprehend it to be undisputed that a division may be affected without instrument in writing. Secondly: That a division may be either total or partial. Thirdly: That a separation from commensality does not, as a necessary consequence, affect a division, or, at least, of the whole undivided property."

Moreover, we find their Lordships in the well-known case of *Deen Dyal Lall v. Jugacep Narain Singh* (I. L. R., 4 I. A., 247 (*see* p. 255): S. C., I. L. R., 3 Cal., 198] again recognizing the continuance of the joint estate of a family after a partition so as to separate the share of one member. It was in that case held that, although a member of a joint family could not alienate his

share in the family estate, the purchaser of his rights in execution of a decree against him, could, by insisting on a partition so as to definitively ascertain those rights, obtain possession of a distinct portion of that estate which represented them.

The Judgment proceeds thus :

"It seems to their Lordships that the same principle may and [824] ought to be applied to shares in a joint and undivided Hindu estate, and that it may be so applied without unduly interfering with the peculiar status and rights of the coparceners in such an estate, if the right of the purchaser at the execution sale be limited to that of compelling the partition, which his debtor might have compelled had he been so minded before the alienation of his share took place."

From these observations we understand that it was not disputed in argument, and it was accepted by their Lordships as a rule of Hindu law, that the separation of one member of a Hindu family does not in itself affect the position of the other members *inter se*. In the case of *Mussamut Cheetha* (11 Moore's I. A., 369), their Lordships (p. 380) thus describe the estate of the family of the parties to the suit :—

"The family originally consisted of three brothers—Shama Dass, Damodur Dass, and Koonj Kishore Dass. It is admitted on all hands that Shama Dass separated himself from his brothers, and took his share of the ancestral estate as separate property. It is, however, clear upon the evidence (and if the fact be not admitted, it is hardly disputed on the part of the appellant) that the two other brothers continued joint after the separation of Shama Dass; and further, that for many purposes Damodur Dass and the respondent (being his nephew, the son of Koonj Kishore Dass) were members of a joint family at the time of Damodur Dass' death."

Speaking therefore for myself, as one of the Judges who decided the case of *Radha Churn Dass*, I am of opinion that the point has been definitively decided by their Lordships of the Privy Council, and had these judgments been brought to my notice, my judgment in the case of *Radha Churn Dass* would have been otherwise. The case must, therefore, be remanded to the lower Appellate Court to determine on the merits, whether the compromise can be set aside. We allow no costs in this Court. *Case remanded.*

NOTES.

[EFFECT OF THE SEPARATION OF ONE COPARCENER ON THE STATUS OF THE OTHERS—

One coparcener's share is generally ascertained by reference to the shares of other coparceners, and thereby the shares of the others may be said to be incidentally ascertained; this has led to the proposition that even when one separated, the others also separated.

This case is an authority for the position that on the separation of one coparcener the others may continue to be joint. In the case of **30 Cal. 729 P. C.** the Privy Council stated that, on the separation of one coparcener, there is no presumption of jointness as to others, but the fact should be proved, like any other fact, of their remaining joint or re-united. "Their Lordships however do not say that in such a case the family is in all cases to be deemed to be divided; they point out that there may be cases where the shares of all the members of the family have to be ascertained, and say that it is in that sense that the separation of one is said to be the separation of all"—(1908) 31 Mad. 482. See also (1906) 5 C. L. J. 417 at 424 where it is pointed out that the 30 Cal. 729 case is not inconsistent with 9 Cal. 817. BHASHYAM AYYANGAR, J. in (1901) 25 Mad. 149 (11 M. L. J. 353) at p. 157 made observations to a similar effect; 16 C. L. J. 311; 18 I. C. 604.

It is always a question of intention at the partition whether an entire division or only partial partition was contemplated; whether the others that remained together were re-united or continued to be joint.—30 Cal., 231, 5 C. L. J. 417 at 424; 35 Bom. 293.

This fact should be established like any other fact :—(1912) 1 I. C. 553; 1913 P. L. R. 8.

The following have been held to be material circumstances :—

(1) Whether the partition purported only to specify the shares falling to each branch of the family :—(1911) 10 I. C. 103; (1885) 12 Cal., 262.

(2) Whether the partition deed, award, decree etc., went further and defined the shares of the other coparceners *inter se* or of coparceners of each branch *inter se* :—(1906) 29 All., 93; 1906 A. W. N. 287; 3 A. L. J. 688.

(3) In a Mitakshara family, it is enough, if there were a numerical calculation of the shares; 30 Cal., 231 at 255; but see 5 Mad. 362 at 367.

This consideration does not apply to the case of a Dayabhaga family, where even without division every coparcener's share is known:—5 C.L.J. 417.

(4) The conduct of the parties must be looked at in order to arrive at what constitutes the true test of partition according to Hindu law, namely, the intention of the members of the family to become separate owners:—30 Cal. 231 at 253.

(5) The mere fact of continuing together after the share was ascertained was in some cases held insufficient; in some sufficient:—(1899) 22 Mad. 470; (1912) 35 All. 41; (1910) 6 I. C. 795; (1911) 35 Bom., 293; (1912) 18 I. C., 601; (1913) P. R. 24; (1912) P. L. R., 16; (1913) P. W. R., 18; (1911) M.W.N., 310. See these cases also as to the effect of describing oneself *joint*.

(6) If the state of re-union is sought to be established, then the conditions under which it can take place should be satisfied:—(1912) 14 I. C. 237 (those not party to the partition cannot re-unite); (1903) 30 Cal. 729; (1905) 33 Cal. 371 (who can re-unite); (1910) 37 Cal. 703 (minor, cannot?).

(7) Minority of a co-partner affects the inferences:—(1910). 37 Cal. 703; 30 Cal. 729.

(8) Any unequivocal expression of intention will outweigh many acts consistent with either supposition:—(1910) 10 I. C. 967; 4 S. L. R. 225; 13 I. C. 30.

II. REVERSIONER'S SUIT—

On this subject, see also, 31 Cal. 853; 11 C. W. N. 956; (1909) 3 I. C. 234; 5 C.W.N., 445; 22 Cal. 354; 10 Mad. 90; 8 All. 616.]

[—12 C.L.R. 400].

[823] APPELLATE CIVIL.

The 9th March, 1883.

PRESENT:

MR. JUSTICE PRINSEP AND MR. JUSTICE O'KINEALY.

Surjya Narain Singh.....Defendant
versus

Sirdhary Lall.....Plaintiff.*

Hindu Law, Contract—Debtor and Creditor—Damdupat—Principal and interest—Interest in excess of principal.

Since the passing of Act XXVIII of 1855, a Hindu creditor may claim from his Hindu debtor interest in excess of the principal sum lent, should such interest have accrued.

The rule of law prohibiting the recovery of interest in excess of the principal sum lent was in force in the Mofussil of Bengal not as a provision of Hindu law, but as a statutory rule introduced by Regulation XV of 1793, and embracing all persons contracting in the Mofussil.

THIS was a suit to recover the sum of Rs. 58,800, the amount of two mortgage bonds which had been executed by the defendants in favour of the plaintiff on the 8th June 1872 and the 31st of March 1873, respectively. The principal due on the first bond was Rs. 1,000, and the interest Rs. 1,308. The principal due on the second bond was Rs. 19,000, and the interest due on this bond was Rs. 37,492. Two questions arose on this appeal: (1) whether compound interest was chargeable under the term of the bonds; (2) whether interest greater in amount than the principal could be recovered. The Court below decided both these points in favour of the plaintiff, following, on the second point, the case of *Deen Dyal Paramanick v. Kalesh Chunder Pal Chowdhry* (I. L. R. 1 Cal., 92; 24 W. R. 106), in preference to *Ramcomoy Audicary v. Johur Lall Dutt* (I. L. R., 5 Cal., 867). One of the defendants, a subsequent mortgagee, appealed, making the plaintiff alone the respondent.

The Advocate-General (Mr. G. C. Paul), Baboo Mohesh Chunder Chowdhry and Baboo Taruck Nath Palit for the Appellant.

* Appeal from Original Decree, No. 108 of 1881, against the decree of Moulvi Hafiz Abdul Kayim, First Subordinate Judge of Bhagulpore, dated the 11th February 1881.

The Advocate-General.—The appellant is entitled to dispute the amount due on the plaintiff's mortgage—*Ram Chandra Mankeshwar v. Bhimrao Ruvi* (I.L.R., 1 Bom., 577.) The plaintiff cannot recover [826] compound interest on his bond. At any rate, he cannot recover more interest than the amount of his principal.—*Ram Lal Mooerjee v. Haran Chandra Dhar* [3 B. L. R., (O. C.), 130] ; *Mia Khan v. Bibi Bibijan* (5 B. L. R., 500) ; *Omda Khanu v. Brojendro Koomar Roy Chawdhry* (12 B.L.R., 451) ; *Ramconnoy Auicary v. Johur Lall Dutt* (I.L.R., 5 Cal., 867). This rule is a rule of Hindu law, Colebrooke, Bk. I, para. 59 ; *Goverdhan Das v. Waris Ali* (4 Sel. Rep., 961) ; and is still in force as it has not been abolished by legislative enactment, Act VI of 1871, s. 24.

Mr. Evans and Baboo Doorga Mohun Das for the Respondent.

Mr. Evans.—The rule that interest was not to exceed the principal was a specific rule introduced by Regulation XV of 1793, and was rescinded by Act XXVIII of 1855—*Kalica Prosad Misser v. Gobind Chunder Sein* (Suth. S. C. C., 110 : 2 W. R. S. C. C., 1). It was not then introduced as a living custom of Hindu law, and, in fact, like other rules laid down by Menu, it has long been obsolete—*Ramalakshmi Ammal v. Sivannantha Perumal Sethurayar* (14 Moore's I. A., 570 ; 12 B. L. R., 396) ; *Lalloobhoy Bappobhoy v. Cassibai* (L. R., 7 I. A. 212 ; I. L. R., 5 Bom., 110). The Bombay Regulations were different—*Khushalchand Lalchand v. Ibrahim Fakir* [3 Bom. II. C. R., (A. C.) 23]. The Civil Courts' Act (VI of 1871), s. 24, does not apply. [The learned Counsel also referred to *Huromonee Gooptia v. Gobind Coomar Chowdhry* (5 W.R., 51), and to *Madhub Chunder Poramanick v. Raj Coomar Doss* (14 B. L. R., 76).]

The Judgment of the Court (PRINSEP and O'KINEALY, JJ.), was delivered by

Prinsep, J.—The questions raised in this appeal are, *first*, whether the bond marked "A," executed by Baboo Ram Gopal Singh to Baboo Sirdhary Lall dated the 31st March 1873, entitles Baboo Sirdhary Lall to demand compound interest ; and, *second*, whether under Hindu law plaintiff was entitled to recover arrears of interest to an amount greater than the principal. One portion of the bond runs as follows : "I, the declarant, * * * have borrowed from Baboo Sirdhary Lall, inhabitant and part proprietor [827] of Maskin Masihuddinnuggur, pergunnah Bhagulpore, Rs. 19,000, bearing interest at the rate of one rupee five annas per cent. per mensem from this day up to the date of repayment. Therefore I, the declarant, do hereby declare and state in writing that I shall pay the interest on the said sum every year, and the principal in one lump sum in Magh 1286, F. S ; that whatever amount will be paid for interest or principal, I, the declarant, shall have the same credited on the back of this bond, the plea of payment, under a separate receipt, or in any other way, shall be invalid ; that I shall pay off the interest for each year after adjustment ; that out of the amount paid in a year, at first the interest found due on adjustment of the account for the year shall be deducted, and if there remains any surplus, it shall be set off against the principal ; that I, the declarant, shall not claim any interest on the amount thus paid ; that I shall pay interest at the said rate until payment on the entire sum found to be due after adjustment of the account for a year."

We think that the interpretation of this document is that the accounts are to be made up at the end of each successive year, and that whatever remains due is treated as principal, and bears interest at the stipulated rate of one rupee five annas per cent. per mensem, and that the contention of the appellant, that the plaintiff cannot claim compound interest under the bond, is untenable.

In regard to the second question it is necessary, in order to come to a correct conclusion, to enter into some details in respect of the law relating to usury in Lower Bengal. By Regulation XV of 1879, s. 6, it was declared that if the interest on any debt, calculating according to the rates allowed by

the Regulation, should accumulate so as to exceed the principal, the Courts were not, except in certain specified cases, to decree a greater sum for interest than the amount of such principal. This was not declared to be a principle of Hindu law, applicable only to Hindus, but was a statutory provision embracing all persons contracting in the Mofussil. Nevertheless, it was the practice of the Courts to allow interest in excess of the principal where the interest had accumulated owing to reasons not ascribable in any degree to the laches of the creditor. In the case of *Jankee* [828] *Pershad v. Maharajah Oodwunt Narain Singh* (3 Sel. Rep., 270), it was decided that interest exceeding the principal could, in the case of Hindus, be granted if the excess accrued *pendente lite*, and there is no fault attributable to the creditor. No custom or usage "among Hindus was asserted in that case. Subsequently, in the case of *Goverdhun Dass v. Waris Ali* (4 Sel. Rep., 261), interest exceeding the principal was granted. This was the state of the law and practice of the Courts until the supersession of Regulation XV of 1793 by Act XXVIII of 1855. By s. 2 of that Act it was declared that in any suit in which interest was recoverable the amount should be adjudged or decreed by the Court at the rate, if any, agreed upon by the parties, and if no rate should be agreed upon, at such rate as the Court should deem reasonable. Subsequent to the passing of this Act, in the case of *Kalica Prosad Misser v. Gobind Chunder Sein* (Suth. S.C. C., 110: 2 W. R. S.C. C., 1), it was decided that the law under which the claim for accumulated interest was limited in amount to a sum not exceeding the principal had been rescinded by Act XXVIII of 1855. This was a case between Hindus. This decision was followed in the case of *Huromonee Gooptia v. Gobind Coomar Chowdhry* (5 W. R., 51), and in the case of *Omda Khanum v. Brojendro Coomar Roy Chowdhry* (12 B. L. R., 451). It would thus appear that from the earliest times up to the year 1874 no claim for a reduction of interest has ever been allowed on the ground of Hindu law or usage, but on the contrary that this contention whenever raised has always been repudiated, and in several cases the Courts granted interest beyond the principal. In this respect the Courts in the province of Lower Bengal have been in no way singular. The very same point has been decided in conformity with this view in the North-Western Provinces to which the Bengal Regulations apply, and in Madras where the Regulation is of similar import.

In the case of *Annaji Rau v. Ragubai alias Sithabai* (6 Mad. H. C., 400) the Court at Madras declared that in the matter of interest the Hindu law was not binding in the Mofussil. This [829] decision was followed in the case of *Kuar Lachman Singh v. Pirbhu Lal* (6 N. W. P., H. C., 358). So that there is a complete consensus of opinion in Bengal, in the N.-W. P., and in Madras, that since the passing of Act XXVIII of 1855, a Hindu may claim from another Hindu interest in excess of the principal. We do not refer to the cases decided in the Bombay Presidency, because, as appears from the case of *Khusalchand Lalchand v. Ibrahim Fakir* (3 Bom. H. C. A. C., 23), the Regulations in that Presidency were different from those in Bengal and Madras. The learned *Advocate-General*, in support of his view that interest should not be allowed beyond the principal, has referred to the decision of Sir BARNES PEACOCK in the case of *Ram Lal Mookerjee v. Haran Chandra Dhar* (3 B. L. R., O. C., 130), in which it was decided that within the town of Calcutta, interest as between Hindus might not exceed the principal.

This decision, though doubted in the case of *Meah Khan v. Bibi Bibijan* (5 B. L. R., 500) has been followed in a case lately decided in the Original Side of this Court, but this judgment is founded upon considerations special to the town of Calcutta, and has no application to the Mofussil.

We are, therefore, of opinion that there is a whole series of cases from the earliest times to show that in Bengal interest beyond the principal is demandable among Hindus, and the contention now raised by the learned Advocate-General cannot be sustained.

In this view, we dismiss the appeal with costs. *Appeal dismissed.*

NOTES.

[DAMDUPAT—

The rule is applied in the Presidency Town of Calcutta, 14 Cal., 781; 12 C. L. R., 590; in the Bombay Presidency, 20 Bom. 721; 21 Bom. 38; 45.

But not in the Madras Presidency :—6 M. H. C. 400.]

[13 C.L.R. 109 : 8 Ind. Jur. 38]
[830] APPELLATE CIVIL.

The 9th March, 1883.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE O'KINEALY.

Ram Narain Sing.....Judgment-debtor
versus
Poaray Bhugut.....Deereo-holder.*

Hindu Law—Husband and wife—Immoveable property—Gift—Deed of gift.

It is not necessary in Hindu law, in order that a wife should take an absolute estate in immoveable property under a deed of gift from her husband, that the gift should be made with such words of limitation as are ordinarily used to convey an estate of inheritance. The intention of the husband may be expressed in other ways, and is a matter of construction merely.

Koonj Behary Dhur v. Prem Chand Dutt (I. L. R., 5 Cal., 684 : 5 C. L. R., 561) distinguished.

THE facts of the case and the arguments are sufficiently set out in the judgment.

Baboo Mohesh Chunder Chowdhry for the Appellant.

Baboo Chunder Madhub Ghose for the Respondent.

The **Judgment** of the Court (PRINSEP and O'KINEALY, JJ.), was delivered by

Prinsep, J.—This case depends upon the proper construction of a deed of grant from a husband to his wife. The document sets forth that it conveys all his rights to the lady without exception; that she shall take possession of his property; that neither he nor his heirs shall at any time have any claim either to the property or to the price or value of it.

It has been contended on behalf of the appellant, first, that, unless there are express terms in the grant, such as will convey ordinarily an estate of inheritance, the gift must be taken to be only one lasting for the lifetime of the lady. In support of the contention we have been referred to the case of *Koonj Behary Dhur v. Prem Chand Dutt* (I. L. R., 5 Cal., 684 : 5 C. L. R., 561), and, no doubt, if one sentence of that judgment be taken by itself, it would support the contention now raised [831] before us. But when we look at the case as a whole, we find that the learned Judges who expressed that opinion were not content to base their judgment on it, but actually decided upon the terms of the grant. There is also another case of *Srimati Pabitra Dasi v. Damodar Jana*

* Appeal from Appellate Orders, Nos. 272, 273, and 274 of 1882, against the order of W. Verner, Esq., Judge of Bhagulpore, dated the 8th June 1882, modifying the order of Moulvi Syed Fikruddin Hossen, Munsif of Jamooyee, dated the 3rd June 1881 and 6th May 1882.

(7 B. L. R., 697), which does not coincide with the expression of opinion in the case to which we have already referred. It seems to us that that statement made by the learned Judges is not binding upon us as a judicial decision, and is inconsistent with the case referred to of *Srimati Pabitra Dasi v. Damudhar Jana* (7 B. L. R., 697).

We are, therefore, of opinion that this should be decided upon the terms of the grant. Looking at the fact that the husband divested himself of all his rights that he prohibited his descendants from claiming the property or its price, we think that the gift was a gift out and out.

In this view we dismiss the appeal with costs. *Appeal dismissed.*

NOTES.

[See also (1907) 30 All., 84; 23 All. 309; 21 A. W. N., 84; 19 All. 133; 5 C. W. N. 300 (303); 27 Cal. 44; 30 Cal. 20; 2 O.C. 226.]

[9 Cal. 831: 12 C L.R. 556]

APPELLATE CIVIL.

The 5th April, 1883.

PRESENT:

MR. JUSTICE McDONELL AND MR. JUSTICE TOTTENHAM.

Tarruck Chunder Bhuttacharjee and others Judgment-debtors
versus

Divendro Nath Sanyal and others.....Decree-holders.

Execution—Joint decree—Payment out of Court to one of several joint judgment-creditors—Part satisfaction certified to the Court—Application for execution of full amount of decree—Civil Procedure Code (Act XIV of 1882), ss. 244, 258.

On an application for execution for the full amount due under a decree by some of several joint decree-holders the judgment-debtor objected to execution being granted for the full amount of the decree on the ground that he had already paid off a large portion of the money due under the decree to B, one of the joint decree-holders. The payment was made out of Court, but B, who claimed to be entitled to a $12\frac{1}{2}$ annas share in the decree, certified the payment in the manner prescribed by s. 258 of the Civil Procedure Code (Act XIV of 1882), and represented that his claim had been satisfied in full. The other joint decree-holders denied B's right to the $12\frac{1}{2}$ annas share claimed by him, and refused to recognise the [832] payment said to have been made to him. The lower Court disallowed the objection, and granted execution for the full amount of the decree.

Held, that, regard being had to the provisions of the General Clauses Act (Act I of 1868), the word "decree-holder" in s. 258 of Act XIV of 1882 should be read in the plural, and looking at the provisions of s. 231 of the latter Act, the Court ought not to recognise payments made out of Court unless made and certified for the benefit of all the joint decree-holders of any portion of the decree in excess of that to which the decree-holder so paid is undisputedly entitled.

Held, also, that a judgment-debtor is entitled to credit for any sum paid *bona fide* to one of several joint decree-holders, and duly certified to the Court by the latter, and that the other joint decree-holders cannot execute the decree for more than their own share.

Held, further, that in this case the lower Court was wrong in wholly ignoring the payment certified by the decree-holder B, and that it should have determined, *first*, whether the

*Appeal from Original Order, No. 50 of 1883, against the order of J. G. Charles, Esq., Officiating Judge of Rajshahye, dated the 30th January 1883.

payment to B was a fraud on the other joint decree-holders; and, *secondly*, what amount the latter were entitled to have out of the whole decree, the latter being the main question between the applicants for execution and the judgment-debtor, and as such clearly within the scope of s. 244 of the Civil Procedure Code.

Ranee Nyna Kooer v. Doolee Chund (22 W. R., 77); *Brojeswari Chowdhranee v. Tripoora Soondree Debi* (3 C. L. R., 513); and *Mahima Chandra Roy v. Pyari Mohan Chowdhry* (2 B. L. R., Ap., 43).

THIS was an appeal against the order of the Officiating Judge of Rajshahye disallowing the objections of a judgment-debtor in an execution case. The facts appear sufficiently for the purpose of this report in the judgment of Mr. Justice TOTTENHAM.

The *Advocate-General* (Mr. G. C. Paul) (with him Baboo Rash Behary Ghose and Baboo Aukhil Chunder Sen) for the Appellant.

The lower Court is wrong in holding that a certificate is of no effect, unless made by all the decree-holders in a case where there may be more than one decree-holder. Payment to one of several joint-creditors is in law a payment to all, and consequently the payment here to the decree-holder is a payment to all persons having a joint interest with him in the decree. Here the Court below was wrong in granting execution for the full amount of the decree, as one of the decree-holders, [833] *viz.*, Behary Lall, at any rate admitted that his claim had been satisfied. The Court below also should have determined the amount of the share Behary Lall had in the decree, when it was disputed by the other decree-holders, as the judgment-debtor was at any rate entitled to claim that his portion of the decree had been satisfied—*Ranee Nyna Kooer v. Doolee Chund* (22 W. R., 77); *Brojeswari Chowdhranee v. Tripoora Soondree Debi* (3 C. L. R., 513); *Ahamuddeen v. Grish Chunder Shamunt* (I. L. R., 4 Cal., 350); and *Chitty on Contracts*, 716.

Baboo Rash Behary Ghose followed, and in support of the above contentions cited *Wise v. Moulvie Abdol Ali* (7 W. R., 136); *Umrith Nath Chowdhry v. Chunder Kishore Singh* (21 W. R., 31); *Shib Chunder Dass v. Ram Chunder Poddar* (16 W. R., 29); *Kally Soondery Dabia v. Hurrish Chunder Chowdhry* (I. L. R., 6 Cal., 594; s.c., on appeal, L. R., 10 I. A., 4; s.c., ante p. 482); and *Ahamuddeen v. Grish Chunder Shamunt* (I. L. R., 4 Cal., 350).

Baboo Gopal Lal Mitter (with him Baboo Saroda Churn Mitter) for the Respondent.

The other decree-holders are in no way bound by the payment out of Court to Behary Lall. In *Mahima Chandra Roy v. Pyari Mohan Chowdhry* (2 B. L. R., Ap. 43), it has been held that, although the decree had been fully satisfied by payment of the whole amount of the decree to one of two decree-holders, the other was still entitled to re-open the proceedings, and take out execution for his moiety.

The **Judgments** of the Court (MCDONELL and TOTTENHAM, JJ.), were as follow:—

Tottenham, J.—The cause of this appeal, which arises from the execution of a decree, is the refusal of the lower Court to recognize an alleged payment out of Court by the judgment-debtors of a large portion of the amount of the decree to one [834] amongst several joint decree-holders, who also had certified the payment in the manner prescribed in s. 258 of the Civil Procedure Code. This individual did not profess to have received payment for the joint benefit of all the decree-holders; but claiming to be entitled to 12½ annas share of the whole, represented that his claim had been satisfied.

Application was made by the other decree-holders for execution of the whole decree. They denied the right of Behary Lall to $12\frac{1}{2}$ annas share, or to any more than a small fraction of the decretal amount, and refused to recognize the payment said to have been made to him.

The lower Court was of opinion that a payment out of Court could not be recognized under s. 258 unless certified by all the decree-holders; and that a sharer in a joint decree could not be allowed to realize for himself separately. He, therefore, overruled the debtor's objection, and holding that it was unnecessary to decide to what extent the decree-holders were severally interested, he ordered the execution to proceed as for the whole amount. It has been argued before us for the appellants that the lower Court was wrong in holding that a certificate under s. 256 is of no effect, unless made by all the decree-holders in a case where there are several; that payment to one of several joint-creditors is in law payment to them all; and that at any rate the Court below ought not, on the present application, to have allowed the applicants to take out execution for more than their own share of the decree since Behary Lall admitted having received his share. In connection with this last point there has been some discussion, whether under s. 244 of the Code the amount of the respective shares of the several decree-holders is a question between the parties to the suit, *i.e.*, plaintiffs and defendants, or is one between the plaintiffs themselves; and, if the latter, whether the Court can decide it in the execution proceedings.

To show that it is not essential that all the decree-holders must unite in certifying under s. 258 a payment made out of Court, the learned Advocate-General cited *Ranee Nyna Koor v. Doolee Chund* (22 W. R., 77), and *Brojeswari Chowdhralee v. Tripoora Soonderee* [835] *Debi* (3 C. L. R., 513). Certainly in these cases the Court did take into consideration the fact that payment had been certified under s. 206 of Act VIII of 1859 by one decree-holder.

In each of these cases one of the decree-holders had certified payment of the whole decree. In the first case this Court held that, under the circumstances, the remaining decree-holders ought not to be allowed to take out execution again, until they had satisfied the Court that they knew nothing of the payment; that if made it was a fraud upon them; and that the judgment-debtor was privy to the fraud.

In the second case also full payment had been certified; but on enquiry the Court disbelieved the fact of any payment at all: yet held that, inasmuch as the party certifying it was admittedly entitled to one moiety, the other decree-holder could not be allowed to execute the decree for more than the other moiety.

In both cases the Court recognized the validity of payments certified by one only of joint decree-holders. And whatever be the correct technical construction of s. 258, *i.e.*, whether "*the decree-holders*," may be construed "*as any one amongst any number of decree-holders*" it seems impossible to say that, so far as the undisputed share of the one who certifies is concerned, the Court would be wrong in giving credit to the judgment-debtor.

But I must say that I am disposed to think that, regard being had to the provisions of the General Clauses Act (which governs the present Code, though it did not touch Act VIII of 1859), the words "*the decree-holder*" in s. 258 should be read in the plural in cases in which there are more decree-holders than one; and that, strictly, the Court ought not to recognize payments made out of Court, unless made and certified *for the benefit of all*, at least in cases where, as in this one, the extent of the shares is in dispute. I am rather strengthened in this view by the terms of s. 231.

That section provides that any one or more of joint decree-holders may apply for execution of the whole decree *for the benefit of all*. The Court may grant such application if it sees sufficient cause for doing so; but it must then pass some order [836] for protecting the interests of the persons who have not joined in the application. Whereas then by this section the Court is not permitted to allow one of several joint decree-holders to obtain execution of the whole decree for his own individual benefit, it seems unlikely that it was intended that, under s. 258, the same Court should recognize the payment out of Court to one of several joint decree-holders for his own benefit, and not for the benefit of all, of any portion of the decree in excess of that to which he is undisputedly entitled. In the case cited above, *Brojeswari Chowdhranee v. Tripoorra Soonderee Debi* (3 C. L. R., 513), this principle seems to have been adopted; for credit was given only for the amount of the acknowledged share of the decree-holder who had admitted having received the whole amount of the decree. And in another case, *Mahima Chandra Roy v. Pyari Mohan Chowdhry* (2 B. L. R., Ap., 43), it was held that, although the decree had been fully satisfied by payment of the whole amount to one of two decree-holders, the other one was still entitled to re-open the proceedings, and take out execution for a moiety of the amount of the decree.

But in the case of *Ranee Nyna Koor v. Doolee Chund* (22 W. R., 77), payment of the whole decree having been certified by one, the principal decree-holder, this Court would not suffer the other decree-holders to execute the entire decree.

The decided cases, therefore, do seem to establish this, that a judgment-debtor is entitled to credit for any sum paid *bond fide* to one of several joint decree-holders, and duly certified to the Court by the latter; and that the other joint-creditor cannot execute the decree for more than their own share.

This being so, I would hold in the present case that the lower Court was wrong in wholly ignoring the payment certified by the decree-holder Behary Lall. Whether the debtors are entitled to have credit for the whole of the sum certified, or for only a portion of it, will depend upon other considerations. It will depend partly upon the question whether payment to one joint decree-holder is good as against all; and partly on the question whether the Court in the execution proceedings can determine [837] the shares of the joint decree-holders severally. As to the first question the Advocate-General's position is that in law the release of a debt by one of several joint-creditors is a release by all: and the case of *Ranee Nyna Koor v. Doolee Chund* (22 W. R., 77,) seems to affirm this principle in the absence of fraud. But the case of *Mahima Chandra Roy v. Pyari Mohan Chowdhry* (2 B. L. R., Ap., 43), directly ignores the principle; while the case of *Brojeswari Chowdhranee v. Tripoorra Soonderee Debi* (3 C. L. R. 513,) neither affirms nor contradicts it; for it was held that no payment had been made at all. Apparently then the lower Court could not properly dispose of the judgment-debtor's objection in this case, and order execution in favour of the decree-holders who applied for it, without deciding first, whether the payment to Behary Lall was a fraud upon them committed by the judgment-debtors, and next what amount they were entitled to have out of the whole decree. This last question is, no doubt, one that is between Behary Lall and the other decree-holders; and as such may not be one which the Court should decide in the execution proceedings. But it is not necessary to decide whether the Court has jurisdiction to decide the point as between the decree-holders; for it is obviously also a question, and the main question between the applicants for execution and the judgment-debtors: and as such it clearly comes within the scope of s. 244.

Shortly stated, the question is for what amount are the applicants entitled to have execution? And this question it is necessary for the Court executing the decree to determine under s. 244, it being clear that Behary Lall's share at least has been paid off.

I would, therefore, allow this appeal; and, setting aside the lower Court's order, would send the case back to have the question determined.

McDonell, J.—I concur in the order of remand and for the reasons given by my learned colleague. The appellant will be entitled to five gold mohurs as costs of this appeal.

Appeal allowed and case remanded.

NOTES.

[PAYMENT TO ONE OUT OF SEVERAL JOINT DECREE-HOLDERS—

Pro tanto satisfaction may be entered:—18 Mad., 464 (465); 15 Mad., 343 (344); 1.N.L.R., 24 (29); as to who can draw out the money paid in, see 25 Mad., 431 (440); 26 All., 384; (1904) A. W. N., 34.

See also (1888) 11 Mad., 309 (313) **F. B.**]

[=12 C.L.R. 409]

[838] APPELLATE CIVIL.

The 28th March, 1883.

PRESENT:

MR. JUSTICE PRINSEP AND MR. JUSTICE O'KINEALY.

Atri Bai.....Claimant

versus

Arnopoorna Bai.....Objector*

*Land Acquisition Act (X of 1870, ss. 15, 39)—Appeal—Second Appeal—
High Court, Appeal to.*

Where a dispute as to the right of one of two claimants to certain compensation awarded under the provisions of the Land Acquisition Act has been referred to the Civil Court under s. 15 of that Act, a second Appeal will lie to the High Court from the judgment passed in an appeal against the decision of the Court to which the dispute was referred.

IN this case an award of Rs. 69 was made by the Land Registration Officer at Cuttack, in respect of compensation for a share in a piece of land occupied by the compound and building of the office of the Commissioner of that district. Two claimants for the money, Atri Bai and Arnopoorna Bai, having appeared before the Collector, the latter referred the matter to the Munsif of Cuttack under s. 15 of the Land Acquisition Act X of 1870. The Munsif decided in favour of Atri Bai, but this decision was reversed by the District Judge on appeal. Atri Bai appealed to the High Court, where a preliminary objection was taken that no appeal lay.

Baboo Gopi Nath Mookerjee and Baboo Aubinash Chunder Banerjee for the Appellant.

Baboo Mohit Chunder Bose and Baboo Boido Nath Dutt for the Respondent.

* Appeal from Appellate Order, No. 386 of 1882, against the order, of J. B. Worgan, Esq., Officiating Judge of Cuttack, dated the 2nd September 1882, reversing the order of Baboo Nilmadhub Shamanta, First Munsif of that District, dated the 31st March 1882.

The **Judgment** of the Court (PRINSEP, and O'KINEALY, JJ.) was delivered by

Prinsep, J.—A preliminary objection has been raised to the hearing of this appeal that the law (s. 39 of the Land Acquisition Act of 1870) does not provide for a second appeal; and that only certain provisions of the Code of Civil Procedure, among which the chapter relating to appeals is not to be found, are extended to proceedings under that Act. The case falls [839] under Part IV of the Land Acquisition Act, and relates to the apportionment of the compensation awarded. The limitation of the application of the Code applies only to Part VII. Further it appears to us from the very nature of the dispute between the parties that these proceedings must be regarded as a suit. In the next place s. 39 declares that in cases like the present case "the appeal shall lie in the *first instance* to the District Judge," from which it would seem that a further appeal was contemplated by the Legislature. In any case, however, having regard to the nature of the proceedings and the powers conferred on us by law in suits, we should not be inclined to limit our jurisdiction without any express words in any law to that effect.

On the merits of the case there is no reason to question the correctness of the conclusion arrived at by the lower Appellate Court.

The appeal is dismissed with costs.

Appeal dismissed.

[9 Cal. 839—12 C. L. R. 393—8 Ind. Jur. 38]

APPELLATE CIVIL.

The 5th April, 1883.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE O'KINEALY.

Koob Lall Chowdhry.....Defendant

versus .

Nittyannund Singh and others.....Plaintiffs.*

Execution of decree—Mortgage-decree—Decree on mortgage-bond—Sale of decree—Conveyance—Registration.

A decree-holder purported to sell to A, by private sale, all his right, title, and interest in a mortgage-decree obtained by him in a suit on a mortgage-bond against the mortgagor. The deed of sale was not registered. Afterwards, by a registered deed of sale, A conveyed all his right, title, and interest in the same decree to B.

Held, that the right to execute the decree as a mortgage-decree did not pass to B.

THE facts of this case were as follows: On the 5th of January 1877, one Golab Chand Nowlakha obtained the usual mortgage decree on a mortgage-bond against one Shaikh Imdad Ali. By a deed of sale, dated the 6th of August 1877, this decree was sold [840] by the decree-holder to one Shaikh

* Appeal from Appellate Decree, No. 971 of 1882, against the decree of F. Comley, Esq., Judge of Purnea, dated the 27th March 1882, affirming the decree of S. Wright, Esq., Sub-Judge of that district, dated the 18th November 1881.

Jotee ; this deed of sale was not registered. On the 15th of July 1879, by a registered deed of sale, Shaikh Jotee sold the decree to one Koob Lall Chowdhry.

In the meantime, on the 5th of November 1878, one Srinundun Singh, in execution of a money-decree passed in his favour against Imdad Ali on the 12th of August 1878, purchased and entered into possession of the property covered by the mortgage-decree. On the 17th of August 1880, Koob Lall Chowdhry attached the mortgaged property in execution of the mortgage-decree. Srinundun Singh applied for the release of the property from attachment, but this application was dismissed on the 18th of December 1880 ; and on the 7th of March 1881, Srinundun was compelled to deposit Rs. 1,057-1-8 in order to save the property from sale. The plaint in the present suit was filed on the 20th of June 1881, and prayed for a decree setting aside the order of the 18th of December 1880, and for the recovery of the amount of the deposit with interest and costs.

The Subordinate Judge decreed the plaintiff's claim, citing *Gopal Narayan v. Trimbak Sadashiv* (I. L. R., 1 Bom., 267). On appeal the Judge said :—

“ The Subordinate Judge finds that the transfer of the decree by Golab Chand Nowlakha to Jotee was in consequence of the non-registration of the conveyance deed, a transfer, in effect, of the decree, as a decree, for money alone and that under such a transfer Jotee lost the right of lien against immoveable property declared by the decree. On that point the Subordinate Judge's decision appears to be correct, if the transfer rested solely on that conveyance, for under s. 17, Act III of 1877, that conveyance ought to have been registered. It appears that Golab Chand took out execution of his decree, and had the property in dispute notified for sale to take place on the 6th of August 1877 ; that on that date Golab Chand sold his right under the decree to Jotee, and applied to the Munsif to stay the sale, to strike off the name of the applicant (Golab Chand), decree-holder, and to insert in lieu the name of the purchaser Shaikh Jotee. The order made by the Munsif was : ‘ In accordance with the petition of the decree-holder, let the sale be stopped, and let this case be struck off the file.’ This is not equivalent to an order admitting Jotee to be the assignee representative in the decree proceedings of Golab Chand, and does not bring the case within the exemption clause (i), s. 17, Act III of 1877.”

[841] The District Judge dismissed the appeal with costs. The defendant appealed to the High Court on several grounds to the effect that no registration of the deed of the 6th of August 1877 was necessary ; that Jotee had been placed on the record as decree-holder, and his subsequent registered conveyance passed a good title to the decree ; and that the case came within clause (i) s. 17, Act III of 1877.

Mr. C. Gregory for the Appellant.

Munshi Mahomed Yusuf for the Respondents.

The **Judgment** of the Court (PRINSEP and O’KINEALY, JJ.) was delivered by

Prinsep, J.—We think that the orders passed by the lower Courts are correct. Golab Chand Nowlakha, defendant No. 5, in 1877, obtained a mortgage decree against Imdad Ali. The plaintiff, in execution of a decree held by another person, has purchased the property hypothecated by that decree. The defendant, Koob Lall, stating that he was the assignee of the decree-holder, then executed the mortgage-decree obtained by Golab Chand and was about to put up for sale a portion of the property previously purchased by the plaintiff, when the plaintiff, in order to protect that property from sale, deposited under

protest the money due under the decree. The present suit is to recover the money so paid. It has been found by both the lower Courts that Golab Chand, on the 6th August 1877, sold to one Jotee under an unregistered deed of conveyance, and that Jotee in August 1880 transferred his rights thereunder to Koob Lall by a registered conveyance. Both the Courts have found, and we think rightly, that the title under which Jotee acquired the rights of Golab Chand not being registered, and the registration law requiring that such conveyances should be registered, the title of Koob Lall from Jotee, so far as it relates to the mortgage lien on this property, is defective, inasmuch as it cannot be proved to come from Golab.

We think that the rule recently laid down by a Full Bench of this Court as regards the right of an obligee to recover on an unregistered mortgage bond, should be applied to cases such as that now before us, and that accordingly Koob Lall must be [842] held to have acquired only a money decree entitling him to recover the amount of the decree without any hypothecation of any particular property.

Under such circumstances plaintiff, as purchaser of the property held by Imdad Ali, is entitled to recover the money paid to stay the resale of this property in execution of the decree held by Koob Lall since the rights of the debtor have passed to him, and Koob Lall can enforce no lien on it.

We dismiss the appeal with costs.

Appeal dismissed.

NOTES.

[As for the necessity of registration see also 23 Cal., 450; 13 All., 89; 17 Bom., 235.]

[9 Cal. 842=12 C. L. R. 448]

APPELLATE CIVIL.

The 16th March, 1883.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE O'KINEALY.

Tara Prasad Mytee and another.....Defendants

versus

Nund Kishore Giri and others.....Plaintiffs.*

Execution of Decree—Sale of immoveable property—Confirmation of sale—Sale certificate—Evidence.

The order confirming a sale of immoveable property in execution of a decree is sufficient to pass the title in the property to the purchaser, and its production is sufficient evidence of the purchaser's title. The production of the sale certificate is not essential.

Doorga Narain Sen v. Baney Madhub Mozoomdar (I. L. R., 7 Cal., 199) followed.

IN this case the Judgment appealed from was as follows :—

“The plaintiffs have brought this suit to recover possession of the property in dispute on the establishment of title as auction-purchasers at a sale

* Appeal from Appellate-Decree, No. 444 of 1882, against the decree of Baboo Kedar Nath Mozoomdar, Sub-Judge of Midnapore, dated the 31st December 1881, affirming the decree of Baboo Jodigoswar Gupto, Officiating Munsif of Nermal, dated 24th March 1881.

in execution of a Civil Court's decree. It appears that the defendants have purchased the same property in execution of a decree for a share of the rent. The plaintiff's purchase is prior to that of the defendants'. I think the sale *furd* and the proceedings confirming the sale, in the name of the plaintiffs should be received as evidence in the case. The evidence and the circumstances of the case lead me to believe that the property in dispute is covered by the plaintiffs' auction-purchase, and the plaintiffs were in possession of the disputed property, and they paid rents. The receipts filed in the case substantiate their allegation. The appeal will be dismissed."

[843] The defendants appealed to the High Court.

Baboo Omesh Chunder Banerjee for the Appellants.

Baboo Bhowany Churn Dutt for the Respondents.

The **Judgment** of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

Prinsep, J.—The main objection taken before us in this case is that the plaintiffs' suit should be dismissed, because they have failed to produce the sale certificate on which they acquired their title. It has nowhere been denied, nor is it disputed before us, that the plaintiffs purchased in an execution sale the right, title and interest of the defendants, judgment-debtors, in the present case. We, therefore, think that this objection is untenable, and in this respect we agree with the judgment of a Division Bench of this Court in the case of *Doorga Narain Sen v. Baney Madhub Mozoomdar* (I. L. R., 7 Cal. 199), in which it was held that "the order affirming the sale would be sufficient to pass a title to the purchaser; and the certificate which might afterwards be obtained by him would be merely evidence that the property so passed."

We therefore dismiss the appeal with costs.

Appeal dismissed.

NOTES.

[There was some conflict under the old Code as to when title passed to the purchaser. The C. P. C., 1908, sec. 65, enacts that the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute. See also 10 Cal. 252; 11 Mad., 296; 9 P. R. 1903=36 P. L. R., 1903; (1907) 7 C. L. J. 384.]

[9 Cal. 843=12 C. L. R. 592]

APPELLATE CIVIL.

The 10th April, 1883.

PRESENT :

MR. JUSTICE CUNNINGHAM AND MR. JUSTICE MACLEAN

Kali Krishna Tagore.....Plaintiff

versus

Fuzle Ali Chowdhry and others.....Defendants.*

Landlord and Tenant—Forfeiture—Waiver by acceptance of rent.

A lease provided that every four years a measurement should be made either by the lessor or by the lessees, and additional rent paid for accretion to the land leased. It then provided

*Appeal from Original Decree, No. 228 of 1881, against the decree of Baboo Raj Chundra Sanyal, Officiating Second Sub-Judge of Backergunge, dated the 10th June 1881.

for failure on the lessor's part to execute a kabuliat for the excess lands in the following terms: "If at the fixed time stated above we do not take an amin and cause measurement to be made, you will appoint an amin and cause the entire land of the said chur to be measured, and no objection on the ground of our recording or not, our presence on such measurement chitta shall be entertained, and we will duly file a separate dowl kabuliat for the excess rent that will be found [844] after deducting the settled land of the dowl executed by us from the land settled therein. If we do not, we will be deprived of our right of obtaining a settlement of such excess land, as well as of the land which will accrete in future to the said chur, and no objection thereto on our part shall be entertained." In a suit by the lessor, alleging that in 1876 he had caused a measurement to be made, and had called on the lessees to execute a kabuliat for the rent of certain excess lands, and praying that the lessees might be ejected, the lessees pleaded that the lessor had waived his right to enforce the forfeiture by subsequent receipt of rent. It appeared that payments had been made to the lessor by the lessees, which were accepted as rent, but were kept in suspense subject to payment by the lessees of the "remaining amount."

Held, that such a qualification did not make the payments anything else than payments of rent and that the lessor had waived his right to insist on re-entry on the lessees' failure to measure the lands, or execute a kabuliat when called on to do so.

Davenport v. The Queen (L. R., 3 App. Cas., 115) followed.

Baboo Kali Mohun Doss, Baboo Doorga Mohun Doss, and Baboo Ram Sakkhya Ghose for the Appellant.

Baboo Rashbehary Ghose for the Respondents.

THE facts of this case sufficiently appear from the **Judgment** of the Court (CUNNINGHAM and MACLEAN, JJ.), which was delivered by

Cunningham, J.—In the suit out of which these appeals arise it is admitted that the plaintiff's father leased to the defendants on 30th Cheyt 1265 (12th April 1859) 4 deores 10½ kanis of culturable land at an annual rent of Rs. 335-4.

The lease provided that every fourth year a measurement should be made, either by the lessor or by the lessees, and additional rent paid for accretions to the land leased in 1859. It then provided for failure on the lessees' part to execute a kabuliat for the excess lands in the following terms:—

"If at the fixed time stated above, we do not take an amin and cause measurement to be made, you will appoint an amin and cause the entire land of the said chur to be measured, and no objection on the ground of our recording or not our presence on such measurement chitta shall be entertained, and we will duly file a separate dowl kabuliat for the excess land that will be found [845] after deducting the settled land of the dowl executed by us from the land stated therein. If we do not, we will be deprived of our right of obtaining a settlement of such excess land as well as of the land which will accrete in future to the said chur; and no objection thereto on our part shall be entertained."

It is alleged in this suit that the plaintiff caused a measurement to be made in 1282 (1875-76), which resulted in a notice dated 31st December 1876, calling on defendants to execute a kabuliat for rent of 9 deores 10 kanis 6½ gundas of excess lands, and the plaintiffs called on the Court to enforce the forfeiture entailed by defendant's failure to execute the kabuliat by ejecting the defendants, or assessing rent on the excess lands.

The defendants denied the fact of measurement, and notice to execute a kabuliat, and in the 9th paragraph of their written statement pleaded that plaintiff had waived his right to enforce the forfeiture by subsequent receipt of rent.

The lower Court has found that the plaintiff measured the land and gave notice to the defendants as alleged, and that there was an excess by accretion of 8 deores 12 kanis and 3 gundas of land. It also found that plaintiff had not waived the right to enforce the forfeiture by subsequent receipt of rent.

But the lower Court, considering that the plaintiff having claimed relief in an alternative form, had really left it to the Court to do substantial equity, decided that the plaintiff should take the rent which it assessed, and should not get possession.

Both sides appeal—plaintiffs in suit No. 228 urging that they are entitled to possession, and that they have not forfeited or waived their right; the defendants in No. 243 questioned the findings of the lower Court, and urged that the decree assessing rent was bad.

Vakils were heard on both sides, and in the end they left it to the Court to decide whether the plaintiffs were entitled to insist on khas possession. The plaintiff's vakil referred the Court to a decision of another Bench in appeal from original decree No. 276 of 1871. That was a case between the plaintiff and other parties. It was founded upon a kabuliati identical in terms as to measurement and forfeiture with the kabuliati in this [846] case, and we find that in that case the prayer was for khas possession only, and there was no plea of waiver by receipt of rent. We do not think, therefore, that we are in any way bound to consider that decision, which is under appeal to Her Majesty in Council.

After careful consideration of the case we think that we ought to affirm the decision of the lower Court, and dismiss the plaintiff's appeal on the ground that by receipt of rent in the years 1275, 1276, 1277, 1281, 1282, 1283, 1284, and 1286, for excess lands the plaintiff waived his right to insist on re-entry on defendants' failure to measure the lands, or execute a kabuliati when called on to do so in Pous 1283.

It appears that in each of these years the defendants made an undisputed payment of Rs. 150, which was accepted as rent, but was kept in suspense subject to payment by the defendants of the "remaining amounts." We are decidedly of opinion that such a qualification did not make these payments anything else than payments of rent, and we think that we may be guided on the effect of these payments by the opinion of the Judicial Committee in *Davenport v. The Queen* (L. R. 3 App. Cas., 115), to which the defendants' vakil referred us. Their Lordships there remark at pages 131-132: "Where money is paid and received as rent under a lease, a mere protest that it is accepted conditionally and without prejudice to a right to a prior forfeiture cannot countervail the fact of such receipt." In the present case the plaintiff received rent after the defendants had incurred a forfeiture—not indeed conditionally and without prejudice to the forfeiture, but unconditionally and without prejudice to his claim to a larger amount.

The defendants' vakil did not press us with Appeal No. 243. We, therefore, dismiss both these appeals, and under the circumstances direct that both sides bear their own costs in this Court.

Appeals dismissed.

NOTES.

[See also (1903) 30 Cal., 883 (898).]

[12 C. L. R. 481]
[847] APPELLATE CRIMINAL.

The 2nd May, 1883.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE O'KINEALY.

Empress
versus
Ishan Chundra De and another

*Bengal Excise Act (VII of 1878), ss 15, 53, 60, 61 - Sale by servant
of licensed vendor- Cooly employed by servant-Reference to High Court—
Revisional jurisdiction.*

The servant of a licensed vendor sold eight quart bottles of country spirit, and employed a cooly to carry them as he directed. The servant was convicted under s. 60, Beng. Act VII of 1878; and the cooly was convicted under s. 61 of the same Act. It was suggested that the servant should have been convicted under s. 53, and that the cooly had committed no offence.

Held, that the conviction of the cooly was illegal, and must be set aside.

Held, also, that the servant was properly convicted, and whether under s. 60 or s. 53 was immaterial.

Queen v. Ishan Chunder Shaha (19 W. R., Cr., 34); and *Empress v. Baney Madhub Shaw* (I. L. R., 8 Cal., 207; 10 C. L. R., 389) followed.

The necessity for altering a conviction from one section to another for cognate offences, when the accused has not been prejudiced by any such error, is no sufficient ground for a reference to the Court of Revision.

THIS was a reference from the Sessions Judge of Tipperah under s. 438 of the Code of Criminal Procedure. The terms of the Reference were as follows :-

Accused No. 1 has been convicted under s. 60, and accused No. 2 under s. 61 of Beng. Act VII 1878. The former sold eight quart bottles of country spirit, and the latter had them in his possession, i.e., carried them as a cooly by direction of accused No. 1.

It is contended that the conviction of both the accused is illegal, because accused No. 1 was not a licensed vendor, and accused No. 2 might lawfully have had 12 quart bottles in his possession.

With regard to the case of accused No. 1 he is not a licensed vendor, but he is servant to a licensed retail vendor, and sold the liquor as such. Section 60 applies only to sale by licensed vendors, accused ought not therefore to have been convicted under that section. It may be that he has committed an offence punishable under s. 53, and if an appeal lay to this Court, I might perhaps under s. 423 of the Criminal Procedure alter the finding [848] maintaining the sentence, but as the case is not appealable I cannot do so, and I cannot direct the lower Court to enquire into the offence punishable under s. 53, because I could only make such order in case the accused had been discharged; s. 436, Criminal Procedure. I think I ought, therefore, to submit the case of accused No. 1 to the High Court to be dealt with under s. 439. I am inclined to think that the proper course would have been to prosecute, not him, but his master, under s. 60.

As to accused No. 2 the conviction seems unsustainable. Section 61 of the Excise Act must be read with s. 15, in which the quantity specified is 12 quart bottles. It is stated that the Board of Revenue have made an order, as they are empowered under s. 15, reducing

* Criminal Reference, No. 49 of 1883, from the order made by R. Towers, Esq., Sessions Judge of Tipperah, dated the 25th April 1883.

the quantity to six quart bottles, but my attention has been directed to the case of *Empress v. Kola Lalang* (I.L.R., 8 Cal. 214), in which it is shown that persons, who are not licensed vendors (and it is admitted that accused No. 2 is not one) do not commit an offence by possessing a less quantity than 12 quart bottles, though the quantity they possess may be greater than that authorized by the Board by virtue of the power conferred on them by s. 15. I would, therefore, recommend that the conviction of accused No. 2, who seems an innocent party, be set aside, and the fine ordered to be refunded to him.

No one appeared to argue the case.

The **Judgment** of the Court (PRINSEP and O'KINEALY, JJ.), was delivered by

Prinsep, J.—The second defendant must clearly be acquitted on the authority of the judgment of this Court in the case of *Empress v. Kola Lalang* (I. L. R., 8 Cal., 214) in which we concur.

The first defendant has in our opinion been properly convicted whether under s. 60 or s. 53 is immaterial—see *Queen v. Ishan Chunder Shaha* (19 W. R., Cr., 34); *Empress v. Baney Madhub Shaw* (I. L. R., 8 Cal., 207; 10 C. L. R., 389). We would further observe that for reasons stated by the Sessions Judge himself, he need not have referred the case of this prisoner. A necessity for altering a conviction from one section to another for cognate offences when the accused has not been prejudiced by any such error is no sufficient ground for a reference to the Court of Revision.

NOTES.

[See also 17 Cal. 566 (569); 1 N. L. R. 81 (84).]

[12 C. L. R. 508]

[849] APPELLATE CRIMINAL.

The 7th March, 1883.

PRESENT:

MR. JUSTICE McDONELL AND MR. JUSTICE TOTTENHAM.

Chundi Churn Mookerjee and others
versus
The Empress.

Master and Servant—Criminal act of Servant—Non-liability of Master—Indian Ports' Act (XII of 1875), s. 22.

The servants of a contractor who had engaged to discharge ballast from a ship lying in the port of Calcutta, threw the ballast into the river within the limits of the port, and thus committed an offence under s. 22 of the Indian Ports' Act (Act XII of 1875). It did not appear that the contractor had abetted the offence.

Held, that he was not, in the absence of proof of abetment, liable for the acts of his servants.

Baboo Umbica Churn Bose for the Appellant.

The *Standing Counsel* (Mr. Phillips) and Mr. Adkin for the Crown.

THE facts of this case sufficiently appear from the **Judgment** of the Court (McDONELL and TOTTENHAM, JJ.), which was delivered by

McDonell, J.—The appellant has been convicted before the Chief Presidency Magistrate of an offence against s. 22 of Act XII of 1875, by improperly

* Criminal Appeal, No. 155 of 1883 against the order of F. J. Marsden, Esq., Chief Presidency Magistrate of Calcutta, dated the 21st February 1883.

discharging ballast from the ship *Ben Nevis*, by the boats of Bishto Manjhi and Nufur Manjhi, by throwing it into the river within the Port of Calcutta, and has been sentenced to pay a fine of Rs. 250. The amount of the fine entitles the accused to appeal to this Court.

In our opinion the conviction is bad in law, for the facts proved or admitted do not establish any offence under the Act against the appellant. The first clause of s. 22 prohibits the casting of ballast or rubbish in the port without lawful excuse.

The next clause prescribes a penalty for whoever by himself or another so casts or throws the same, and for the master of any vessel from which the same is cast or thrown. It seems to us that to warrant the conviction under this section of a person, not being master of a vessel from which ballast is thrown, it must be shown that the accused person, if he did not himself throw the ballast or [850] rubbish into the port, intentionally caused somebody else to commit that offence.

In this case all that is proved or admitted against the appellant is that he made an agreement to remove the ballast from the ship *Ben Nevis*; that he engaged boats for that purpose; and that the ballast was removed from the ship in those boats. The boatmen, instead of landing the ballast at the proper place, threw it into the river within the limits of the port. They were arrested, convicted, and fined. Proceedings were subsequently taken against the appellant under the same section, when the Magistrate held him "liable for his servants' act," and accordingly convicted and sentenced him. We cannot bring ourselves to accept this doctrine as admissible in dealing with a person accused of an offence, unless his liability for the acts of another is specifically declared by statute. The learned Standing Counsel who has supported the conviction admits that in a criminal trial the doctrine laid down by the Magistrate in this case would not be applicable, but he endeavours to distinguish this case from a criminal matter by describing it as *quasi*-criminal, or as one relating not to an "offence" but to a mere breach of rule. And in such a case he submits that knowledge or intention on the part of the person who is accused in respect of something done by other persons is not essential.

We cannot, however, apprehend the distinction so suggested as entitling a Criminal Court to place a person accused of what is described as a *quasi*-criminal act at a disadvantage from which one charged with serious crime would be protected, *viz.*, being held responsible for the acts of another without any proof of abetment or connivance on his part, and, in the absence of any statutory provision, fixing him with such responsibility. We observe that Act XII of 1875 in Chapter VIII refers to breaches of it as "offences," makes them triable by a Magistrate, and provides for the enforcement of penalties on conviction. The trial then is, we apprehend, a criminal trial, and the same principles will apply to it as to other criminal trials.

If the Legislature had intended to make persons in appellant's position criminally liable for acts done by persons employed [851] by them without proof of connivance, it would surely have provided for this in the Act. The very section (22) and following sections do enact that the master of any vessel shall be liable to be punished for acts done on board in breach of the rules laid down, though they may possibly be done without his knowledge, or even against his orders. This specific creation of criminal liability as against the master shews that without it he would not be liable for an act not done, or expressly permitted by himself.

We find nothing in the Act which renders the appellants liable to punishment for the acts done by others not proved to have been by his abetment or connivance. We therefore set aside the conviction and direct that the fine, if paid, be refunded.

For these reasons we set aside the convictions and sentences in appeals Nos. 156 and 157.

Convictions set aside.

[9 Cal. 851: 12 C.L.R. 527]

APPELLATE CIVIL.

The 9th May, 1883.

PRESENT:

MR. JUSTICE CUNNINGHAM AND MR. JUSTICE MACLEAN.

Lakhimoni Chowdhrain.....Defendant

versus

Akrooni Chowdhrain.....Plaintiffs.

Registration Act (III of 1877), ss. 74, 77—Refusal to execute deed—Suit to compel registration.

If the non-registration of a deed has resulted from the refusal of one of the parties to it, to execute it, that matter must be enquired into by the Registrar, as directed by s. 71 of the Registration Act, before any right to sue under s. 77 can arise, and unless the requirements of the Act have been complied with no cause of action arises under s. 77.

Edun v. Mahomed Siddik (ante p. 150) followed.

THIS was a suit under s. 77 of the Registration Act (III of 1877) to enforce registration of a *kobala*. The defendant denied execution. An attempt had been made to register the deed before the Sub-Registrar who refused to register it upon the ground [852] that it had not been presented by a proper person, and that his registration fees had been not paid. An appeal was preferred to the Registrar who held that the Sub-Registrar was right in refusing registration. The present suit was then instituted praying for a declaration that the defendant had executed the deed and for an order directing the Sub-Registrar to register it within thirty days. It was admitted that the defendant had not appeared before the Registrar. The Munsif dismissed the suit. On appeal this decision was reversed. The defendant appealed to the High Court.

Mr. O'Kenedy and Baboo Anukul Chunder Sen for the Appellant.

Baboo Hem Chunder Benerjee and Baboo Lall Mohun Dass for the Respondent.

The following **Judgments** were delivered:—

Cunningham, J.—The order of the Sub-Registrar, which was the commencement of the proceedings out of which this suit has arisen, sets forth certain circumstances which occurred before him in connection with the application for registration. It then went on to state that Moheem, the person applying for registration, had stated that it was not his deed, and that he did not pay the fees on being asked for them. It then continued "the deed has

* Appeal from Appellate Decree, No. 238 of 1882, against the decree of Baboo Nobin Chunder Gangooli, Second Sub-Judge of Dacca, dated the 9th December 1881, reversing the Decree of Baboo Kalidhun Chatterjee, Second Munsif of Moonshigunge, dated the 7th February 1881.

not agreeably to s. 42, clause 7 of the rule in force been presented by a proper person, and the fees have not according to s. 66 been paid. Therefore, the registration of the deed is rejected."

From this order there was an appeal to the Registrar who passed the following order: "The rural Sub-Registrar was right in refusing registration, as he was unable to satisfy himself that it had been presented by a person authorized to do so, and because the proper fee was not paid. Appeal dismissed."

It is contended on behalf of the appellant that upon these orders the present suit could not be brought, or that, if brought, all that could be enquired into would be the question whether or not the Sub-Registrar and Registrar were right in holding that a proper presentation of the deed for registration had not been made.

On behalf of the respondent it has been urged that, inasmuch as there had been a refusal by the Sub-Registrar to register, and as [853] that refusal had been appealed against to the Registrar the respondent was at liberty to bring this action under s. 77, and in that action to raise the whole question whether or not the deed had been executed by the defendant, and whether it ought not therefore to be registered.

I do not think that this contention is right. It appears to me that the contention of the appellant is sound, that if the non-registration of the deed has resulted from the refusal of one of the parties to it to execute it, that matter must be enquired into by the Registrar, as directed by s. 74, before any right to sue under s. 77 would arise; and my opinion is, following the ruling of this Court in *Eidun v. Mahomed Siddik* (*ante*, p. 150), that unless the requirements of the Act have been complied with, no cause of action arises under s. 77.

I am, therefore, of opinion that the decree of the lower Appellate Court must be set aside, and that of the original Court dismissing the plaintiff's suit restored with costs throughout.

Maclean, J.—In my opinion this suit cannot be maintained, either under s. 77 of the Registration Act or under the general provisions of the Code.

To maintain this suit it was indispensable, I think, that the requirements of the Act as to presentation of the document by some one executing it should have been found; but this has not been done. The Subordinate Judge does indeed find that the defendant went in a boat to the Sub-Registrar, but he evidently went to the place where the Sub-Registrar's office is, for it is common to both plaintiff and defendant that the defendant did not appear before the Sub-Registrar. There is, therefore, no finding that the defendant appeared before the Sub-Registrar. He could not, therefore, register, and was bound to refuse to register the document; and the first Court could not properly direct that a document not presented according to law should be registered.

I think, on the authority of the case of *Eidun v. Mahomed Siddik* (*ante*, p. 150) the appeal should be decreed and plaintiff's suit dismissed with all costs.

Appeal allowed.

NOTES.

[See the Notes to 9 Cal. 150.]

[12 C.L.R. 530]
[854] APPELLATE CIVIL.

The 8th May, 1883.

PRESENT:

MR. JUSTICE CUNNINGHAM AND MR. JUSTICE MACLEAN.

Dagai Dabee.....Defendant

versus

Mothuranath Chattopadhyaya and others.....Plaintiffs.*

*Hindu Law, Gift--Possession retained by donor--Transfer of possession--
Symbolical transfer.*

A gift by a Hindu, unaccompanied either by possession on the part of the donee or any symbolical act, such as handing over documents of title, or permitting the donee to receive rents, is not in itself a valid transaction, even though the deed of gift be registered.

Baboo Rasbehari Ghose for the Appellant.

Baboo Durga Mohan Dass and Munshi Serajul Islam for the Respondents.

THE facts of this case sufficiently appear from the **Judgment** of the Court (CUNNINGHAM and MACLEAN, J.J.) which was delivered by

Cunningham, J. In this case the question raised is, whether the gift of a house in a case in which the donor reserved to himself the right of remaining in the house for the term of his life, and which was unaccompanied by any act of physical delivery, or any symbolical act by which physical delivery could be held to be implied, is valid.

No case supporting the view of the respondent that such a gift is valid has been brought to our knowledge.

In the present instance the donees appear to have never in any way had delivery of the house, and the only incident which can be regarded as symbolical of delivery is registration of the deed of gift.

With regard to registration it was contended by the respondent that the Full Bench Ruling in *Naram Chunder Cuckerbutty v. Dataram Roy* (I.L.R. 8 Cal. 597) had laid down that possession was necessary neither for a sale nor a gift. We find, however, that the learned [855] Judges in that case confined themselves strictly to a case where there has been a sale of property for valuable consideration, and where the document evidencing that sale has been registered. Their Lordships appear to have referred to the general course of dealings with regard to property, and to have considered that the general usage of the province had had the effect of dispensing with actual delivery in the case of sales for valuable consideration. No case, however, has gone the length, so far as we are aware, of saying that a gift by a Hindu, unaccompanied either by possession on the part of the donee or any symbolical act, such as handing over documents of title, or by permitting the donee to receive rents, or other like act, is in itself a valid transaction, even though the deed of gift be registered. On the other hand, we think that the decision in *Kishto Soondery Debia v. Ranees Kishto Motee* (Marsh., 367), must be taken as laying down that in such a case as this no valid binding transaction has taken place, until the donee has either actually or symbolically taken possession of the gift.

* Appeal from Appellate Decree, No. 314 of 1882, against the decree of Baboo Gunga Churn Sircar, Sub-Judge of Dacca, dated the 9th December 1881, reversing the decree of Baboo Kalidhun Chatterjee, Second Munsif of Munshigunj, dated the 17th May 1881.

We think, therefore, that the decree of the lower Appellate Court must be reversed, and that of the original Court restored with costs throughout.

Appeal allowed.

NOTES.

[HINDU LAW—GIFTS—POSSESSION—

The better opinion appears to be that the necessity as to delivery of possession enjoined by the Hindu law has been abrogated by sec. 123 of the Transfer of Property Act 1882, which applies to Hindus by virtue of sec. 129. See 11 Cal. 191; 14 Cal. 446; 15 Cal. 684; 20 Cal. 464; 27 Cal. 242; 4 All. 40; 12 All. 523; 16 All. 185; 23 Bom. 234; *Contra* 11 Bom. 517 18 Bom. 688; 3 C. P. L. R. 37; 5 C. P. L. R. 63.]

[9 Cal. 855]

APPELLATE CIVIL.

The 2nd March, 1883.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE O'KINEALY.

Chunder Narain Singh.....Decree-holder

versus

Kishen Chand Golecha.....Judgment-debtor.*

Landlord and Tenant—Arrears of rent—Decree for arrears of rent Sale for arrears of rent—Insolvency—Official Assignee—Beng. Act VIII of 1869, ss. 59 and 60—Insolvent Act 11 and 12 Vict. c. 21.

A decree for arrears of rent of an under-tenure was obtained against a tenant who became an insolvent, and whose tenure became vested in the Official Assignee by virtue of the provisions of the Indian Insolvent Act, 11 and 12 Vict., c. 21. An application was made under ss. 59 and 60 of the Rent Law, Beng. Act VIII of 1869, for an order that the tenure should be sold for its own arrears. The Official Assignee objected to the sale, and contended that the decree-holder's only right was to prove in the insolvency for the amount of his debt.

[856] *Held*, that, whether the arrears of rent became due before or after the insolvency of the judgment-debtor, the decree-holder was entitled to sell the tenure in execution of his decree.

THIS was an application for execution made in the Court of the District Judge of Beerbhoom. In rejecting the application the Judge said :—

“This case is similar to execution case No. 82 of 1880. A decree was obtained in the Court of the Subordinate Judge of Moorshedabad for arrears of rent, against the Official Assignee on behalf of the insolvent Kishen Chand Golecha. This decree has been transferred to this Court with a certificate of non-satisfaction, and filed here. Execution of this decree has been sued out here, and the under tenure, in respect of which such arrears were due, has been attached. The Official Assignee now raises an objection to the sale of that property on the ground that all properties of the insolvent had by orders of the High Court been previously vested in him, and that this Court has no jurisdiction.” It seems the suit had been instituted against the insolvent as well as the Official Assignee.

* Appeal from Original Order, No. 304 of 1882, against the order of S.H.C. Taylor, Esq., Judge of Beerbhoom dated the 1st September 1882.

The District Judge refused the application, and the decree-holder appealed on the grounds (1), that under the Rent Law the arrears of rent are a charge on the tenure, and, therefore, the sale should have been allowed; (2), that the tenure was liable to be sold for its own arrears, no matter into whose hands it had passed.

Baboo *Gurun Dass Banerjee* and Baboo *Bhoobun Mohun Dass* for the Appellant.

Baboo *Saligram Singh* for the Respondent.

The **Judgment** of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

Prinsep, J.—In this case the plaintiff, having obtained a decree against the Official Assignee for arrears of rent due on a patni tenure, attempted to sue out execution by attachment and sale of the tenure for which the arrears are due. The Official Assignee objected and stated that the landlord was not entitled to sell the tenure, but must come in like any other creditor. Neither of the Courts state whether the arrears said to have been due accrued before the property of the insolvent vested in the Official Assignee, [867] or while it was under his charge. If the Official Assignee neglected to disclaim or get rid of the lease, he would become liable for the rent due after the property of the insolvent debtor vested in him. This is clear from *Ex parte Davis* (L. R. 3 Ch. D., 463) and *Ex parte Dressler* (L. R. 9 Ch. D., 252). But even if the arrears were due from the insolvent before he took the benefit of the Insolvent Debtors' Act, we think that the landlord was entitled to sell the tenure. This very point was raised before the Madras High Court in the case of *Chinna Subbaraya Mudali v. Kandaswami Reddi* (I.L.R., 1 Mad., 59). Mr. Justice HOLLOWAY, who delivered the judgment of the Court, said : * * * "It appears to me no interest in the particular property in question vested in the Official Assignee by the vesting order. The interest of the potta-holder is one dependent upon his payment of rent, and if he does not pay, his right to hold ceases and becomes saleable for whatever it is worth for the arrears. It is a case of a contract, a contract of letting, and the Official Assignee must have expressed his election to take it and must have taken it *cum onere*, otherwise he acquired no right or interest in the land." In this view we concur, and we think that the lower Court was wrong in not allowing the under-tenure to be sold.

The appeal is allowed with costs. The case will go back to the lower Court with a direction to proceed with the execution.

Appeal allowed.

NOTES.

[See (1904) 9 C. W. N. 131 (137).]

[9 Cal. 857]

APPELLATE CIVIL.

The 2nd March, 1883.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE O'KINEALY.

Nilmadhub Chuckerbutty..... Judgment-debtor
versus
 Ramsodoy Ghose.....Decree-holder.*

*Execution of decree—Decree payable by instalments—Instalments—
 Construction of decree—Limitation.*

A consent decree for Rs. 350 directed payment of the money by fourteen half-yearly instalments of Rs. 25 each, in Cheyt and Assin of each year, the first instalment to be paid in the month of Cheyt 1283 (March-April 1877). [858] The decree contained a provision that in default of payment of any one instalment, the execution-creditor should have the option of executing the decree for the whole amount remaining unpaid. Default was made in payment of the first instalment, but the judgment-debtor paid up (not on due date) the instalment which fell due up to, and including Assin 1285 (October-November 1878), when he stopped making any payments. On the 26th of November 1881 the decree-holder applied for execution in respect of all sums then remaining unpaid under the decree. The District Judge allowed execution to issue for all sums which had fallen due within three years previously to the date of the application for execution, but refused to allow execution to issue in respect of the instalments not then due.

Held, that the execution-creditor must be considered to have waived his right to execute the decree for the whole amount, but was entitled under the decree to realize any instalments which were still due.

THIS was an application for execution of decree. The Court of First Instance rejected the application. This decision was reversed by the District Judge. The judgment-debtor then appealed to the High Court. The following is the judgment appealed from :-

The question which has to be decided in this case is, whether execution is barred by the law of limitation. The decree which bore date the 26th of February 1877 directed the payment of Rs. 350 by instalments, *viz.*, Rs. 25 in Cheyt 1283 (March-April 1877). In Assin (October-November) and Cheyt of each year from 1284 to 1289, Rs. 25, and in Assin 1290, Rs. 25. The decree provided, further, that in case of default in the payment of any one instalment the whole should be realized in execution. Although the language of the decree about the penalty is a little obscure, yet there can be very little doubt that the intention of the parties was, that in case of default in the payment of any one instalment the whole amount, which would remain unpaid, should be realized at once in execution.

According to the decree-holder, the first default took place in Cheyt 1283, but he went on receiving payments, notwithstanding that there were successive defaults. Up to the Assin kist of 1285 the debtor has paid, and the remaining amounts are yet due.

* Appeal from Appellate Order No. 249 of 1882, against the order of Baboo Brojendro Coomar Seal, Judge of Bancoora, dated the 26th May 1882, reversing the order of Baboo Taraprosunno Ghose, Munsiff of Katulpore, dated the 25th March 1882.

The decree-holder considered that every default would give him a fresh start, and so on the 26th November 1881, (and not on the 11th November as the first Court supposed) the decree-holder applied for the realization of the whole amount yet due.

The first Court held that the decree-holder having come to Court after the expiration of three years from the end of Cheyt 1283, execution was barred. The Munsiff refers to Art. 75* of Schedule II of the Limitation Act, but that article has nothing to do with execution applications. The case has to be decided by reference to the 6th Clause of Art. 179 of Schedule II.

[859] I have carefully read the case cited by the appellant on the one hand, *Asmutullah Dalal v. Kally Churn Mitter* (I.L.R. 7 Cal. 56) and that quoted by the respondent, *Ugrah Nath v. Laganmani* (I. L. R. 4 All. 83). The case last cited does not help the respondent. There, the decree provided that in case of default possession should be obtained, and inasmuch as the decree-holder had not come within three years, it was ruled that he was not entitled to get possession. Similarly it may be held in this case, as it was held in *Ugrah Nath v. Laganmani* (I. L. R. 4 All. 83) that the decree-holder not having come within three years from the first default, he could not pray for the realization of the whole amount; but to use the language of the High Court in *Asmutullah Dalal v. Kally Churn Mitter* (I. L. R. 7 Cal. 56), "we think that the decree-holder is still entitled to the benefit of Clause 6 of Article 179 as respects any instalments ordered in the decree, and which fell due on dates not exceeding three years before the application was filed."

The decree-holder is certainly not entitled to take out execution with respect to amounts which have not fallen due. It was also urged by the appellant that the payment made by the debtor was a step in aid of execution. That is a wrong view of the meaning of the phrase, "step taken in aid of execution." The judgment of the first Court is set aside, and the records of the case are sent back to the Court below, in order that the decree-holder may be allowed to amend his application for execution in accordance with the view set forth above.

The judgment-debtor appealed on the grounds (1) that the Judge was wrong in allowing execution to issue in respect of instalments which had fallen due within three years; (2) that execution was barred when not issued within three years of the first default in Cheyt 1283; (3) that the Court should not have allowed the decree-holder to amend his application.

Baboo Bama Churn Bannerjee for the Appellant.

Baboo Rajender Nath Bose for the Respondent.

The **Judgment** of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

Prinsep, J.—In this case the decree, which was drawn up by consent of parties, declares that the decretal amount should be paid in instalments,

* [Art. 75 :—

Description of suit.	Period of limitation.	Time from which period begins to run.
On a promissory note or bond payable by instalments, which provides that, if default be made in payment of one instalment, the whole shall be due.	Three years. ...	When the first default is made, unless where the payee or obligee waives the benefit of the provision, and then when fresh default is made in respect of which there is no such waiver.]

namely, Rs. 25 in Cheyt 1283, in Assin and Cheyt of each year from 1284 to 1289, Rs. 25, and in Assin [860] 1290, Rs. 25. It also provides that the decree-holder on default of payment of any instalment may execute the decree for the whole amount not paid. In Cheyt 1283 a default was made; but notwithstanding three instalments were afterwards received by the judgment-creditor.

The question now is, whether the application to execute the decree having been filed more than three years after Cheyt 1283, when the entire amount could be realised in execution on failure to pay an instalment, execution is not barred by limitation, or whether it can be executed for the amount of the remaining instalments within three years from the time when each became due.

The Munsiff dismissed the application.

We have had the decree read out to us, and, though it is not expressed in as clear and precise language as we would expect to be used in a document of this nature, we think that, on a proper consideration of that document, the decree-holder had, on default of payment of any instalment, a mere election to enlarge his power, and instead of executing the instalment decree, to execute the decree for the whole amount, and at his option proceed to realise the whole amount due. This clause in the decree which enlarged his power was made solely for the protection and benefit of the decree-holder. It does not infringe on any public right or public policy, or affect the right of any third party, and there was nothing to prevent the judgment-creditor's waiving any advantage that he might obtain under it. In the present case he never exercised the election to realise the whole amount, but on the contrary received instalments due subsequent to the default. He must therefore be held to have waived his right to execute the decree for the whole amount, but he is entitled under the decree to realize instalments still due. Art. 179, cl. 6 does not apply to such a decree.

We dismiss the appeal with costs.

Appeal dismissed.

NOTES.

[WAIVER BY ACCEPTANCE OF OVERDUE INSTALMENTS—

Some cases have drawn a distinction according as the creditor has or has not the option of enforcing the payment : 13 Cal. 73 (75) ; 15 Cal. 502 ; 31 Cal. 297 ; 11 C. W. N. 903 ; 21 Cal. 542 ; 20 Bom. 109 ; See also 27 Bom. 1 where it is said that waiver creates an estoppel, and the previous cases are reviewed ; 36 Cal. 394 - 9 C. L. J. 226--13 C. W. N. 1004.]

[12 C.L.R. 411 : 8 Ind. Jur. 40]
 [861] APPELLATE CIVIL.

The 5th March, 1883.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE O'KINEALY.

Golam Abed.....Defendant

versus

Toolseeram Bera.....Plaintiff.*

*Absconding of accused—Attachment by Magistrate—Execution of decree—
 —Sale in execution of decree—Sale by Magistrate—Code of Criminal Procedure (Act X of 1872), ss. 172, 173.*

A, having been accused of an offence under the Indian Penal Code, absconded, and his property was on the 7th of August 1878 attached by the Magistrate under s. 172 of the Code of Criminal Procedure, Act X of 1872. While the property was so under attachment, it was attached by *B* in execution of a money decree against *A*, and sold on the 15th of January 1879, *B* being the purchaser. On the 21st of April 1880, the Magistrate sold the property to *C*. It did not appear whether the time fixed by the Magistrate's proclamation for *A*'s appearance had expired at the date of the sale to *B*.

Held, in a suit for possession by *B* against *C*, that the title obtained by *C* under the Magistrate's sale was superior to the title (if any) obtained by *B* at the sale in execution of the money-decree.

Semble, that after the date of the attachment by the Magistrate under s. 172 of the Code of Criminal Procedure and during its continuance, no title could be conferred by an attachment and sale subsequently made in execution of a money-decree.

THIS was a suit for possession of certain plots of land. The judgment appealed from was as follows :—

It appears that the property in dispute belonged to two brothers, Boidonath and Kasinath, who had equal shares in it. Boidonath, who was accused of an offence under the Penal Code, absconded, and the property in dispute was attached by the Magistrate on the 11th of August 1878, under s. 172 of the Civil Procedure Code. During the subsistence of this attachment the plaintiff (respondent) attached the property for debts due, from both Boidonath and Kasinath, and sold and purchased it himself on the 15th of January 1879. The Magistrate then subsequently sold the right, title and interest of Boidonath (which was only a moiety share), and the appellant (Sheik Golam Abed) purchased it on the 21st of April 1880. The question is whether the plaintiff's purchase of Boidonath's share can be held good after the attachment made by the Magistrate under s. 172 [862] of the Criminal Procedure Code. It was contended that after attachment by the Magistrate the property should be considered to have been at the disposal of the Government, and, therefore, the plaintiff had no right to attach and sell it in execution of his decree. Reading s. 172, it appears to me that the property which was attached was not to be considered at the disposal of Government as soon as it was attached, but when the time specified in the proclamation for the absent person to appear expired.

In this case it does not appear whether the time fixed for Boidonath's appearance expired before or after the plaintiff's sale, and, therefore, I cannot say that the property was at the disposal of Government at the time when the plaintiff purchased it. The defendant ought

* Appeal from Appellate Decree No. 952 of 1882, against the decree of Baboo Jodunath Roy, First Subordinate Judge of Midnapore, dated the 24th March 1882, affirming the decree of Baboo Joggodishur Gupto, Munsif of Newal, dated the 31st December 1880.

to have shewn that a proclamation was issued before the plaintiff's purchase, and that the time specified in it for Boidonath's appearance expired before the plaintiff's purchase. I think; therefore there is no ground for interfering with the lower Court's judgment, and therefore it is dismissed with costs.

The defendant appealed to the High Court on the grounds (1) that nothing passed to the plaintiff at his sale; (2) that the defendant was entitled to priority over the plaintiff; (3) that the lower Court misconstrued s. 172; (4) that the lower Court was wrong in holding that the defendant was bound to show that a proclamation had issued before the plaintiff's purchase.

Moonshi Serajul Islam for the Appellant.

No one appeared for the Respondent.

The **Judgment** of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

Prinsep, J.—The property, which is the subject of the present appeal, was attached by the Magistrate under s. 172 * of the Code of Criminal Procedure (Act X of 1872) in consequence of the proprietor Boidonath Dutt absconding when accused of committing a criminal offence. The date of the attachment is stated to be the 7th of August 1878. Subsequently a third person, who held a decree against Boidonath Dutt, proceeded to execute it, and attached the same property, which was sold to the plaintiff on the 15th of January 1879. Notwithstanding these proceedings the attachment under the order of the Magistrate still continued, and it appears that, as Boidonath Dutt did not appear within the period specified in the proclamation issued under s. 171, the [863] property at once became (to use the terms of s. 172) "at the disposal of Government." We understand by this expression that it came under the absolute control of Government to dispose of, or deal with it, in whatever manner might seem most appropriate and convenient. In April 1880, the Magistrate at a public sale sold the rights of Government to the defendant. We have therefore in the present suit to determine which of these sales conferred the title to this property.

The Subordinate Judge has given the plaintiff a decree as against the defendant, because in his opinion the defendant ought to have shown that the proclamation had issued before the plaintiff's purchase, and that the time specified in it for Boidonath's appearance expired before the plaintiff's purchase.

These reasons appear to us to be altogether unsound, for the Subordinate Judge should have presumed in accordance with s. 114 (c) of the Evidence Act that the judicial acts of the Magistrate were regularly performed, that is to say that, unless the contrary was shown, the proclamation under s. 171 had been properly issued; that Boidonath did not appear within the time specified in

* [Sec. 172 :—Such Magistrate may order the attachment of any property, moveable or

immovable, or both, belonging to the person so absconding or concealing himself. Such order shall authorize the attachment of any property within the jurisdiction of the Magistrate of the district in whose district it is made; and it shall authorize the attachment of any property without the jurisdiction of the Magistrate of the district, when endorsed by the Magistrate of the district in which such property is situated.

The attachment under this section shall, if the property ordered to be attached be land paying revenue to Government, be made through the Collector of the District in which the land is situate, and, in all other cases, by seizure under the order of the Magistrate having jurisdiction; or by the appointment of a manager and receiver; or by an order prohibiting the payment of rent to the absent person; as such Magistrate deems proper.

If the absent person does not appear within the time specified in the proclamation, the property under attachment shall be at the disposal of Government, but shall not be sold until the expiration of six months, unless it is of a perishable nature, or such Magistrate considers that the sale would be for the benefit of the owner.]

the proclamation; and that the property having become at the disposal of Government, the Magistrate transferred it to the defendant. As regards the title of the defendant it appears to us that, so long as the attachment by the Magistrate continued, no title could be conferred by any attachment subsequently made. Section 172 provides that if the person to whom the property belongs does not appear within the specified period, his property (not his right, title and interest) shall be at the disposal of Government, and from the terms of s. 173 it would appear that if the property has been sold, although the person to whom it belonged might be able to show to the satisfaction of the Magistrate that he was not at fault, and therefore not properly responsible for the sale, even then the sale is not to be set aside, and the property restored, but the proceeds of the sale are to be made over to the proprietor.

Under these circumstances the suit must be dismissed, the orders of the Courts below being set aside with costs in all the Courts.

Appeal allowed.

[864] APPELLATE CIVIL.

The 8th February, 1883.

PRESENT :

MR. JUSTICE CUNNINGHAM AND MR. JUSTICE MACLEAN.

Bidhu Bhushun Basu and others.....Plaintiffs

versus

Komaraddi Mundul and another.....Defendants.*

*Enhancement of rent, suit for—Co-sharers—Notice of
enhancement—Parties.*

A and *B* were taluqdars of a certain village, each having an eight annas share. A certain ryot held a jote within the village, in respect of which he paid his rent separately—eight annas to *A* and eight annas to *B*. *A* served a notice of enhancement on the ryot, but the notice was signed by *A* only, and it did not appear that the consent of *B* had been previously obtained. *A* afterwards instituted a suit for arrears of rent at the enhanced rate, making *B* a defendant to the suit.

Held, that the notice of enhancement was sufficient to maintain a suit so framed.

IN this case it appeared that village Baruipara, in pergunnah Mahomedshahi station Nowpara in the District of Nuddea, was the patni taluk of the plaintiffs and one Shoshi Bhusun Sircar, the share of the plaintiffs being eight annas. Komaraddi Mundul was a ryot having a right of occupancy within the taluk, and who paid his rent separately—eight annas to the plaintiffs and eight annas

* Appeal from Appellate Decree No. 1323 of 1881, against the decree of Baboo Amrito Lall Chatterjee, Subordinate Judge of Nuddea, dated the 4th April 1881. Affirming the decree of Baboo Behari Lal Banerjee, 2nd Munsiff of Kooshtea, dated the 11th March 1880.

to Shoshi Bhusun Sircar. The plaintiffs served a written notice of enhancement on Komaraddi Mundul, but this notice was not signed by Shoshi Bhusun Sircar, nor had his consent to serve it been previously obtained. Komaraddi neglected to pay the enhanced rent required, and the plaintiffs brought the present suit against him for arrears of rent at the enhanced rates mentioned in the notice. Shoshi Bhusun Sircar was made a party defendant to the suit. The Court of first Instance dismissed the suit on the authority of *Guni Mahomed v. Moran* (I. L. R., 4 Cal., 96), and this decision was upheld on appeal, the Judge citing *Kasheekishore Roy Chowdhry v. Alip Mundul* (I. L. R. 6 Cal. 149).

[865] The plaintiffs appealed to the High Court on the ground that the lower Court was wrong in declaring the notice insufficient.

Baboo *Mohini Mohun Roy* and Baboo *Kali Churn Banerjee* for the Appellants.

Baboo *Sreenath Banerjee* for the Respondents.

The **Judgment** of the Court (CUNNINGHAM and MACLEAN, JJ.) was delivered by

Cunningham, J.—This was a suit for rent at an enhanced rate. The defence raised was that the notice of enhancement was signed, not by the whole body of landlords, but by the plaintiffs alone, who held an eight annas share, and separately collected their rent from the defendants. The question we have to decide in second appeal is, whether this notice was good. This question has, in our opinion, been decided in the affirmative by the observations of the Chief Justice in the Full Bench case of *Chuni Singh v. Hera Mahto* (I. L. R., 7 Cal., 633). We understand the meaning of the Chief Justice to be that a suit by a portion of the co-sharers for rent at an enhanced rate may be brought, provided the other co-sharers are joined in the suit either as plaintiffs or defendants; and that, in such a case, notice may be duly given by that portion of the co-sharers by which the suit is instituted. We think, therefore, that the question is no longer open to discussion. The present appeal must accordingly be admitted, and the case remanded to the Court of First Instance for trial on the merits.

Appeal allowed and case remanded.

NOTES.

[See (1885) 11 Cal. 615 (616) ; (1903) P. L. R. 159.]

The 30th April, 1883.

PRESENT :

MR. JUSTICE CUNNINGHAM AND MR. JUSTICE MACLEAN.

Kedarnath Mitter.....Plaintiff

versus

Surendro Deb Roy and others.....Defendants.*

Registration Act (III of 1877), s. 17—Lease or agreement to lease.

In a suit for possession of certain property and for the execution of a pottah, it appeared that two of the defendants had executed an agreement which was duly registered, by which they acknowledged the receipt of a [866] portion of the *salami*, and covenanted to execute a pottah on a certain day. This agreement was afterwards confirmed by two of the defendants who were minors when it was entered into : the confirmation was by deed which was duly registered. Subsequently all the defendants executed a document, which provided for the payment of a portion of the *salami* on the day when possession should be given as provided in the first agreement, and for the payment of the remainder by instalments which were to carry interest. This document was not registered.

Held, that it was not a "lease or agreement to lease" within the meaning of s. 17 of the Registration Act, and was admissible in evidence.

Mr. Evans, Baboo Sree Nath Doss, Baboo Guru Doss Banerjee, Baboo Kali Doss Khunjo, and Baboo Mahib Chunder Bose for the Appellant.

Baboo Mohini Mohun Roy, Baboo Ras Behary Ghose, and Baboo Jogesh Chunder Dey for the Respondents.

THE facts of this case sufficiently appear from the **Judgment** of the Court (CUNNINGHAM and MACLEAN, JJ.) which was delivered by

Cunningham, J.—The plaintiff sues to have it declared that three documents, constituting his *patni* right in certain properties are in force, to be put in possession of the properties, and that the defendants may be ordered to execute a *patni* pottah in respect of the taluks recorded in the Collector's *towjee* and a *mourasi* and *mokurari* pottah in respect of the *tikka* and other *mehals*, and to accept a *kabuliat* for the same from the plaintiff.

The first of these documents was dated 28th Pous 1283, and was executed by the defendants 1 and 2 ; the second was executed on 21st Bysack 1286 by the defendants 3 and 4, assenting to the terms of the first agreement ; and the third on the 26th Srabun 1286 executed by the four defendants modifying the terms of the first.

The questions raised in this appeal are, first whether the third document is inadmissible in evidence for want of registration ; and, secondly, whether, if it is inadmissible specific performance of the other two contracts can be decreed.

In the first of the three documents the defendants 1 and 2 covenanted that they would grant to the plaintiff a *mourasi* *mokurari* *istomrari* *patni* pottah of the lands mentioned ; they admitted receipt, of Rs. 4,000 out of Rs. 38,000, the bonus of the [867] *patni* ; they stated that the permanent rental of the *patni*,

* Appeal from Original Decree No. 98 of 1881, against the decree of Baboo Bhoobun Chunder Mukerjee, First Sub-Judge of Alipore, dated the 10th February 1881.

after deducting collection expenses, would be Rs. 33,126-11; that on payment of a further portion, Rs. 5,000, of the bonus, the plaintiff should be put in possession; that the patni rent should be payable in monthly instalments; that the first defendant would cause her second and youngest sons, the third and fourth defendants, to execute the patni and have it registered; that of certain arrears which had accrued, the plaintiff was to pay ten annas to the defendants, paying it in specified instalments, and was to keep six annas; that the plaintiff should pay the defendants road-cess, etc. This document was registered on the 13th May 1879.

The second document was executed by the two younger brothers, and ratified the first, but provided that in addition to the bonus specified in the first agreement a *nuzzur* of Rs. 4,000 should be presented to them, and that on payment of these two sums before 22nd Jeyt a pottah should be executed and registered. This document was also registered, 13th December 1879, the two brothers admitting execution, but refusing to sign the endorsement on the ground that it had been subsequently superseded by the acts of the plaintiff.

The third instrument was as follows:—"To Kader Nath Mitter, worthy of blessing! May our highest wishes for your welfare attend you.

"With reference to the future settlement in respect of our zamindari, *ticca lakhiraj*, and *daphaet*, etc., estate situate in the southern quarter which we have determined to make agreeably to the purport of the agreement of the 28th Pous 1285, *one or two terms therein being wanting to complete it*, it is this day settled that you should have to pay the sum Rs. 6,000 as *salami* to my three sons, and that out of the same Rs. 3,000 should have to be paid to my three sons on the date of delivery of possession as provided in the said agreement, i.e., you should pay the said Rs. 3,000 on or before Tuesday the 28th or Wednesday the 29th *Srabun*, and the balance of Rs. 3,000 on the date of the pottah, and by paying the residue of the bonus within a period of 45 days next after possession in the mofussil you should take a pottah and give a *kabuliat*. Further, you should pay a sum of Rs. 9,000 on [868] *account of the patni bonus on the 31st day of Srabun next*; in case you fail to do so, you are to pay interest at the rate of Rs. 1-8 per cent. *per mensem* from the said month of *Srabun*. You must pay the monthly rent on the due date, failing to do which, you should pay interest at the rate of 8 annas per cent. *per mensem* from the due date. In addition to the amount of bonus provided for in the agreement, you should pay a sum of Rs. 2,000 *in the shape of bonus*, but you are to pay the said sum subsequent to the auction *kist* in the month of Pous next. All other conditions shall be duly provided in the pottah and *kabuliat*."

This document was executed by all the defendants, but was not registered, and the question is, whether its non-registration renders it inadmissible in evidence.

This depends on the meaning to be given to s. 17 of the Registration Act III of 1877.

Its first provision is that a *salami* of Rs. 6,000 should be paid to the three sons, half on the day of delivery of possession as fixed by the first agreement, which it stated to be 28th or 29th *Srabun*, and the balance within 45 days after possession, upon which a pottah and *kabuliat* should be exchanged; it provided that Rs. 9,000 on account of the patni bonus should be paid on 31st *Srabun* then next, failing which it should bear interest; that on failure to pay the monthly instalments plaintiff should pay interest at Rs 1-8 per mensem; that he should pay an additional Rs. 2,000 in shape of bonus, but subsequent to the auction *kist* in Pous then next.

This document did not in our opinion amount to a "lease or agreement to lease"; it was merely a provision for certain payments to the landlords by way of consideration in addition to those already agreed on; and that in the case of arrears certain interest should be payable. Such an agreement might, we consider, be properly regarded as falling within cl. (h) of s. 17, and so be exempted from registration under cl. (b).

The appeal must, therefore, be decreed, the judgment of the Original Court set aside, so far as it concerns the respondents, defendants 3 and 4, and the case remanded for trial on the merits. Costs of this appeal to be paid by the defendants 3 and 4.

[869] This judgment renders it unnecessary for us to deal with the objections raised by the respondents. The matters referred to in those objections can be disposed of, if necessary, at the hearing by the Original Court.

Appeal allowed.

NOTES.

[See also 25 Mad, 608.]

[9 Cal. 869]

APPELLATE CIVIL.

The 20th June, 1882.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE O'KINEALY.

In the matter of Bhaobunessury.

Bhaobunessury

versus

Judobendra Narain Mullick.*

Limitation Act (XV of 1877), Sch II. Art. 164—Code of Civil Procedure (X of 1877), s. 108—Ex parte decree—Setting aside Ex parte decree.

An *ex parte* decree was obtained against a defendant who applied to have it set aside under s. 108 of the Civil Procedure Code. The application was made more than thirty days from the date of attaching the defendant's property in execution of the decree, but within thirty days of the service of the sale proclamation.

Held, that the application was barred by limitation under Art. 164, † Sch. II, Act XV of 1877.

* Appeal from Original Order, No. 90 of 1882, against the order of Baboo Aughur Nath Ghose, Subordinate Judge of Dinagepore, dated the 6th April 1882.

† [Art. 164: —

Description of application.

Period of
limitation.

Time from which period begins to
run.

By a defendant for an order to set aside a judgment *ex parte*.

Thirty days... The date of executing any process for enforcing the judgment.]

IN this case the judgment appealed from was as follows :—

" This is an application made by the petitioner to set aside an *ex parte* judgment passed against her and another defendant named Gour Loll Chowdhry on the 18th of July 1881, on the ground that the summons was not served at the residence of the petitioner, and that the petitioner is not aware of the service of summons.

" The plaintiff pleads limitation, and alleges that the summons was duly served. I think the application is barred by limitation, it having been brought after the lapse of thirty days from the date of completely executing the process of attachment, issued at the plaintiff's instance for enforcing the judgment, Art. 164, schedule II of the Limitation Act. The attachment was made on the 9th, 13th, and 18th of September, and the present application was presented on the 4th of January last. There is no reason why the Court should not in this case presume, under s. 114 of the Evidence Act, that the attachment, which is an official act, was regularly made. The presumption arising under the section has not been rebutted by any evidence. As the application was not made in time, it must be considered barred by limitation. The application is, therefore, refused.

[870] The petitioner appealed to the High Court on the ground that " your petitioner, having applied to set aside the *ex parte* decree within thirty days from the date of the service of sale proclamation, and your petitioner not having been aware of the service of attachment process before, the Subordinate Judge was wrong in holding that your petitioner's application was made beyond the period prescribed by the law of limitation. "

Baboo *Ishur Chunder Chuckerbutty* for the Appellant.

Baboo *Boikunt Nath Dass* for the Respondent.

The **Judgment** of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

Prinsep, J.—The lower Appellate Court has held that the application under s. 108 of the Code of Civil Procedure of 1877 is barred, inasmuch as it was not made within thirty days from the date of executing the process, that is, the attachment in execution of the *ex-parte* decree. For the judgment-debtor it is contended that there was no such attachment made, and that this application is in time. The lower Court, however, held that in the absence of any evidence on the part of the defendant, it would, under s. 114 of the Evidence Act, presume that the attachment was properly made.

We think that the view taken by the lower Court was perfectly correct, and that it was incumbent on the defendant judgment-debtor to show that he made his application under s. 108 within thirty days from the date of the first process in execution of the decree passed against him. Having failed to do so, his application was correctly disallowed as barred. The appeal is, therefore, dismissed with costs.

Appeal dismissed.

NOTES.

[LIMITATION—SETTING ASIDE EX PARTE DECREE—

The Legislature in the Limitation Act, 1908, has in Art. 164 substituted the following as the starting points of limitation :—" The date of the decree or where the summons was not duly served, when the applicant has knowledge of the decree.]

[---12 C. L. R. 590]
[871] APPELLATE CIVIL.
The 20th April, 1883.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE WILKINSON.

Het Narain SinghDefendant
versus

Ram Dein Singh and others.....Plaintiffs.*

Hindu Law—Contract—Interest exceeding principal—Suits between Hindus in mofusil—Act XXVIII of 1855, s. 2.

In suits between Hindus in the mofusil interest exceeding the principal may be awarded.

Baboo Chunder Madhub Ghose and Baboo Aubinash Chunder Bannerjee for the Appellant.

Baboo Mohesh Chunder Chowdhry and Baboo Rugho Nundun Persad for the Respondents.

THE facts of this case sufficiently appear from the **Judgment** of the Court, which was delivered by

Mitter, J.—This is an appeal against the decision of the Subordinate Judge of Shahabad in a suit upon a bond. The only question raised in the appeal is, whether the decree for interest from the date fixed in the bond for the repayment of the loan at the particular rate mentioned in the bond is correct or not. There is also another question raised, *viz.*, that the plaintiffs are not entitled to recover interest in excess of the principal. As regards the question of rate, the terms of the bond are quite plain. It says: "I do declare and give out in writing that I shall, without any objection, repay the said amount, principal with interest at the rate of Rs. 1-4 per cent. per mensem, on the 30th Bhadur 1277 Fusli. If I fail to do so on that date as promised, then on the expiration of that date, *i.e.*, from the 1st Assin 1278 Fusli interest on the said amount of loan at the rate of Rs. 1-8 per cent. per mensem, till the date of repayment, shall be due from me." We are bound to decree the rates agreed upon under s. 2, Act XXVIII of 1855, and there is no ground upon which we can say that this stipulation was in the nature of a penalty. Then as regards the question raised before us, as to whether under the Hindu law the plaintiffs were entitled [872] to recover interest in excess of the principal, we are of opinion that the aforesaid s. 2, Act XXVIII of 1855, is also conclusive upon this point. Our attention has been called to several decisions of the Original Side of this Court and of the Bombay High Court; they were based upon the provisions of the Charter of the late Supreme Court, by which it was provided that the Hindu law was to govern contracts between parties who were Hindus in suits before the Supreme Court. But in the mofussil there was a Regulation, *viz.*, Regulation XV of 1793 distinctly providing rules under which interest was to be allowed, and s. 6 of that Regulation provided that in no case interest was to exceed the principal. That section was expressly repealed by Act XXVIII of 1855, and the only section enacted in lieu of s. 6†

* Appeal from Original Decree, No. 1 of 1882, against the decree of Baboo Ram Persad Sub-Judge of Shahabad, dated the 22nd August 1881.

† [Sec. 6 :—In any case in which an adjustment of accounts may become necessary between the lender and the borrower of money upon any mortgage, conditional sale of landed property, or other contract whatsoever,

Rate of interest on future adjustment of accounts. which may be entered into after the passing of this Act, interest shall be calculated at the rate stipulated therein; or, if no rate of interest shall have been stipulated and interest be payable under the terms of the contract, at such rate as the Court shall deem reasonable.]

and other sections repealed was s. 2 of the Act, which says: "In any suit in which interest is recoverable, the amount shall be adjudged or decreed by the Court at the rate (if any) agreed upon by the parties. That being so, it is quite clear that we are bound, under s. 2, Act XXVIII of 1855, to award the full interest that is due under the terms of the bond.

The appeal will, therefore, be dismissed with costs.

Appeal dismissed.

NOTES.

[See also (1887) 14 Cal 781.]

[9 Cal. 872 : 12 C.L.R. 571]

APPELLATE CIVIL.

The 19th April, 1883.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE WILKINSON.

Najhan.....Defendant

versus

Mahomed Taki Khan *alias* Peer Bux Khan and another.....(Plaintiffs).*

Civil Procedure Code (Act XIV of 1882), s. 244, cl. (c).—Question relating to the execution of the decree—Separate suit.

In a suit to recover possession of land, the defendants resisted execution on the ground that they were cultivators, and that the decree only authorised the plaintiff to recover possession as proprietor. The objection was overruled, and the defendants were ejected. They then sued to set aside the order made in the execution proceedings and to recover possession.

Held, that the suit was barred under s. 244, cl. (c), of the Civil Procedure Code.

THIS was a suit to recover ten bighas of jote land in Mulna Chuk. The plaintiffs alleged that it was their mouroasi jote; that [873] one Khairat Ali took an izara from Mussamut Latifa, the proprietor, which was to continue until the zuripeshgi was paid; and that on the 7th of July 1855, Khairat Ali sold his izara right to Akbar Khan, and that they hold their jote both under Khairat Ali and Akbar Khan. The plaintiffs also alleged that Akbar Khan, on the 21st July 1857, sold his izara right to the wives of the plaintiffs, to whom also they paid rent. The defendant, who afterwards purchased the proprietary rights in Mulna Chuk, sued the present plaintiffs and their wives to recover possession of the disputed land. In that suit the present plaintiffs pleaded that they were mere cultivators, and that their wives were the real purchasers, and their wives admitted having purchased the izara right. On the 11th September 1879, a decree was made for possession in the last-mentioned suit. The present plaintiffs resisted execution on the ground that they being cultivators could not be ejected. This objection was disallowed on the 17th of April 1880, and the present plaintiffs were dispossessed. They then instituted the present suit to recover possession and to set aside the order of the 17th April 1880.

Both the lower Courts, holding that the suit was not barred under s. 244 of the Civil Procedure Code, gave the plaintiffs a decree. The defendant appealed to the High Court.

*Appeal from Appellate Decree, No. 746 of 1882, against the decree of Baboo Poresh Nath Banerjee, First Subordinate Judge of Patna, dated the 27th February 1882, affirming the decree of Baboo Kedar Nath Roy, additional Munsif of that District, dated the 30th May 1881.

Munshi *Mahomed Yusuf* for the Appellant.

Mr. *Twidale* for the Respondents.

The **Judgment** of the Court (MITTER and WILKINSON, JJ.) was delivered by

Mitter, J.—We are of opinion that this suit ought to be dismissed as barred under s. 244 of the Civil Procedure Code. The defendant appellant before us brought a suit against the present plaintiffs, and also certain other persons, including the wives of the present plaintiffs, as defendants. That suit was for possession of a piece of land, which includes the disputed land. In that suit the plaintiffs alleged that they were in possession as ryots. The question whether they were entitled to remain in possession of the land as ryots or not, was not gone into, but on the 11th of September 1879 a decree for possession was given in favour of the defendant appellant, and the direction in the decree was that [874] the plaintiff in that case, *viz.*, the appellant before us, was to recover possession of the land claimed in the month of Pous 1287. In execution of that decree possession was obtained by the appellant. Thereupon the plaintiffs in this suit appeared as objectors, and contested the right of the appellant before us to eject them from the land now in dispute. Their contention was that the decree awarded to the appellant only the right to recover possession of the property as proprietor, and that it did not extinguish their right as tenants. The matter was gone into, and the Court executing the decree on the 17th April 1880, held that under it the appellant was entitled to recover khas possession of the property by evicting the plaintiffs. Thereupon the present suit was brought to set aside that order and to recover possession of the land in dispute upon the tenant right of the plaintiffs. It appears to us that the question, which was decided by the execution Court, was a question which came under cl. (c) of s. 244. That clause is to the following effect:—"Any other questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree." Now this question, *viz.*, whether under the decree the defendant appellant was entitled to evict the plaintiffs, was a question which arose between the parties to that suit. There is no dispute as to that. It also appears to us that it was a question relating to the execution of that decree. The contention of the plaintiffs was, that the real effect of that decree was simply to entitle the decree-holder to obtain possession as proprietor. On the other hand, the contention of the appellant was that he was entitled under the decree to take khas possession of the property by evicting the plaintiffs in this suit. It was, therefore, a question relating to the execution of that decree, *viz.*, a question as to the construction of it. The matter which was in dispute falling within cl. (c), s. 244, no separate suit would lie. Section 244 says that the questions enumerated in clauses (a), (b) and (c) shall be determined by order of the Court executing the decree and *not by separate suit*. The plaintiffs, if so advised, might have appealed against the decision of the execution Court, but [875] they are precluded from maintaining a separate suit by the express words of s. 244.

We, therefore, set aside the decision of the lower Appellate Court, and dismiss the plaintiffs' suit with costs in all the Courts.

Appeal allowed.

NOTES.

[See also (1884) 11 Cal. 93.]

[9 Cal. 375 : 12 C.L.R. 506 : 8 Ind. Jur. 41]
APPELLATE CRIMINAL.*The 7th May, 1883.*

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE O'KINEALY.

Shadulla Howladar and another

versus.

The Empress.*

*Code of Criminal Procedure (Act X of 1882), s. 309—Trial by
Assessors—Evidence—Summing up of evidence—Delivery of
opinions of Assessors—Sessions Judge, Duties of.*

The power of summing up the evidence given by s. 309 of the new Code of Criminal Procedure, Act X of 1882, is intended to be exercised in long or intricate cases, and the Sessions Judge should confine himself to summing up the evidence and should not obtrude on the assessors his opinion of the worthlessness or otherwise of certain portions of the evidence.

The Sessions Judge should also conform strictly to the words of s. 309, and require *each* assessors to state his opinion orally.

The Sessions Judge should not utilize the services of the pleader for the prosecution for the purpose of recording his summing up to the assessors. If he is not capable of recording the substance of it himself, he should employ an independent person for that purpose.

THIS was an appeal from a conviction and sentence of the Sessions Judge of Furreedpore. The facts of the case are sufficiently set out in the judgment of the High Court.

Baboo Grija Sunker Mozoomdar for the Appellants.

The Deputy Legal Remembrancer (Mr. Kilby) for the Crown.

The **Judgment** of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

Prinsep, J.—After considering the evidence on the record in this case, we are of opinion that the appellants have been rightly [376] convicted under ss. 149 and 304 of the Indian Penal Code. It is clear that they were the ringleaders in a premeditated riot, with the knowledge and intention necessary to bring them within these sections. The mob, of which the appellants were the ringleaders, consisted of about one hundred and twenty-five men, said to have been armed with shields, spears, and clubs. One man was killed, and others were injured.

On these facts we hold that the appellants have been properly convicted, and we also think that the sentences passed on them are not too severe. The appeals are, therefore, dismissed.

It is necessary, however, to make some observations on the procedure adopted by the Sessions Judge. He has taken advantage of the terms of s. 309 of the present Code to sum up the evidence for the prosecution and defence to the assessors. This provision has, for the first time, been introduced into our Code, and in our opinion the object is to enable the Sessions Judge in long or intricate cases to place the evidence in an intelligible form, so as to assist the assessors in arriving at a reasonable conclusion.

* Criminal Appeal, No. 184 of 1883 against the order of F.J.G. Campbell, Esq., Officiating Sessions Judge of Furreedpore, dated the 12th March 1883.

In the present case we observe that the Judge seems rather to have taken an opportunity of expressing his opinion in emphatic terms on every single matter put in evidence. He observes on one point : * * * "although you may utterly disbelieve the witnesses, as this Court has done, with regard to those persons (who had been acquitted), but yet *there is no ground for disbelieving them with regard to those men who have been named from the beginning.*"

Now, it is impossible to suppose that the assessors could have been otherwise than very much embarrassed in coming to an independent opinion of their own in the face of the very decided opinion expressed by the Judge. There are other passages in the summing up which might be quoted to a somewhat similar effect.

In the next place, we observe that the summing up has been recorded by the pleader for the prosecution and accepted by the Judge as correct. We think that such a course should not have been taken by the Judge, and that if he was incapable himself of recording the heads of the summing up to the assessors, he should [877] have availed himself of the services of some Court-officer, or directed it to be done by some independent person.

We next find that, instead of taking the opinion of each assessor, as is required by law, the Judge has received the opinions of all the assessors combined, as delivered through one of them whom he thus regards as the foreman of a jury.

We further observe that four other persons, who were under trial along with the appellants, were acquitted by the Sessions Judge at the termination of the evidence for the prosecution. The grounds on which the judgment of acquittal was based are, that the evidence of identification was unworthy of belief.

Under such circumstances, it was the duty of the Judge, before passing judgment, himself to ask for and record the opinions of the assessors on that evidence. The Judge, however, has thought it unnecessary to do so, because he considers that there was "no evidence" against the accused, the fact being that there was evidence which the Judge thought unworthy of belief.

Appeal dismissed.

[9 Cal. 877]
APPELLATE CRIMINAL.

The 4th May, 1883.

PRESENT:

MR. JUSTICE PRINSEP AND MR. JUSTICE O'KINEALY.

Sheo Saran Tato

versus

The Empress.*

Sentence—Penal Code (Act XLV of 1860), s. 75—Previous conviction.

The object of s. 75 of the Indian Penal Code is to provide for an additional sentence, not a less severe sentence, on a second conviction. Recourse should not be had to that section if the punishment for the offence committed is itself sufficient.

THIS was an appeal from the following finding and sentence of the Judge of Shahabad sitting with assessors on the 19th of March 1883 :—

"The Court concurring with the assessors finds that the accused person Sheo Saran Tato is guilty as charged, namely, that he on or about the 18th day of February 1883, at Arrah, committed house-breaking by night with intent to commit theft, he having previously, that is to say on the 25th August 1874, been convicted of house-breaking by night in order to the committing of theft, such conviction not having been set aside [878] on appeal, and that he thereby committed an offence under s. 457 of the Indian Penal Code punishable under section 457/75 of the same; and under these sections the Court directs that the said Sheo Saran Tato be punished with rigorous imprisonment, which shall extend to four years from this date."

No one appeared to argue the case.

The **Judgment** of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by **Prinsep, J.**—There is no reason for questioning the correctness of the conviction of the appellant, and the sentence is not excessive. The appeal is, therefore, rejected.

We think it necessary, however, to notice a misconception of the object of s. 75, Penal Code, into which the Sessions Judge has fallen. He seems to think that on a second conviction of any of the offences specified in that section he is bound to pass sentence thereunder, and he accordingly observes that, although for the offence committed (s. 457), the prisoner would be liable to imprisonment for fourteen years, he would under s. 75 of the Penal Code, by reason of a previous conviction, be liable to imprisonment for only ten years. He then states that "it is for the prisoner's advantage, provided he is prepared to take his chance of transportation to admit a previous conviction." The object of s. 75 is to provide for an additional sentence, not for a less severe sentence on a second conviction. Recourse should not be had to s. 75 if the punishment for the offence committed is itself sufficient, and even then the Code of Procedure requires that the prisoner should be first convicted of that offence.

Appeal dismissed.

NOTES.

[See also (1895) 17 All. 120.]

* Criminal Appeal, No. 207 of 1883, against the order of J. Tweedie, Esq., Sessions Judge of Shahabad, dated the 19th March 1883.

[9 Cal. 878]
APPELLATE CRIMINAL.

The 28th May, 1883.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE O'KINEALY.

Chand Khan

versus

The Empress.¹

Appeal—Security for good behaviour—Code of Criminal Procedure
(Act X of 1882), ss. 110, 118, 123.

No Appeal lies to the High Court from an order passed by a District Magistrate under the provisions of s. 123 of the Criminal Procedure Code and on reference by the Magistrate confirmed by the Sessions Judge under the same section, requiring a person to be detained in prison, until he should provide security for his good behaviour.

[879] IN this case a rule was issued under s. 110 of the Criminal Procedure Code by the Officiating Magistrate of Patna, calling upon the appellant to show cause why he should not be ordered to provide two good and sufficient securities in Rs. 50 each, and his own recognizance in Rs. 100 to be of good behaviour for three years. On cause shown the rule was made absolute under s. 118 of the Criminal Procedure Code, but the appellant was unable to provide the necessary security. The Magistrate detained him in prison pending the orders of the Sessions Judge. The latter passed the following order: "The respondent, Chand Khan must give his own recognizance of Rs. 100, and find two securities in Rs. 50 each for three years, as required by the Magistrate whose order is confirmed under s. 123 of the Code of Criminal Procedure. Failure to comply will entail on the respondent rigorous imprisonment not exceeding three years until compliance." Chand Khan appealed to the High Court.

No one appeared to argue the case.

The **Judgment** of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

Prinsep, J.—We think that no appeal lies in this case. Section 406 provides expressly for an appeal on behalf of a person required by a Magistrate, other than the District Magistrate or a Presidency Magistrate, to give security for good behaviour, and the law nowhere declares that any appeal shall lie in other cases of this class. The order moreover is not a conviction on a trial held by a Sessions Judge (s. 410), nor a sentence of the District Magistrate subject to the confirmation of the Sessions Judge (s. 408a), and, therefore under s. 404 no appeal would lie.

Appeal dismissed.

* Criminal Appeal No. 253 of 1883 against the order of G. A. Grierson, Esq., Officiating Magistrate of Patna, dated the 26th April 1883.

[—13 C.L.R. 412—8 Ind. Jur. 81]

[880] ORIGINAL CIVIL.

The 18th March, 1883.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE AND MR. JUSTICE.
CUNNINGHAM.

The Oriental Bank Corporation
versus
The Baree Tea Company, Limited.

*Principal and Agent—Managing Agent—Authority of Agent—Liability of
Principal—Banker and Customer—Bills of exchange—
Indorser and Acceptor.*

N. & Co., the Managing Agents of the Baree Tea Company, had a general banking account with the Oriental Bank Corporation, which account they were allowed to overdraw on having the overdraft properly secured. Under the Articles of Association of the Baree Tea Company, N. & Co. had power to "draw, accept, endorse, and negotiate on behalf of the Company all such cheques, promissory notes, drafts, etc., as should be necessary for enabling them to carry on the business of the Company." Purporting to act under this power N. & Co. drew a bill of exchange on the Managing Agents of the Company, which was accepted by the latter, and endorsed by N. & Co., to the Oriental Bank Corporation, who credited the amount to N. & Co.'s general account. The amount was drawn out by cheques drawn by N. & Co., personally, without reference to the Baree Tea Company, and there was no proof that the money had been applied for the purposes of the Baree Tea Company.

Held, in an action by the Oriental Bank against the Baree Tea Company, that the latter were not liable on the bills as acceptors.

TWO suits were brought by the Oriental Bank Corporation, the indorsees of certain bills of exchange, against the Baree Tea Company, Limited, as acceptors, to recover the amount of the bills. From the evidence it appeared that Nicholls & Co., who (previously to the month of February 1881), carried on the business of Bankers and Agents in Calcutta, had been appointed Managing Agents of the Baree Tea Company in 1874, and as such Managing Agents had power under the Articles of Association to "draw, accept, endorse, and negotiate all such cheques, promissory notes, drafts, etc., as should be necessary for enabling them to carry on the business of the Company."

It appeared that for several years Nicholls & Co., had a general banking account with the Oriental Bank, and in [881] September 1879 Mr. William Nicholls, the senior partner of the firm of Nicholls & Co., applied to the manager of the Bank for a loan to the Baree Tea Company. He showed the accounts and the Directors' report of the Tea Company, stated to the Manager that the Company was in need of money to carry on its business, and, producing the Articles of Association, pointed out the passage above quoted, giving the Managing Agents power to accept and draw bills for the purpose of the Company. The Manager agreed to advance the money, and advances were made by discounting bills to the amount required. These advances were paid off by Nicholls & Co. No separate account was opened with the Baree Tea Co., the proceeds of the bills being credited to, and the amounts drawn debited in, the general accounts of Messrs. Nicholls & Co.

It appeared from the bank books that Messrs. Nicholls & Co. were allowed to overdraw their account on having the overdrafts properly secured, and on the 22nd of April 1880, the amount overdrawn was Rs. 23,560-12-5, which amount was secured by the deposit of Government paper belonging to Nicholls & Co., to the amount of Rs. 26,000. In this state of affairs, on the 22nd of April, Mr. William Nicholls applied to the Manager of the Bank for a loan for the purposes of the Baree Tea Company, Limited. The Manager agreed to give the loan, and the transaction was carried out as follows :—A bill of exchange for Rs. 15,000 payable “ to us or order ” three months after date was drawn by “ Nicholls & Co., ” and directed “ to the Managing Agents, Baree Tea Company, Limited, Calcutta. ” Across the face of the bill was written, “ accepted due 22-25th July 1880. Nicholls and Co., Managing Agents, Baree Tea Company, Limited. ” This bill was endorsed by Nicholls and Co., to the Oriental Bank, was discounted by the Bank at the market rate of the day, and the proceeds Rs. 14,690-15-5 were credited in the general banking account of Messrs. Nicholls & Co. It has been stated above, that before this transaction the debit balance in the deposit ledger of the Bank was Rs. 23,560-12-5. After the transaction the debit balance was stated to be Rs. 8,869-13-0, being the difference between Rs. 23,560-12-5 and Rs. 14, 690-15-5. After this date, the 22nd April 1880, the name of the Baree Tea Company did not [882] appear in the books of the Bank ; and Mr. Harper, the Bank Manager, stated, “ the amount was drawn out by cheques by Nicholls and Co., personally, without any reference to the Baree Tea Company. ” The bill for Rs. 15,000 was never paid ; but was renewed from time to time by other bills drawn in a similar form and finally by the bills the subject-matter of the present suits, which were drawn, accepted and endorsed, on the 5th of February 1881.

The Baree Tea Company denied liability for the amount of the bills ; denied the authority of Nicholls & Co., to accept the bills so as to bind the Company ; denied that the bills were drawn or accepted for the purposes of the Tea Company ; and alleged that the bills, if endorsed, were wrongfully endorsed for the purpose of securing debts of Nicholls & Co., due to the plaintiff Bank, and that the Bank had notice of such wrongful endorsement. The case was tried by WILSON, J., who on the 23rd of May 1882 delivered the following **Judgment** :—

Wilson, J.—The plaintiff Bank in those two cases sues the defendant Company upon certain bills of exchange accepted on behalf of the Company by Nicholls & Co. By the Articles of Association, Art. 6, the managing agents, Nicholls and Co., had power “ to draw, accept, endorse, and negotiate on behalf of the Company all such cheques, promissory notes, hundies, drafts, Government and other securities as shall be necessary for enabling them to carry on the business of the Company. ” The bills in question were accepted by Nicholls & Co., professing to represent the Company, to secure advances which Nicholls & Co. said they required for the purposes of the Company. Several objections were raised to the plaintiff’s right to recover, some of which would require grave consideration, if it were necessary to decide upon them. But I do not think it necessary to deal with more than one objection, because that one seems to me to be fatal. If Nicholls & Co., had authority to accept such bills as those sued upon, they could only have a right to do so for the purposes of the Company ; but I do not think it is open to the Bank in this case to say that the transaction was anything but a transaction with Nicholls & Co., personally. The consideration for the bills was not an advance to the Company, or indeed any advance at all. [883] The Bank merely credited Nicholls &

Co., in their general account with the amount of each bill, and that account was an overdrawn account, though the overdraft was, no doubt, secured. Suit dismissed with costs.

The plaintiffs appealed.

Mr. *Branson* and Mr. *Hill* for the Appellants.

Mr. *Branson*.—The evidence shows that Nicholls & Co. kept the Baree Tea Company going when they were in great difficulties, and it is only fair to presume that the money raised by the Bank was applied for the Company's benefit. The Managing Agents of the Company came to the plaintiffs to ask for an advance on behalf of the Company. They had a clear right to draw and accept bills under the Articles of Association, and the Bank was not bound to see to the application of the money. Mr. Harper's evidence shows clearly that credit was given not to Nicholls & Co., but to the Baree Tea Company. Counsel referred to *Gray v. Johnston* (L. R. 3 H. L. 1).

Mr. Hill on the same side contended on the evidence that there was no doubt that an advance was made by the Bank, and that that advance was made to the Tea Company and not to Nicholls & Co. The accounts showed that at the time the advance was made the Tea Company were in want of the money. Nicholls & Co., had power to pledge the credit of the Company, and the Bank were satisfied that that was the case. The Bank was not bound to look to the application of the money, nor was it aware that Nicholls & Co. were committing a breach of trust, or a fraud on the Company—see *Gray v. Johnston* (L. R., 3 H. L., 1). Even had the account with the Bank been opened in the name of the Tea Company, Nicholls & Co. as Managing Agents could have at once transferred the money to their own account. As to the form of the bills the learned Counsel contended that they were the bills of the Tea Company not of Nicholls & Co.: see the rules of law referred to in Story on Agency, ss. 147 and 154, and *Lindus v. Melrose* (2 H. & N., 293: s. c. 4 Jur. N. S., 488), and that it need not be expressed in words that they were made "by or on behalf of the [884] Company," if there was sufficient to show that they were so made. He also contended that there was an exclusion of personal ability—see *Alexander v. Sizer* (L. R. 4 Ex., 102).

Mr. *Pugh* and Mr. *Trevelyan* for the respondents were not called on.

The following **Judgments** were delivered by the Court, (GARTH, C.J., and CUNNINGHAM, J.)

Garth, C.J.—In these cases I entirely agree with the Court below, and upon the same grounds.

Both suits were brought to recover the amount of certain bills of exchange from the defendants Company, which bills, it was alleged, had been drawn by Messrs. Nicholls & Co., upon, and accepted by themselves as the defendants' Agents, and endorsed by Nicholls & Co. to the plaintiffs Bank.

Messrs. Nicholls & Co., were undoubtedly the Managing Agents of the defendants Company and by the Articles of Association they were empowered as such Agents "to draw, accept, endorse, and negotiate on behalf of the Company all such cheques, promissory notes, drafts, etc., as should be necessary for enabling them to carry on the business of the Company."

The bills in question were drawn by Nicholls & Co., upon the Managing Agents of the Baree Tea Company; they were accepted by Nicholls & Co., under the description "Managing Agents of the Baree Tea Company." They were payable to the order of Nicholls & Co., and endorsed by Nicholls & Co. to the plaintiffs Bank.

These bills were given in renewal of certain other bills, which were in a similar form, and the origin of them all was a bill for Rs. 15,000, dated the 22nd of April 1880, drawn, accepted, and endorsed in the same way. The question whether the plaintiffs can succeed in these suits admittedly depends upon whether they could have successfully sued the defendants upon the last mentioned bill.

The defendants take two principal objections to the suit: first they say, that the bills were not accepted in such a form as to bind the defendants; and secondly, that as a matter of fact, the [885] bill for Rs. 15,000 was not drawn or accepted for the purposes of the Company, and that it was not necessary for Nicholls & Co., to accept that bill to enable them to carry on the business of the Company.

I agree with the learned Judge in the Court below, that it is not necessary to consider the first of these points, because I think that upon the plaintiffs' own evidence, the second point should be decided in the defendants' favour.

The question appears to me to be one of fact. Was the bill for Rs. 15,000 drawn and accepted for the purposes of the Company? Or can we say upon the evidence that it was necessary for carrying on the business of the defendants' Company that the bill should have been negotiated?

Now the relations between the plaintiffs and Nicholls & Co. at the time when the bill was drawn were as follows:—The plaintiffs were the private bankers of Nicholls & Co., who kept a current account there. The plaintiffs were in the habit of allowing Nicholls & Co., to overdraw their account, sometimes to a considerable amount; and the latter had deposited with the plaintiffs Government securities to cover those overdrafts to the amount of Rs. 26,000.

Nicholls & Co., were at this time engaged in a great variety of business transactions, and on the 22nd of April 1880 they had overdrawn their account with the plaintiffs to the amount of Rs. 23,560. A few days previously the balance against them had been Rs. 36,000.

In this state of things Mr. Harper, the Manager of the Bank, tells us that Mr. Nicholls (of the firm of Messrs. Nichols & Co.) stated to him that his firm wanted money to carry on the Baree Tea Gardens, and that they proposed to do, (what they had done before on more than one occasion) namely, to draw a bill upon themselves as Agents for the defendant Company in the form in which these bills were drawn, and then to accept and endorse it to the Bank. To this Mr. Harper assented, and the bill for Rs. 15,000 was negotiated. No money passed between them upon the transaction, but the bill was entered in the usual way in the plaintiffs' bill book, and Nicholls & Co., [886] were credited in their current account with the plaintiffs with the amount of the bills, less discount.

It is perfectly true, that after this transaction moneys were from time to time drawn out of the plaintiffs' Bank by Nicholls & Co., which it is probable that the Bank would not have allowed them to draw, but for the fact of the proceeds of this bill having been placed to their credit. But it has not been shewn, that any of these sums were required for or expended upon the defendants' Tea Garden, or were otherwise used for the purposes of the defendants' Company.

The direct and immediate effect of the transaction, as the Bank well knew, was simply this: to reduce the balance due to them by Nicholls & Co., in their private current account by the sum of Rs. 15,000 less discount; and if Nicholls & Co., had failed the next day, as indeed they did not long after-

wards, the effect of the transaction would only have been to pay off the private debt to the Bank of Nicholls & Co., and the defendants' Company could have derived from it no benefit whatever.

Even if the Rs. 15,000 had been paid into the hands of Nicholls & Co., instead of being applied by the plaintiffs in discharge of Nicholls & Co.'s private debt to them, I much doubt whether the defendants would be liable to pay the amount of the bills, unless it could be shewn, which it certainly has not been in this suit, that the money was really required for the purposes of the defendants' Company. If the defendants could be fixed with liability to the Bank, by Nicholls and Co., *by merely informing the Bank that they required money for carrying on the defendants' gardens*, it seems to me, that it would have been in the power of Nicholls and Co., to raise any sum of money they pleased upon the defendants' credit, without applying, or intending to apply, a single rupee of it for the defendants' benefit.

I entirely agree with the lower Court that the defendants are not liable upon the bills in question, and I think that these appeals should be dismissed with costs on scale 2.

Cunningham, J.—I concur in dismissing these appeals. The question on which the case depends is, whether the circumstances under which the bill for Rs. 15,000 was given to the Bank were [887] such as to entitle the Bank to look to any one but Nicholls and Co., for their satisfaction. I think that the Court below rightly held that the Bank could hold no one but Nicholls and Co., responsible. Nicholls and Co., were in the habit of advancing funds for the Baree Tea Company, of which they were Agents. These advances were made from their general balance at the Oriental Bank, and this balance was kept up by large overdrafts, partially secured, which the Bank allowed Nicholls and Co. to make. It was also kept up by the proceeds of bills, which Nicholls and Co. drew on the Company, and themselves accepted as Agents to the Company. These bills were discounted by the Bank, and the proceeds went to reduce Nicholls and Co.'s overdrawn account. It is true that Mr. Harper says that Mr. Nicholls told him on one occasion when a bill was thus discounted, that the money was required for carrying on the Baree Tea Company, and that his firm had made advances to the Company; and on the occasion when the bill for Rs. 15,000 was given, he said "that he wanted another discount to carry on the Baree Tea Gardens." That, thereupon, the bill was discounted, and the proceeds placed to Nicholls and Co.'s credit; but I do not think that this justifies the Bank in holding the Baree Tea Company responsible, or that a bill so drawn and so employed could be properly regarded as falling within the scope of Article 56 of the Company's Articles. That article empowers the Agents "to draw, accept endorse, and negotiate on behalf of the Company, all such cheques, promissory notes, hundies, drafts, Government and other securities as shall be necessary for enabling them to carry on the business of the Company." I do not think that this empowered them to accept bills drawn on the Company with a view that the proceeds should be placed to their general account, and that from that general account advances should be, from time to time, made to the Company. The arrangement had the effect, as my Lord has pointed out, of exposing the Company to lose the entire benefit of the bill in case of Nicholls and Co.'s failing before any further advances were made by them to the Company. Article 56 does not, in my opinion, contemplate any such arrangement, but merely the drawing and accepting of bills in the ordinary transaction of the Company's business.

[888] The case of *Gray v. Johnston* (L. R., 3 H. L., 1), has been much insisted on as justifying the appellants' contention; but that case merely defined

the circumstances which will justify a bank in refusing to honor a customer's cheque, that customer being an executor. In fact, Lord WESTBURY'S remarks seems to me to go strongly against the Bank. "It has been very well settled, that if an executor or trustee, who is indebted to a banker, or to another person, having the legal custody of the assests of a trust estate, applies a portion of them in the payment of his own debt to the individual having that custody, the individual receiving the debt has at once not only abundant proof of the breach of trust, but participates in it for his own personal benefit."

In the present instance, when the bill was discounted, the Bank was in custody of funds which Nicholls and Co. held to the Bank's knowledge in trust for the Company; and being so in custody, it received partial payment of its own debt from Nicholls and Co. out of those funds, and thus it seems to me, fell within the scope of Lord WESTBURY'S remarks.

Appeal dismissed.

Attorneys for the Appellants: *Messrs. Barrow & Orr.*

Attorneys for the Respondents: *Messrs. Harriss & Co.*

[9 Cal. 888 =12 C.L.R. 574==8 Ind. Jur. 85]

APPELLATE CIVIL.

The 9th April, 1883.

PRESENT:

MR. JUSTICE MITTER, AND MR. JUSTICE WILKINSON.

Sitanath Koer and others.....Defendants

versus

Land Mortgage Bank of India.....Plaintiffs.*

Hindu law, alienation—Mitakshara—Mortgage by father—Liability of sons not made parties—Civil Procedure Code (Act XIV of 1882), s. 283.

The L Bank advanced money to C, a Hindu governed by the Mitakshara school of law upon mortgage of ancestral property. S, who was stated to be C's only son, joined in the mortgage. Subsequently the Bank obtained a decree against C and S for the amount due on the mortgage. On attempting to sell the mortgaged property other sons of C objected. This objection was allowed, and the mortgagees referred to a regular suit.

[889] They then sued all the sons of C to establish their lien on the mortgaged property.

Held, that the suit was maintainable under s. 283 of the Civil Procedure Code.

Nuthro Lall Chowdhry v. Shoukee Lall (10 B. L. R., 200); and *Mussamut Dhase v. Hurry Prosad* (unreported), distinguished.

* Appeal from Original Decree, No. 120 of 1881, against the decree of Baboo Mohendro Nath Bose, Subordinate Judge of Tirhoot, dated the 14th February 1881.

THIS was a suit for a declaration that certain property, which had been mortgaged to the plaintiffs, was charged with the plaintiffs' lien, and was liable for the full amount of their claim, and for sale.

It appeared that on the 7th of April 1873 the plaintiff Bana advanced the sum of Rs. 10,000 to one Chundermun Koer, a Hindu governed by the Mitakshara school of law, his son Singheswar Koer joining in the mortgage upon the security of a mouzah called Ahabakerpore. The mortgage-deed, which was in the English form, contained a recital, that the mortgagor was subject to Mitakshara law, and that Singheswar Koer was his only son. On the 13th of June 1873 the plaintiff Bank obtained a decree for the amount of the loan, with interest and costs, making the mortgaged property liable in satisfaction. The Bank then sought to execute the decree by sale of the mortgaged property, but five other sons of Chundermun Koer (in the present suit the defendants 1 to 5) objected to the sale on the ground that as members of the joint family they were equally interested with Chundermun and Singheswar in the ancestral property which had been mortgaged without their consent or permission. This objection was allowed on the 19th of November 1878, the Judge holding that the joint and undivided interest of the sons other than Singheswar was not liable to attachment and sale in execution, and referring the plaintiff Bank to a separate suit to enforce their lien.

The plaintiff Bank now sued all the sons of Chundermun, alleging that they (the plaintiff Bank) were entitled to recover jointly and severally from all the defendants and from the mortgaged property all moneys then due, or to become due, under the decree on the following grounds: (1) that the property mortgaged was not family property; (2) because the debt covered by the [890] mortgage-bond and the decree was a proper and valid debt for which Chundermun Koer, the father and manager, could legally pledge the property; (3) because the defendants were the heirs and legal representatives of Chundermun Koer, and had inherited from him property far exceeding in value the amount due to the plaintiff Bank; and (4) because the plaintiff Bank were entitled to protection as *bona fide* mortgagees without notice of the claim of the defendants 1 to 5. The defendants pleaded that the suit was barred under ss. 13 and 43 of the Civil Procedure Code. It was proved that before the loan the Manager of the plaintiff Bank had made enquiries as to the family of Chundermun Koer, and that the fact that there were other sons than Singheswar was concealed from him. The Subordinate Judge gave the plaintiff Bank a decree, declaring that the entire mortgaged property was liable to satisfy the debt due to the Bank, and that if it was not sufficient the other properties of the defendants should be liable.

The defendants appealed to the High Court.

Baboo Mohesh Chunder Chowdhry and Baboo Doorga Dass Dutt for the Appellants.

Baboo Dwarka Nath Mookerjee and Baboo Kashi Kant Sen for the Respondents.

The **Judgment** of the Court (MITTER and WILKINSON, JJ.) was delivered by

Mitter, J.—The appellants before us are the five sons of one Chundermun Koer, *viz.*, Silanath Koer, Gopinath Koer, Hera Lall Koer, Hurbuns Narain Koer, and Rughoobuns Narain Koer; and Mussamut Amilbutee Thakooranee, widow of Chundermun Koer, Hurbuns Narain and Rughoobuns Narain Koer are said to be minors. It was also stated in the course of the argument that the first four sons are at present adults, and were also adults on the 7th April 1873, when the mortgage bond, the origin of the present suit, was

executed. There is some evidence in support of that statement. The lower Court has not expressed any opinion upon it, but we may take it as a fact proved that they were adults on the 7th April 1873. It appears that this bond [891] of the 7th April 1873 was executed by Chundermun Koer and his eldest son Singheswar Koer, who was the defendant No. 6 in the lower Court, but who has not joined in the appeal which has been preferred to this Court. In this bond, which was for Rs. 10,000, a property named mouzah Ababakerpore Kowahi was hypothecated as collateral security for the loan. A suit was brought against Chundermun Koer and Singheswar Koer, the executants of the bond, and a decree was obtained on the 10th June 1877. After this decree was passed, Chundermun died. Then the decree-holder applied for the execution of this decree against Singheswar Koer and the appellants, other than the widow of Chundermun, as representatives of the deceased Chundermun. An objection was made that the appellants, other than the widow of Chundermun, were not his legal representatives. Thereupon the decree-holders, the respondents before us, withdrew their application to proceed against the appellants, other than the widow of Chundermun, as the legal representatives of latter. The mortgaged property having been attached on the 23rd June 1878, a petition was filed by the appellants, who are the sons of Chundermun, to the effect that their interest in the mortgaged property could not be sold, inasmuch as they were not parties to the original mortgage transaction of the 7th April 1873. On the 19th November 1878 the execution Court being of opinion that the objection was valid released their interest in the mortgaged property from attachment, and the present suit was brought by the Land Mortgage Bank of India, the decree-holders in that proceeding, on the 17th of November 1879. They pray that it may be declared that in spite of the objections taken by the defendants Nos. 1 to 5 the entire mortgaged property mentioned above is charged with the plaintiffs' lien, and is liable for the full amount of the plaintiffs' claim under the aforesaid mortgaged bond; and (2) that the defendants Nos. 1 to 6 may be declared by the Court liable to pay severally or jointly with defendants No. 6 all the amount due up to this time, and also the amount which may be due in future to the plaintiff Bank according to the conditions laid down in the decree dated 13th June 1877. There are other prayers in the plaint, but it is not necessary to refer to [892] them. The defendants in their written statement allege that the original loan transaction was not for the benefit of the family, and that their shares in the family property were, therefore, not liable for the debt, and for the same reason they alleged that they were not also personally liable. This was their statement on the merits of the plaintiffs' claim, but they urged two objections against the maintenance of the suit: (1) that the present claim was barred under s. 13 of the Procedure Code, there having been already an adjudication of the cause of action upon which the suit was brought; (2) that the claim of the plaintiffs was barred by the law of limitation. The lower Court, overruling all these objections, has awarded a decree in favour of the plaintiffs in these terms: "That the suit be decreed in favour of the plaintiffs, and it being proved that the entire mortgaged property, *i.e.*, Mouzah Ababakerpore Kowahi, is ancestral property, the same is liable for Rs. 16,859-13-9, being the amount of decretal money, principal with interest, up to date of suit, and further interest from the date of suit up to the date of realisation under the terms of the decree dated 13th June 1877: and that in case of the entire amount not being realised therefrom, the persons and other property of the defendants shall be held liable for the remaining portion of the debt." Against this decree Singheswar Koer has not appealed, and it must therefore stand as against him. We have no jurisdiction to go into the question whether it was a correct decree against him

or not. We have only to deal with the appeal of the appellants before us. It was contended, on their behalf that this suit was not maintainable, that it was based upon a cause of action upon which a suit had been brought and disposed of, that there was no separate cause of action upon which this suit has been brought, and that, although it was urged that the appellants were not parties to the suit which was brought upon the bond and decreed on the 13th June 1877, still, if they were jointly liable with the executant of the bond a second suit would not lie against them, the cause of action having been exhausted in the first suit. In support of this contention two cases have been cited before us, viz., the case of *Nuthoo Lall Chorahry v. Shoukee Lall* (10 B.L.R., 200), [893] and the case of *Mussamut Dhace v. Hurry Prosad*, an unreported decision of this Court dated 22nd March 1882. The whole of this contention, it seems to us, is based upon a misapprehension as to the nature of the plaintiffs' claim. We are of opinion that the present suit was maintainable under the provisions of s. 283 of the Civil Procedure Code. It has been already stated that in execution of the decree dated 30th June 1877, the whole of the mortgaged property was attached. Thereupon an objection was preferred by the sons of Chundermun other than Singheswar Koer. That objection (as the execution Court distinctly says) was disposed of under s. 280 of the Code, and it appears to us from the statements made in the petition by which that objection was first preferred that it properly came within the purview of ss. 278 to 282. Now s. 278 says: "If any claim be preferred to, or any objection be made to the attachment of, any property attached in execution of a decree, on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim or objection." In this case their contention was that the property attached in execution of the decree, dated 10th June 1877, was not wholly liable to sale in execution of that decree. Then s. 280 says, after providing for other cases which have no application to the present, that if upon the said investigation the Court is satisfied that, for the reasons stated in the claim or objection, the property attached was in the possession of the judgment-debtor, partly on his own account and partly on account of some other person, the Court shall pass an order for releasing the property wholly, or to such extent as it thinks fit, from attachment. In this case, as we shall presently show from the judgment of the execution Court, it was found that the property attached was partly in the possession of the judgment-debtor and partly in the possession of the claimants—in fact that it was a joint-family property belonging to the father and the son; and the sons being objectors the Court found that it was partly in the possession of the father and partly in that of the sons. Having found that fact the Court released the interest of the sons from attachment under s. 280. That being so the plaintiffs were entitled to bring this suit under s. 283. In order to show [894] that this was really the nature of the proceedings in the execution Court, we have only to glance at the points decided by that Court. The proceeding is to be found at page 42 of the paper book. After stating the questions that were to be determined in that proceeding, the Court said: "Whether the act of the father was or not valid is not, however, a question that can be tried in this summary case like the claim preferred under s. 278 of the Procedure Code by third parties to property attached in execution of a decree. "The Court has to try such claim, and see whether the property belongs to such third party, and to release it from attachment and sale if it is found to belong to him and to be in his possession; so upon the objections of the sons of the mortgagor in this case, the Court must see whether the property mortgaged is ancestral and the sons were in conjoint possession, and if they were, whether they should not have the share claimed by them, the extent of

which is not disputed, exempted from attachment and sale." Then the learned Subordinate Judge further said: "I cannot enter into the question of the validity, or otherwise, of the mortgage summarily," and so on. After coming to the conclusion that the mortgaged property was in the joint possession of the father and the sons he allowed the claim, and declared that the share claimed was to be exempted from attachment and sale. Then, there is a further declaration at the end of the order to the effect that, "if the decree-holders have any lien on the shares released by virtue of the hypothecation of the said shares having been included in their bond, they must sue to enforce the same by a suit against the objectors." It is, therefore, quite clear that the present suit was brought under s. 283 of the Civil Procedure Code. That being so, the cases cited have no sort of application to the present. In the case of *Nuthoo Lall Chowdhry v. Shoukee Lall* (10 B. L. R., 200) the facts were these: A bond was executed by two persons named Domun Lall and Bhowani Pershad in favour of the plaintiffs in that case. In that bond they hypothecated their share of a certain property, and a decree was obtained against Domun and Bhowani Pershad declaring [893] their shares in the hypothecated property to be liable for the satisfaction of the mortgage debt. In execution of that decree their shares were brought to sale, and a part of the money decreed was realised. These facts are thus stated by Chief Justice COUCH in his judgment. It appears that the plaintiffs executed that decree, viz., the decree which they obtained against Domun and Bhowani Pershad, "and according to the statement in the plaint in the present suit, they sold the right and interest of the two persons named in it, still, in the execution of the decree, treating it as an instrument which had pledged the shares of those two. They recovered the sum of Rs. 7,435, and now, instituting a suit on the 3rd of December 1870, they say: "Since the decree was not against all the defendants, the whole of the mortgaged property in which the second party defendants hold a share, was not put up to sale, but the fact is, that there being community of interest, the loan was taken, and mortgage concluded alike by all defendants; hence all of them are jointly liable to your petitioners, and the entire property ought to be held liable." In that case, therefore, the plaintiffs having obtained a decree by which the shares of the two persons who were the executants of the bond were rendered liable, and having, in execution of that decree sold these shares, brought a second suit for the purpose of extending the operation of that decree on the ground that the original loan that was taken by Domun and Bhowani Pershad was taken not on behalf of themselves only, but on behalf of themselves and the remaining members of the joint Hindu family of which they are the members. It was held that such a suit would not lie, and that conclusion was arrived at upon the ground that either the original bond was executed by these two persons alone, or that it was executed by these two persons as managers of the joint family; if executed by these two alone no suit would lie against the others; if executed by them as managers then all the other members were liable jointly, but the creditors having elected to sue some of the joint-debtors only, were not entitled to bring another suit against those left out in the first suit. That is not the nature of the present suit. It is not the sole object of this suit to make the appellants before us liable on the original cause of action. So far as the [896] plaint contains a prayer to that effect, it is no doubt liable to objection; but so far as it is a suit to have it declared that the mortgaged property is liable to be sold in execution of the plaintiff's decree, it comes under s. 283. That section says: The party against whom an order under s. 280, 281, or 282 is passed, may institute a suit to establish the right which he claims to the property in dispute, but

subject to the result of such suit, if any, the order shall be conclusive. Here the decree-holders have brought this suit to establish the right that they are entitled to sell the mortgaged property in execution of the decree they have already obtained upon the original cause of action. Therefore the decision in *Nuthoo Lall Chowdhry v. Shoukee Lall* is not applicable to the facts of the present case. The other case cited is entirely based upon the decision in the case of *Nuthoo Lall Chowdhry v. Shoukee Lall*. It may be observed, however, that in this last case the learned Judges make this observation: "We do not wish to be understood to hold that in a suit properly brought the mortgagee cannot obtain an order from the Court declaring that as a son in a Mitakshara family, a person in the position of the defendant might not be liable for debts lawfully incurred by his father. That is not, as we understand it, the present case and the nature of the claim now made. The original mortgage bond, we observe, is not on the record, but so far as we can gather from the terms of the plaint and from the counter-objection made by the decree-holder in execution of his decree, we learn that the mortgagee throughout regarded this transaction as being one in which the father alone was concerned, and in which he sought to obtain payment of his debt out of property which belonged exclusively to the father." This observation at once shows that this case is clearly distinguishable from the present. We are, therefore, of opinion that so far as this is a suit under s. 283 it is not barred as *res judicata*. That being our view upon the question of *res judicata* the question of limitation as a matter of course falls to the ground, for the limitation laid down in respect of suits under s. 283 is one year from the date of the order, and the present suit was admittedly brought within that period. Therefore, we need not discuss the questions that have been raised in this appeal, *viz.*, [897] whether this was a suit to enforce the original mortgage lien, or to make the defendants liable for money had to their use. The next question is, whether under s. 283 the plaintiffs in this case have established their right to have the whole of the mortgaged property sold in execution of the decree obtained against the appellants' father, and, the solution of this question depends upon the solution of another, *viz.*, whether or not the original mortgage bond of 1873 is binding upon the sons. It has been already stated that four of these appellants were adults at the time when this bond was executed. Several cases have been cited before us in order to establish this proposition of law, *viz.*, that where there are adult sons, the father, even in case of necessity, has no right, without the concurrence of these sons, to deal with the ancestral property. So far as this proposition goes it has been well established by decided cases, and we are bound to hold that the adult sons are not concluded by a transaction to which they are not parties, unless their assent to it, express or implied, is proved. It may be mentioned here that one of the questions at issue between the parties was, whether the mortgaged property was ancestral or not. The plaintiffs stated that it was the self-acquired property of Chunderman. The lower Court has found against the plaintiffs upon this point, and there is no appeal against that part of the judgment. We must, therefore, take it that it was ancestral. But having regard to the circumstances, to which we shall presently refer, it seems to us that, although there was no express consent by the sons, there was clear evidence of implied consent on their part to the transaction of 1873. (His Lordship then considered the evidence as to this point and continued). We consequently come to the conclusion that the mortgage of the 7th April 1873 was a valid transaction binding upon the whole of the family. The widow has no *locus standi* in the case, unless a partition of the family property be decreed. Therefore, we need not take any notice of the widow, so far as the question of consent is concerned. The plaintiffs have

established their right to sell the mortgaged property. That being so, so far as the lower Court's decree declares that right it is correct; but then that decree goes further and declares that all the defendants are personally liable. It does [898] not appear to us upon what ground that part of the decree is based. That part of the decree must, therefore, be set aside. Although we set aside that part of the decree of the lower Court, having regard to the unjustified opposition on the part of the appellants, we think that they ought to be made liable for the costs of the plaintiffs. The plaintiffs' suit will, therefore, be decreed in the manner stated above against all the defendants with costs in both Courts.

Appeal allowed.

NOTES.

[In the following cases, it has been held that when the sons are not parties to the suit against their father, the creditor may sue them in another suit (1907) 29 All., 544; (1899) 21 All., 301; (1888) 11 Mad., 113, or proceed against their interests in execution, 12 Mad., 142; 9 Cal., 389; 20 Cal., 328.

In this case, the creditor at first pursued the latter course, and when in execution he proceeded against the interests of the sons, he was confronted with their objections which were upheld. The suit subsequently brought by him against them was held by the Court not barred, being one expressly allowed by the Civil Procedure Code in the circumstances. The Court did not decide on the *general* right of the creditor to bring a separate suit against the sons. These views found support in 7 Mad., 295 (297); 8 Mad., 376 (378); 22 All., 307 (310); 23 Cal., 302 (309).

As regards the adult son, *see also* (1882) 4 All., 309; 9 Cal. 195, at 501.]

[9 Cal. 898 13 C. L. R. 11- 8 Ind. Jur. 89]

APPELLATE CIVIL.

The 10th April, 1883.

PRESENT:

MR. JUSTICE CUNNINGHAM AND MR. JUSTICE MACLEAN.

Kashi Nath Dass and another.....Defendants

versus

Hurrihur Mookorjee.....Plaintiff.*

Evidence Act (I of 1872), s. 92—Evidence contradicting document—

Mortgage—Conditional sale.

It does not necessarily follow from s. 92† of the Evidence Act that subsequent conduct and surrounding circumstances may not be given in evidence for the purpose of showing that what on the face of it is a conveyance is really a mortgage. This rule turns on the fraud which is involved in the conduct of the person who is really a mortgagee, and who sets himself up as an absolute purchaser, and the rule of admitting evidence for the purpose of defeating this fraud would not apply to an innocent purchaser without notice of the existence of the mortgage, who merely bought from a person who was in possession of title deeds and was the ostensible owner of the property.

THIS was a suit to establish the plaintiff's right to certain land. The plaintiff alleged that the defendant Kashi Nath Dass had conveyed the land in question

* Appeal from Appellate Decree, No. 2280 of 1881, against the decree of Baboo Radha Kishna Sen, Additional Sub-Judge of Hooghly, dated the 5th September 1881, affirming the decree of P. M. Bannerjee, Munsif of Howrah, dated the 30th September 1880.

†[*q. v. supra* 9 Cal., 529.]

to the second defendant Jadu Nath Dass, from whom the plaintiff purchased. The defendant Kashi Nath Dass pleaded that the deed executed by him in favour of Jadu Nath Dass, though it purported to be a kobala, was in fact a deed of conditional sale. At the hearing the Munsif refused to admit evidence to show that the transaction between Kashi Nath and Jadu Nath was really a mortgage [899] and not a sale, considering that such evidence was inadmissible under s. 92 of the Evidence Act, and gave the plaintiff a decree. The Subordinate Judge took the same view and confirmed the Munsif's judgment.

The defendants appealed to the High Court.

Baboo *Rash Behary Ghose* and Baboo *Jogesh Chunder Banerjee* for the Appellants.

Baboo *Gopal Lall Mitter* for the Respondent.

The **Judgment** of the Court (CUNNINGHAM and MACLEAN, JJ.) was delivered by

Cunningham, J.—The point raised in this appeal is that the Court below was in error in holding that the defendant was not entitled to plead, nor was the evidence tendered by him admissible to show that the document mentioned in the plaint as a deed of purchase was only a security for money. There has been some wavering of opinion at different periods among the Courts in this country as to the law of evidence on this point. The law for some periods was laid down, so far as concerned this Court, by the Full Bench Ruling in *Kashi Nath Chatterjee v. Chandi Charan Banerjee* (B. L. R., Sup. Vol., 383 : 5 W. R., 68), in which it was held that, though evidence of a contemporaneous oral agreement was inadmissible to show that a document purporting to be an absolute conveyance was only a mortgage, yet that evidence might be given of the facts of the case, and of the subsequent conduct of the parties in order to show that this was the case.

After the passing of the Evidence Act it was held by some learned Judges of this Court that the Full Bench Ruling was no longer a correct exposition of the law. That view, however, was called in question in a decision of the Bombay High Court, *Baksu Lakshman v. Govinda Kanji* (I. L. R., 4 Bom., 594), in which case the learned Judges held, with reference to the doctrine prevalent in the English Courts as to fraud, that on this ground it was open to the parties to a document, and those who claimed under them, to show by subsequent conduct and by various circumstances of the case that the [900] document was not a conveyance but was a mortgage. This view has subsequently been accepted by the Chief Justice of this Court and MITTER, J., in *Hem Chunder Soor v. Kally Churn Das* (I. L. R. 9 Cal., 528) in which case the Chief Justice laid down the same doctrine as was affirmed in the Full Bench Ruling in *Kashi Nath Chatterjee v. Chandi Churn Banerjee* (B. L. R., Sup. Vol., 383 : 5 W. R., 68), as being still the correct exposition of the law, and in which he expressed his general concurrence in the views of the Bombay High Court, as expressed in *Baksu Lakshman v. Govinda Kanji* (I. L. R., 4 Bom., 594).

We think, therefore, that the decision of the Court below in this case must be set aside; and that it does not necessarily follow from s. 92 of the Indian Evidence Act that subsequent conduct and surrounding circumstances may not be given in evidence for the purpose of showing that what on the face of it is a conveyance is really a mortgage.

In applying this doctrine, however, it must be recollected that the rule turns on the fraud which is involved in the conduct of the person who is really a mortgagee, and who sets himself up as an absolute purchaser; and that the rule of admitting evidence for the purpose of defeating this fraud would not

apply to an innocent purchaser without notice of the existence of the mortgage, who merely bought from a person who was in possession of the title deeds and was the ostensible owner of the property.

We must, therefore, set aside the decision of the lower Appellate Court and remand the case to the learned Judge for trial with reference to the above observations and the ruling of this Court and the Bombay High Court on the subject.

Costs to abide the result.

Appeal allowed and case remanded.

NOTES.

[See the Notes to 9 Cal. 528 *supra*.]

[=13 C.L.R. 430]

[901] ORIGINAL CIVIL.

The 3rd March, 1883.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE CUNNINGHAM.

G. Stephen.....One of the Defendants

versus

C. N. Stephen.....Plaintiff.

*Act XL of 1858, s. 3—Minor—Certificate of administration—Majority—
Majority Act (IX of 1875), s. 3.*

A certificate of guardianship under Act XL of 1858 takes effect not from the date when it is applied for, nor when an order granting it is passed, but from the date when it is actually issued. Therefore where an application for a certificate was made in 1877, and an order granting it was passed in December 1879, but the certificate was not issued until December 1881, *Held*, that the minor, in respect of whose property the certificate was applied for, who had between the date of the application and the issue of the certificate attained the age of 18 years, and signed a promissory note, was not entitled to take advantage of s. 3 of the Majority Act, 1875, and set up the plea of minority as a defence to a suit on 'he note.

THIS was an appeal from a decision of WILSON, J., dated the 28th of March 1882. The suit was brought to recover the amount due on a promissory note executed on the 27th October 1880 by the appellant, together with two other persons. The appellant was born on the 7th of April 1861. In 1877 his father applied to the Dacca Court for a certificate of administration to his property, under s. 3 of Act XL of 1858. On the 10th December 1879 the Judge made an order granting the certificate; but it was not issued until the 10th of December 1881 which was the date it bore.

The only question in this appeal was whether the plaintiff was or was not a minor at the time he executed the note. WILSON, J., held that he was not then a minor. The judgment is reported in I. L. R., 8 Cal., 714.

Mr. T. A. Apcar for the appellant. The decision of this question depends on the date from which a certificate granted under Act XL of 1858 takes effect. If it can be said to take effect from the date it is applied for, the appellant, instead of attaining his majority at 18, would come under the provisions of s. 3* of the Majority Act 1875, and would be a minor until he was 21; but if it only has effect from the date of the order granting it, or from the date it [902] is issued, then the appellant was no doubt of age when this note was signed. The learned Judge in the Court below seems to have been under the impression that the appellant attained the age of 18 years between the date of the order granting the certificate and its actual issue, but that was not so; he attained the age of 18 years before the order granting the certificate. My contention is, however, that the certificate when granted is to be taken as dating back to the time of the application for it, as being the time at which the applicant may be said to have a right to it. Pending the application, therefore, it is submitted he would remain a minor for all purposes. The case of *Chunee Mul Johary v. Brojo Nath Roy Chowdhry* (I. L. R., 8 Cal., 967), was referred to.

Mr. Trevelyan for the respondent contended, that the mere fact that an application for a certificate was pending could not alter the period at which the minor would attain majority. The appellant ceased to be a minor when he attained 18, and after that the issue of a certificate would not be of any effect so as to make the Majority Act applicable to him, and so alter his status from one of majority to one of minority. The case of *Monsoor Ali v. Ramdyal* (3 W. R., 50) was referred to as to the effect of s. 26† of Act XL of 1858, and also *Wilberforce on Statutes* 48, and *Maxwell on Statutes* 73, to show that express words would be needed to take away vested rights.

Mr. Apcar in reply.

The **Judgment** of the Court (GARTH, C.J., and CUNNINGHAM, J.,) was delivered by

Garth, C.J.—The defendant No. 3 is the sole appellant in this case, and the only ground of appeal is, that at the time when the promissory note was given, he, the defendant No. 3, was a minor.

The facts were these: The defendant No. 1 is the father of the defendant No. 3, and it appears that in September 1877, before the defendant No. 3 had attained the age of 18 years, the defendant No. 1 petitioned the District Judge of Dacca for a certificate of administration (under s. 3 of the Minor's Act XL of 1858) to the property of the defendant No. 3.

* [Sec. 3:—Subject as aforesaid, every minor of whose person or property a guardian has

Age of majority of persons domiciled in British India.

been or shall be appointed by any Court of Justice, and every minor under the jurisdiction of any Court of Wards, shall, notwithstanding anything contained in the Indian Succession Act (No. X of 1865) or in any other enactment, be deemed to have attained his majority when he shall have completed his age of twenty-one years and not before: Subject as aforesaid, every other person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of eighteen years and not before.]

Person under the age of 18 years to be held minors for the purposes of this Act.

† [Sec. 26:—For the purposes of this Act, every person shall be held to be a minor, who has not attained the age of eighteen years.]

[903] On the 10th of December 1879 the Judge made an order for a certificate of administration under that Act, and on the 10th December 1881 the certificate was issued.

But meanwhile, between September 1877 and the 10th of December 1879, when the Judge made the order, the defendant No. 3 had attained the age of 18 years; and the note in question was given on the 27th of October 1880, before the certificate was issued.

In this state of things the learned Judge in the Court below has held that the defendant No. 3 could not avail himself of the defence of minority; and I think he was right.

Section 3 of Act XL of 1858 enables any person who claims a right to have charge of the property of a minor under a will or deed to apply to the Civil Court for a certificate of administration. Section XI provides that, "whenever a Court shall grant a certificate of administration to the estate of a minor, it shall at the same time appoint a guardian to take charge of the person and maintenance of the minor;" and s. 18 further provides that "every person to whom a certificate shall have been granted under the provisions of this Act, may exercise the same powers in the management of the estate as might have been exercised by the proprietor if not a minor."

Then by s. 3 of the Indian Majority Act IX of 1875, it is enacted that "every minor of whose person or property a guardian has been or shall be appointed by any Court of Justice shall be deemed to have attained his majority when he shall have completed his age of 21 years and not before."

The question is, whether by the combined operation of the provisions of these two Acts, the defendant No. 3, at the time when he signed the note in question, was under the disability of minority.

In my opinion he was not.

In the first place I think that until the certificate has been actually issued the estate of the minor does not vest in the person who obtains the certificate, and if after the time when the minor comes of age, that is to say, attains the age of 18 years, and before the certificate is granted he enters into any contract, I consider that he is bound by such contract whether the certificate had been previously applied for or not.

[904] If this were not so, it seems to me that persons dealing with the minor after he had attained his full age would be placed in a most unfair position.

Suppose a certificate to be applied for on the 1st of January 1880, and that before the application is heard, say on the 1st February following, the minor attains his full age of 18. He enters upon the possession and management of his property, sells portions of it to *bona fide* purchasers, mortgages other portions, and has various dealings with various people who know perfectly well that he is of age, and have every reason to believe that they are at liberty to contract with him.

For some reason or other the application is not heard or the certificate granted (as in this case) for a year afterwards. Are all the minor's sales and other dealings to be avoided at his option or that of his guardian? It seems to me, that if that were the law, it would give rise to much injustice, and might frequently be made an instrument of fraud.

When a minor comes of age, and is entitled by law to take possession of and manage his property, the public have a right to deal and contract with

him, and I see no reason why those contracts and dealings should be avoided, merely because the Court may afterwards appoint a guardian of his person or property.

Moreover I very much doubt whether the provisions of s. 3 of Act IX of 1875 were ever intended to apply to those cases, where a minor has actually attained his majority, before any certificate under Act XL has been granted. I think the language of the Act shews, that it is only intended to apply in cases where the person and property of the minor have been placed under the care of a guardian before he has attained his full age. If he has once attained that age, I am disposed to think that the provisions of the Act are not intended to have a retrospective effect, and to restore a person to the status of a minor, who has once attained his majority.

I, therefore, agree with the learned Judge of the Court below and consider that this appeal should be dismissed with costs on scale 2.

Appeal dismissed.

Attorney for the Appellant: Mr. Hume.

Attorney for the Respondent: Baboo O. C. Gangooly.

NOTES.

[I. WHEN AGE OF MAJORITY EXTENDED—

There was a conflict of decisions under XI. of 1858 as to when the age of majority was extended. *The date of the issue* of the order was held to be the decisive point, in (1883) 9 Cal., 901. This was followed in (1886) 13 Cal., 269; (1886) 12 Cal., 542; (1888) 13 Bom., 285. In the following cases, however, *the date of the order* itself was held to be decisive, see (1882) 8 Cal., 967; (1886) 14 Cal., 55; (1887) 15 Cal., 40.

The latter view would appear to be the better view from (1889) 17 Cal., 347=16 I. A., 195 P.C. reversing (1886) 12 Cal., 542.

Under the Guardian and Wards Act of 1890, no certificate is necessary.

II. EXTENSION OF AGE WHEN GUARDIAN IS APPOINTED BY COURT Etc.—

In accordance with the decision in this case, the Indian Majority Act IX of 1875 was amended in 1890 by Act VIII of 1890, sec. 52, by the insertion of the words, '*before the minor has attained the age of 18 years.*'

[=12 C.L.R. 525]
[903] APPELLATE CIVIL.

The 14th May, 1883.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE
MACPHERSON.

Debendra Nath Shaw and another.....Defendants

versus

Aubhoy Churn Bagehi.....Plaintiff. *

Appeal—Arbitration, Reference to —Award—Decree confirming award.

Where an award, i.e., a legal award, has been made, and judgment is passed in accordance therewith, the judgment is final; but where a question arises whether the award is a legal award or not, an appeal lies from a judgment of a Court passed in accordance with such award.

A case was referred to the arbitration of five persons, with a proviso that in the event of any two of the arbitrators being absent, the arbitration should be continued by the other three. Two of the arbitrators named were the pleaders on either side, and those two with the consent of the parties ceased to act as arbitrators, but argued the matter before the other arbitrators. *Held* that the award made by the other three arbitrators named was a valid award.

THE plaintiff sued to recover Rs. 1,850 from the defendants, alleging that the defendants had forcibly taken and retained Rs. 1,000, which he (the plaintiff) had intended to invest in the purchase of jute, and that he, through his inability to purchase the jute suffered a loss of Rs. 850.

The defendants denied having forcibly taken the money, but alleged that the plaintiff's servant had deposited it with them in satisfaction of a debt owing to them by the plaintiff.

After hearing the plaintiff's evidence, the matter was referred to the arbitration of five persons, the agreement providing that in the event of any two of the arbitrators named being absent, the arbitration should be continued by the remaining three.

Amongst the arbitrators named were the pleaders engaged by the parties; they, however, withdrew with the consent of the parties, and did not sit as arbitrators, but argued the case before the arbitrators.

[906] On the 9th August 1880, the arbitrators filed their award, the decision being in favour of the defendants. The plaintiff objected to the award, but the Subordinate Judge confirmed it.

The plaintiff appealed to the District Judge, who found that the award had only been signed by three of the arbitrators, and held that as the proviso regarding the absence of any of the arbitrators had not been complied with, inasmuch as the pleaders were present at the arbitration, and no steps had been taken under s. 510 of the Code to supply the place of the two pleaders, the appeal would lie, and reversed the order of the Subordinate Judge under s. 562.

The Defendants appealed to the High Court.

Baboo *Kali Mohun Das* for the Appellants contended that no appeal would lie from the award, and that the lower Court had no jurisdiction to set aside

* Appeal from Appellate Decree, No. 415 of 1882, against the decree of C. A. Kelly, Esq., Judge of Pubna, dated the 24th February 1882, reversing the decree of Baboo Jibun Kristo Chatterjee, Sub-Judge of that District and Bogra, dated the 23rd August 1880.

the decree of the first Court, except on one of the grounds mentioned in s. 521 of the Civil Procedure Code.

Baboo Mohiny Mohun Roy for the Respondent.

The following **Judgments** were delivered by the Court (GARTH, C.J., and MACPHERSON, J.)

Garth, C.J.—I have had some doubt whether we have any right to entertain this appeal; but after considering the authorities, I think an appeal lies.

It is not easy (as observed by JACKSON, J.), to ascertain precisely what was the decision of the Full Bench in the case of *Sushri Charan Chatterjee v. Tarak Chandra Chatterjee* (8 B. L. R., 315), but it seems to me that the majority of the Judges at least decided this that when an award has been made and judgment is given by the first Court in accordance with that award, the judgment is final—(see s. 325 of the old Code, corresponding with s. 522 of the present Code), but that when there is no award, that is *no legal award*, then the judgment of the first Court is open to appeal. It seems to follow from this, that when the question is, whether the award is a legal award or not, an appeal lies from the judgment.

And that, as it seems to me, is the case here. The question [907] raised is, whether the three arbitrators under the circumstances had any power to make an award, or, in other words, whether the award which they made is a valid one. The first Court determined that it was valid, and gave judgment accordingly for the defendant No. 1; but the plaintiff appealed to the District Judge upon the question of the validity of the award, and he has reversed the decision of the Munsif, and declared the award invalid.

As he has decided this on a point of law, the defendant No. 1 comes to this Court on second appeal, and I think he has a right to do so. It now appears, that the question between the parties is this: The case was referred to the arbitration of five persons, but with a proviso that in case two of the arbitrators should be absent, the other three might make the award.

Now what occurred was this: Two of the arbitrators, it appears, were the pleaders on either side; and it was considered that as these gentlemen had acted as advocates, they could not with propriety act as arbitrators, so they ceased, (apparently with the consent of both parties), to act as arbitrators, and acted, as they had done before, as advocates on either side.

It seems to me, that this was virtually absenting themselves from their post as arbitrators; and as this was done apparently with the concurrence of the parties, I consider that the award made by the remaining three arbitrators was valid.

I think, therefore, that the decree of the lower Court should be reversed, and that of the Subordinate Judge restored with costs to the plaintiff in both Courts.

Macpherson, J.—I concur in decreeing this appeal. I much doubt whether the Judge was right in entertaining the appeal; as however he did entertain it, he was I think clearly wrong in holding the award to be invalid.

The reference clearly contemplated a decision by three out of the five arbitrators, if two were unable to attend. Two of them took no part in the arbitration with apparently the concurrence of the parties. I see no ground for holding the award to be invalid.

Appeal allowed.

NOTES.

[See also the following cases :—(1884) 11 Cal. 37; (1897) 24 Cal. 469; (1897) 25 Cal. 141; (1891) 15 Mad. 348; (1895) 18 M.d. 423; (1892) 17 Bom. 357; (1896) 20 Bom. 596; (1884) 6 All. 174; (1892) 12 A.W.N. 151; (1896) 18 All. 722; (1901) 5 O.C. 13.]

[13 C.L. R. 691
[908] APPELLATE CIVIL.

The 27th April, 1883.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE
MACPHERSON.

Surnomoyee.....Plaintiff

versus

Denonath Gir Sunnyasee and others.....Defendants.*

*Landlord and Tenant—Settlement with tenant containing a clause of
re-entry—Compensation in lieu of rent—Trespassers.*

The plaintiff made a settlement of certain land with A and B for five years, there being in the settlement a stipulation that if the tenants failed to pay rent the plaintiff might accept another tenant.

A died during the tenancy, and B left the place and the property without paying rent, and thereupon the plaintiff entered into possession of the property and held khas possession of it for two years, when he in 1870 entered into a settlement of it with defendant No. 1 for six years.

In 1878 B died, and defendants Nos. 2 and 3 alleging themselves to be the chela and dasi-putra of B took upon themselves to collect rent from the tenants.

The plaintiff thereupon brought a suit against the three defendants, treating them as trespassers, but at the same time asked for the amount of rent due and for eviction.

Held, that defendants Nos. 2 and 3 had no right on the property at all, and that defendant No. 1, who might have been considered as holding over after the expiration of his lease, if he had been in actual sole possession, should not be made liable for the whole rent when defendants Nos. 2 and 3 were in possession as much as he was, but that as the plaintiff had elected to waive the trespass, all the defendants might, on the authority of *Ranee Lalun Monee v. Sonu Monee Dabee* (22 W. R., 334), and *Luckhee Kant Dass Chowdhry v. Suneeruddi Lusker* (13 B. L. R., 243; 21 W. R. 208), be treated as tenants, and a decree for use and occupation given against them.

THIS was a suit for rent and for ejectment. The plaintiff stated that the jotes for which rent was claimed were in their nature "sarasari" or temporary, and that they were held originally by Ramdyal and Rajendra Gir Sunnyasee, who were the registered tenant; that the kabuliati contained a stipulation that if the tenants should fail to pay rent, then the zamindar might accept another tenant in their place and take rent from him; that Ramdyal died in [909] 1275 (1868), and after his death his brother Rajendra left the village without occupying the jotes, or paying rent to the plaintiff; and that in consequence of his relinquishment the plaintiff had entered into and had held khas possession till the year 1277 (1870). That on the 4th Pous 1277 (19th December 1870) the plaintiff entered into a settlement of these jotes for a term of five years, with the defendant No. 1, Denonath Gir Sunnyasee, the settlement containing a stipulation, that if the tenant should fail to pay rent, then the zamindar might put another tenant in possession and realize rent from him; that the defendant No. 1 in 1283 (1876) was not on good terms with his under-tenants, and had been unable to obtain payment of rent, and that the plaintiff

* Appeal from Original Decree, No. 288 of 1881, against the decree of Baboo Bhugoban Chunder Chakrabarthi, Subordinate Judge Rungpore, dated the 29th December 1880.

had been compelled to bring suits against them, and had realized some of the arrears; that Rajendra died in 1285 (1878), and since his death the defendant No. 2, Raj Chundra Gir Sunnyasee, who alleged that he was a chela of Rajendra, and defendant No. 3, professing to be his dasi-putra, collected rents from the tenants.

The plaintiff therefore deemed them trespassers, as they had made no settlement with her nor had paid her any rent, and were alleged to have no transferable interest or mokurari right in the jotes, and brought this suit praying (1) for the amount of rent due, (2) for the eviction of the defendants, and (3) that the decree be given against the defendant No. 1, or against all the defendants or any one of them, and for other relief.

The defendant No. 1 contended that the jotes were transferable, and that he was in possession.

The defendant No. 2 contended that the jotes were mourasi mokurari and transferable, that he was the chela of Rajendra, and had obtained a certificate under Act XXVII of 1860 to collect his debts, and that he was in possession; that Rajendra did not relinquish and had obtained decrees for rent of his under-tenants.

The defendant No. 3 contended that, as Rajendra had a permanent right and interest in the jotes, his heirs, the minors in possession, could not be evicted, and that the prayers of the plaint were contradictory in their nature, and that the suits were no *bonâ fide* rent-suits.

The Subordinate Judge found that the defendant No. 2 was the tenant in possession in Rajendra's right as being his chela, and [910] that Rajendra's rights had never terminated, the tenure being transferable; that according to a custom the tenuro had descended from each Gossami to his chela, and gave a decree for rent against him; and that the onus was on the plaintiff to show that the holders of the jotes were liable to eviction, and that she had failed in this.

The plaintiff appealed to the High Court.

Baboo Sreenath Doss, Baboo Gooroo Das Banerjee and Baboo Ganendra Nath Dass, for the Appellant.

No one appeared for the Respondents.

The Judgment of the Court (GARTH, C.J., and MACPHERSON, J.) was delivered by

Garth, C.J.—This is a suit brought by the plaintiff, a zamindar, against three sets of defendants. Her claim is twofold (1st), for rent, cesses, and interest, amounting altogether to upwards of Rs. 5,000; and (2nd), for khas possession of the property in respect of which the rent is claimed.

The history of the case is this. Previously to the year 1870 the property, which is the subject of the suit, was held by a person named Rajendra Gir Gossami. He, and his predecessors before him who belonged to some religious order, had held the property in question, under settlements made from time to time with the zamindar, and the last of these settlements, made with Rajendra Gir, dated the 26th of Choitro 1267 (9th April 1861), was for a term of five years, from the commencement of 1268 (13th April 1861) to the end of 1272, (12th April 1866) at an annual rent of Rs. 674-0-1. In that settlement there was a provision to this effect: "If failing to pay the rent of the said jote, instalment per instalment (as it should be demanded), we allow the same to fall into arrear, then you will take out of our hand the said jote, put another tenant in possession, and have the rent realized from him."

Then it appears from the evidence, that in the year 1868 Rajendra Gir, in consequence of what he considered a disgrace attaching to him, left the place and the property, without making any arrangement with regard to the payment of his rent; and he never paid any rent afterwards. He remained away for two or [911] three years, and when he came back, he never made any attempt to resume possession of the jote, nor did he pay any rent to the zamindar.

The consequence was, that the zamindar, finding the property deserted, entered upon it under the provision in the lease and realized the rents directly from the ryots for some time, till at length he made a fresh settlement of the property with the defendant No. 1, who took it at an advanced rent of Rs. 975 a year. He held it at that rent for six years (which was the term of the lease), and it then seems very difficult to say who really was in possession. The defendant No. 1 says that he was; but the other defendants, each claiming under Rajendra Gir, laid claim to and asserted their right and possession, the defendant No. 2 being Rajendra's principal chela, and the defendant No. 3 his eldest son by a concubine. Each of these defendants laid claim to the interest which Rajendra had previously possessed.

So far as we can gather from the evidence, there has been a struggle ever since between these three defendants. One or other of them has been obtaining rents (as they could collect them) from the different ryots, and it is very difficult to say which of them has been really in possession; but this is certain, that between them these three persons have been setting the zamindar at defiance, and have entered into no agreement with her for payment of rent.

In this state of facts the lower Court has come to a decision which we cannot uphold. The Subordinate Judge has decided that the defendant No. 2, who is the chela of Rajendra, is the tenant in possession of the property in Rajendra's right; and that Rajendra's interest never in point of fact came to an end. From the fact of Rajendra and his predecessors in title having been in possession of the tenure for a great many years, and of its being a transferable tenure, he considers it to be of a permanent character. He further holds that by custom the tenure has descended from each succeeding Gossami to his chela; and he finds that the defendant No. 2, as being the chela of Rajendra, became entitled, upon Rajendra's death, [912] which occurred in the year 1878, to the interest which Rajendra had in the property.

He then finds that Raj Chundra, the defendant No. 2, is rightfully in possession as Rajendra's successor, and that he is entitled to hold at the old rent which Rajendra paid; and he gives the plaintiff a decree for rent at the old rate for the period in respect of which the claim is made.

We think it impossible to uphold this finding, because whatever was the true nature of Rajendra's tenancy, we think that the zamindar put an end to it in accordance with the clause of re-entry in the lease.

The clause in the lease which I have just read provides that if the rent of the jote falls into arrear, the zamindar is to be at liberty to re-enter upon the property, and put any other tenant in possession, and realize rent from him.

Now, considering that Rajendra actually deserted the property, left the neighbourhood for upwards of two years, and never afterwards paid any rent, it seems to us impossible to say, that the zamindar was not at liberty to take advantage of this clause in the lease, and to re-enter upon the property.

He did re-enter, and he did hold khas possession for some time, receiving rent from the occupying ryots. He then granted a lease of it to the defendant No. 1 at an increased rent. That seems to us to have put an end to Rajendra's interest, and to have effectually debarred Rajendra's chela or son from any right to it in the future.

That being so, we find the state of things to be this : That during the time for which the plaintiff seeks to recover rent in this suit, the defendants Nos. 1, 2, and 3 were all more or less in possession of the property without any right to it ; consequently they were all trespassers. The defendants Nos. 2 and 3 had no right there at all, and the defendant No. 1, who might have been considered as holding on after the expiration of his lease, if he had been in actual possession, can hardly be made liable for rent upon that footing when the other defendants were in possession as much as he was. They are, therefore, all trespassers upon the property.

Then the difficulty is, what relief the plaintiff is entitled to in [913] this suit. She sues all the defendants for rent, and for ejectment. We may, no doubt, treat the defendants as trespassers and eject them, but then we can give the plaintiff no mesne profits.

If the plaintiff had sued for mesne profits as well as for khas possession, we could have given her a decree ; but she has not asked for mesne profits ; and we should have great difficulty in giving her mesne profits after the commencement of this suit, because we do not know who has been in possession since that time.

But the learned pleader for the appellant contends that, although none of the defendants are liable for any definite amount of rent, we are at liberty, in accordance with certain decisions to which our attention has been called, to give the plaintiff a fair compensation for the use and occupation of the land ; and that the plaintiff is entitled to this against all three defendants, who have all been in joint possession of the property.

One case to which he has referred us in support of this view is *Ranee Lalun Monee v. Sona Monee Dabee* (22 W. R., 334). That was a case where there was a difficulty in giving the plaintiff a decree for rent, properly so called ; but the Court thought the plaintiff entitled to some compensation from the defendants for the use of the land, and the case was sent back to the lower Court to ascertain the amount. Mr. Justice JACKSON, in giving judgment, says : " If these parties (meaning the defendants) are in possession, they make themselves tenants by use and occupation of the land."

The other was a Full Bench case of *Lukhee Kant Doss Chowdhry v. Sumerruddi Lusker* (13 B. L. R., 243 : 21 W. R., 20). There the landlord sued a ryot for rent alleged to be due under a kabulait, but when the case came to trial, the plaintiff was unable to prove the kabuliat. Then the question arose, whether, as the defendant had occupied the land under the zamindar, the latter was entitled to recover some rent or compensation for the use of the land, the amount to be ascertained by the Court ; and the Judges held that he was so entitled, and that the case should be remanded to the lower Court to ascertain the proper amount.

[914] As the plaintiff is willing in this case to waive the trespass and to treat the defendants as her tenants, we think that upon the authority of these cases we may give the plaintiff a decree for use and occupation. It is a difficult thing to say what amount we should give. Properly speaking, we ought to have further evidence upon that point, but having regard to the evidence already before the Court, we think we may safely give the plaintiff as against all the defendants the same sum which the lower Court has awarded against the defendant No. 2 ; and we also give the same sum which the lower Court has given for interest upon the amount decreed as from the commencement of the suit.

We are, of course, not in a position to give the plaintiff a decree for ejectment. We could only have given her such a decree if she had elected to treat

the defendants as trespassers; as she has elected to treat them as tenants, she can only put an end to their tenancy by a notice to quit. She cannot treat them as tenants and trespassers in the same suit.

The plaintiff will have her costs in this Court from all the defendants.

Appeal allowed.

NOTES.

[See also (1897) 25 Cal. 324 (328) ; (1905) 9 O.C. 296 (300).]

[9 Cal. 914: 12 C.L.R. 534]

APPELLATE CIVIL.

The 7th May, 1883.

PRESENT :

**SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE
MACPHERSON.**

Rookminy Bullub Roy.....Plaintiff

versus

Mulk Jamaniah Begum.....Defendant.*

*Nawab Nazim's Debts' Act (XVII of 1873), s. 11 Agreement for appropriation
of payments Contract Act IX of 1872), s. 60 -Account.*

So far as the Nawab Nazim's Debts' Act is concerned, rent due by the Nawab is on the same footing as any other debt incurred by him and before his property can be made liable to satisfy such rent debt, the consent of the Governor-General in Council must first be obtained to the issue of execution.

THIS was a suit for rent for the year 1284 (1877) and part of the year 1285 (1878).

[915] The plaintiff stated that her mother formerly was in possession of the mehal, and that whilst so in possession the Nawab Nazim of Bengal took a patni settlement of the mehal on the 6th Pous 1265 (21st December 1858); that the rents fell into arrear, and the patni right was put up to sale, and was purchased by the Nawab in the name of one Joy Sunker Roy; that the Nawab by a deed of gift made over his rights to his wife (the defendant in the suit). That on the death of his mother the plaintiff took possession of the said mehal on the 21st February 1881, and brought this present suit against the defendant (the wife of the Nawab) for rent for the year 1284 and part of the year 1285.

At the hearing the plaintiff and defendant agreed that the question was one of account, and in consequence the pleader of the plaintiff drew up an account, which was agreed to by the defendant, subject to one item of Rs. 390, which was in deposit in the office of the Agent to the Governor-General, which the defendant contended was paid as Government revenue to save the mehal from sale, the plaintiff contending that he was at liberty to appropriate it to the discharge of the rent for 1283 (1876), which otherwise was barred by limitation.

The defendant further contended that the suit would not lie, having regard to s. 11 of the Nawab Nazim's Act of 1873.

* Appeal from Appellate Decree, No. 336 of 1882 against the decree of A. J. R. Bainbridge, Esq., Judge of Moorshedabad, dated the 5th January 1882 affirming the decree of Baboo Mohendra Nath Mitter, Acting Sub-Judge of that district, dated the 1st July 1881.

The Subordinate Judge found that the plaintiff was not at liberty to claim the sum of Rs. 390 towards payment of the rent for 1283, and that s. 11 of the Nawab Nazim's Act of 1873 was no bar to the plaintiff bringing a suit against the Nawab's wife; all that could be contended being that in execution of the decree no writ or process could be issued against the taluk, and he therefore gave the plaintiff a decree for rent for the years 1284 and 1285, ordering that execution should not issue against the taluk, until the consent of the Governor-General in Council should be obtained.

The plaintiff appealed to the High Court

Baboo *Mohing Mohun Roy* (with him Baboo *Bansi Churn Banerjee*) for the appellant contended that he was entitled to apply the payments made by the plaintiff to the liquidation of the earliest debt due to the plaintiff, which he would be entitled to do under s. 60 of the [916] Contract Act, because the plaintiff's pleader had consented to make an account in accordance with the suggestion of the Court; and that the Court below was wrong in holding that the tenure itself was not liable to be put up for sale for its own arrears and had erred in its construction of the Nawab Nazim's Act XVII of 1873.

Baboo *Jugdanund Mookerjee* and Baboo *Guru Das Banerjee* for the Respondents contended that the Nawab's Act was not intended to apply to rent debts, but to debts of a different nature.

The **Judgment** of the Court (GARTH, C.J., and MACPHERSON, J.) was delivered by

Garth, C.J. This suit was brought by the plaintiff, a zamindar, against the wife of the Nawab Nazim of Bengal, for rent of a patni for the year 1284 and part of the year 1285.

The defendant holds the patni under a grant from the Nawab Nazim, and for the purposes of this suit is in the same position as the Nawab himself would be.

The question between the parties turned out to be a matter of account; and in determining that question one point, which was raised by the plaintiff, was, that certain sums, which were admittedly paid by the defendant to the Government for revenue in the year 1284, and which the plaintiff ought to have paid himself, ought to be considered (*as payments made by the defendant to the plaintiff*), and as such might be appropriated by the plaintiff in discharge of the rent of the year 1283, which otherwise was barred by limitation. The plaintiff in this suit did not claim any rent for the year 1283.

The Subordinate Judge was of opinion that the plaintiff had no right to appropriate these sums towards payment of the rent of 1283; and he therefore directed the parties to try and settle an account between themselves of the debits and credits for the years 1284 and 1285, excluding from the account the rent of 1283. The result was that the parties virtually came to an agreement, (except as to a sum which is now not in question), and the Subordinate Judge made a decree accordingly in favour of the plaintiff for Rs. 1,359-9-11.

That decree was appealed to the District Judge, and he seems to have considered that, as the parties had agreed to [917] the account in the Court below, he ought not to interfere; so he dismissed the appeal with costs.

I should mention, however, that another point was raised in the Courts, below, which I shall deal with presently, namely, as to how far Act XVII of 1873, which is called the "Nawab Nazim's Debts' Act," applies in this suit for the purpose of protecting the tenure, in respect of which rent is claimed, from being sold in execution.

The main point which has been pressed upon us in this appeal by the learned pleader for the plaintiff is, that the Subordinate Judge was wrong in

holding that the payments of revenue which were made by the defendant for the plaintiff in the year 1284 were not payments to the plaintiff in such suit, as to give the latter a right to appropriate them to the discharge of the rent of 1283 under ss. 59 to 61^a of the Indian Contract Act.

These sections merely enact the English law with regard to the appropriation of payments; and it is contended that if the payments of revenue made by the defendant to the Government can be considered as payments made to the zamindar, the plaintiff has a right to appropriate them to the discharge of the rent of 1283, and that in the absence of any specific appropriation they would naturally under s. 61 be appropriated to the payment of the earlier arrears of rent.

Now, assuming that we could consider these payments as made to the zamindar, I am not prepared to say that the appellant would not be right in his contention; but it seems to us impossible to consider them in that light. They are in reality the proper subject of set-off. They are payments made by the defendant to the Government, because the plaintiff would not pay them himself. They were made for the purpose of preventing the property being sold, and they were, therefore, moneys paid for the use of the plaintiff, and recoverable as such against him by the defendant. These sections, therefore, of the Contract Act, with regard to the appropriation of payments, are not applicable to the case at all.

The learned pleader for the appellant then argues that, if they are the subject of set-off it is wrong to allow them to be used [918] by the defendant in this suit, because, at the commencement of this suit, they were not *moneys legally recoverable against the plaintiff*. (See s. 111 of the Civil Procedure Code).

We think, however, that s. 111 was never intended to enact any new law as to what is, or is not, the subject of set-off. It merely means to lay down rules as to the way in which subjects of set-off can be made available. That being so it seems to us that we have nothing further to decide; because, subject to the correctness of the point which was decided by the Subordinate Judge, it seems clear that the parties agreed to the account, which was the basis of the judgment of the lower Courts. Both the lower Courts evidently considered that to be so.

The other point raised in the case related rather to the execution of the decree than to the decree itself.

It was contended on behalf of the plaintiff that he is entitled to proceed to sell this tenure, which is part of the property of the Nawab Nazim of Bengal, in the ordinary course of execution; and that he is not bound in that respect by the provisions of Act XVII of 1873.

*[Sec. 59 :- Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation or under circumstances implying, that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.]

Application of payment where debt to be discharged is indicated.

Sec. 60 :- Where the debtor has omitted to intimate, and there are no other circumstances indicating, to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.

Application of payment where debt to be discharged is not indicated.

Sec. 61 --Where neither party makes any appropriation, the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionately.]

Application of payment where neither party makes appropriation.

The 11th section of the Act, to which we have been referred, provides that "no suit shall be commenced or prosecuted, and no writ or process shall at any time be sued for against the person or property of the said Nawab Nazim, unless such suit be commenced, or such writ or process be sued for, with the consent of the Governor-General in Council first had and obtained;" and "any suit which at any time shall have been, or shall be commenced, and any writ or process which at any time shall have been or shall be sued for, against the person or property of the said Nawab Nazim, shall be of no effect, unless and until the consent of the Governor-General in Council certified in manner aforesaid is obtained."

The contention of the defendant is that, having regard to this section, the plaintiff has no right to execute his decree in this suit against the property in question without the consent of the Governor-General in Council.

On the other hand, the plaintiff contends that this section has no application to a case of this kind; because this is a suit for [919] rent, and the Act was not intended to apply to debts for rent but to debts of a different nature.

It seems to us, however, that this is just one of those cases in which the Legislature intended to protect the property of the Nawab Nazim. These two taluks formed part of his estates; and it was for the purpose of protecting those estates and of preventing their sale, that this Act was passed. A debt for rent is like any other debt; and we quite agree with the lower Courts that the consent of the Governor-General in Council will be necessary before the plaintiff can sell the property in execution. This appeal will, therefore, be dismissed with costs.

Appeal dismissed.

[9 Cal. 919 12 C.L.R. 599]
APPELLATE CIVIL.

The 31st May, 1883.

PRESENT :

MR. JUSTICE CUNNINGHAM AND MR. JUSTICE MACLEAN.

Kunnock Chunder Mookerjee.....Defendant
versus

Guru Dass Biswas.....Plaintiff.

Civil Procedure Code (Act XIV of 1882), ss. 42, 43 -- Enhancement of rent, Suit for— Subsequent suit for rent.

Under ss. 42 and 43 of the Civil Procedure Code, plaintiffs must bring their entire claim and every remedy enforceable in respect of that claim into Court at once, and if they fail to do that in any suit, they cannot afterwards avail themselves of any remedy on which they have not chosen to insist in the first suit. Suits for enhanced rent, and suits for rent, are claims arising in respect of the same subject-matter, and a plaintiff cannot be allowed, after having unsuccessfully sued for rent at an enhanced rate, to sue for the original rent for previous years.

Baboo Bama Churn Banerjee for the Appellant.

Baboo Sree Nath Dass for the Respondent.

The **Judgment** of the Court was delivered by

* Appeal from Appellate Decree No. 944 of 1882, against the decree of W. Macpherson, Esq., Judge of the 24-Pergunnas, dated the 10th March 1882, modifying the decree of Baboo Grish Chunder Chatterjee, Second Munsif of Satkhoeera, dated the 30th June 1881.

Cunningham, J.—The question raised in this appeal is whether the plaintiff, having sued for enhanced rent for the year 1286 (1879), can now sue for the original rent for the years 1284, 1285 and 1286 (1877, 1878, and 1879).

[920] The lower Appellate Court has found that the one action is no bar to the other. We feel it impossible to concur in this opinion. It appears to us that, looking at the wording of ss. 42 and 43 of the Code of Civil Procedure, it is clearly the intention of the Legislature that plaintiffs should bring their entire claim and every remedy enforceable in respect of that claim into Court at once, and that if they fail to do that in any suit, they cannot afterwards avail themselves of any other remedy on which they have not chosen to insist in the first suit.

It is true that the Privy Council have pointed out that a suit for enhanced rent and a suit for rent are very different proceedings. None the less are they, in our opinion, remedies or claims arising in respect of the same subject-matter. This being so, we think they fall within the purview of s. 43, and that the plaintiff, not having chosen to put forward this claim for rent of the years 1284, 1285 and 1286 at the original rate in the former suit, is now barred from suing for that rent in the present suit. We think, therefore, that the decision of the lower Appellate Court must be set aside and that the suit must be dismissed with costs throughout.

Appeal allowed.

NOTES.

[This case was overruled in (1887) 15 Cal. 145 F.B. See also (1889) 14 Bom. 31 (55).]

[9 Cal. 920]

APPELLATE CIVIL.

The 5th June, 1883.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE MITTER.

Shumbhoo Nath Poddar.....Plaintiff

versus

Luckynath Dey and others.....Defendants.*

Sale in execution of decree—Civil Procedure Code (Act X of 1877), s. 295—

Rateable distribution amongst decree-holders.

Where property belonging to A has been attached under a decree, and other decree-holders than the attaching creditor have applied before realization of assets to participate in the sale proceeds, and amongst them a creditor who has obtained a decree against A and B, such latter creditor is entitled under s. 295 to share in the proceeds of the sale of A's property.

THIS case was originally filed and decided in 1880, and the regular and special appeal thereon decided on the 30th May 1881 and 19th July 1882 respectively. The case then came up on appeal [921] under the Letters Patent, and the question arising in the appeal, so far as is sufficient for the purposes of this report, is set out in the judgment of GARTH, C.J.

Baboo Grish Chunder Chowdhry for the Appellant.

Munshi Serajul Islam for the Respondents.

* Appeal under s. 15 of the Letters Patent against the decree of Mr. Justice FIELD, dated the 19th July 1882, in appeal from Appellate Decree, No. 1508 of 1881.

The following **Judgments** were delivered :—

Garth, C.J. —This was a Letters Patent Appeal from a decision of Mr. Justice FIELD, confirming the judgments of both the lower Courts. The question depends upon what is the proper construction to be put upon s. 295 of the Civil Procedure Code.

The appeal was heard some time ago ; but it stood over for a time, until Mr. Justice FIELD and myself had decided a case (second appeal No. 211 of 1882) which was supposed to involve a somewhat similar question under s. 246 of the Code.

That case has now been decided (*Hury Dayal Guho v. Din Doyal Guho*, ante, p. 479), but the decision will not much assist us in the solution of the present question, which is this : whether, when assets have been realized by sale or otherwise in execution of a decree, and more persons than one have prior to the realization applied to the Court, by which such assets are held, for execution of decrees for money *against the same judgment-debtor*, the assets are to be divided among such persons, although the decrees under which they claim may not have been obtained against the same person.

To put the question, as it was put by Mr. Justice FIELD in the Court below : Suppose that there were one decree against *A*, and another decree against *A* and *B*, and that the decree-holders in both cases had applied for execution against *A*, but that execution had been taken out and assets realized in one case only, would the decree-holders under both decrees be entitled to a rateable share of the assets ; or, in other words, is that a case which would come within s. 295 ? I think that this question should be answered in the affirmative. It is clear that, as a matter of justice, the decree-holder in the one case has as much right to take out execution against *A*, as the decree-holder in the other case ; and the evident object of the [922] Legislature is to prevent any one decree-holder obtaining an undue advantage over another, when they have both applied for and are both entitled to execution against the same person.

It cannot matter under such circumstances that one decree-holder has a right to proceed against other judgment-debtors, and that the other decree-holder has not. So long as execution may be taken out by both against one and the same judgment-debtor, it cannot signify against what other judgment-debtors the decrees may have been obtained.

I think, therefore, that the judgments of the Court below should be reversed, and that the plaintiff should be declared entitled to a rateable division of the sale proceeds with the defendants. The plaintiff will have his costs in all the Courts.

Mitter, J. —I am also of the same opinion.

There cannot be the slightest doubt, that the governing intention of the Legislature in s. 295 is that there should be an equitable distribution of the assets realized by the sale of a judgment-debtor's property, amongst such of his judgment-creditors as have been diligent enough to apply for execution against him before the realization.

The present case falls within this intention, but the lower Courts are of opinion that it does not come within the language used by the Legislature ; they think that the words "the same judgment-debtors" are governed by the word "*decrees*," and that therefore *all* the judgment-debtors must be common in all the decrees. But that this is not the correct construction of the section appears from the fourth clause of its last proviso. There can be no question that the fourth clause covers *all* cases of the sale of immovable property which are covered by the main portion of the section. The word "*same*" does

not occur here, and it is evident that the words "*the judgment-debtors*" here refer to the judgment-debtor whose immovable property has been sold in execution of a decree. Similarly the words "*the same judgment-debtor*" in the first portion of the section refer to the judgment-debtor or the judgment-debtors, whose property has been sold in execution of a decree.

Appeal allowed.

NOTES.

[This case was followed in (1887) 10 All., 35 (38).

The case of the judgment-creditors being more than one, and the attaching creditor having decree against one only was decided likewise in (1903) 30 Cal., 583 -7 C. W. N., 414 which overruled (1885) 12 Cal., 294 (299); (1901) 27 All., 158; (1905) 29 Bom., 528; (1892) 16 Bom., 683; 91.

See also (1902) 8 O. C. 86 (89); (1899) 3 C. W. N., 368 (371), (1898) 22 Mad., 241 (244); (1895) L. B. R., (1893-1900) 161 (167).]

[9 Cal. 923 = 8 Ind. Jur. 84]
[923] ORIGINAL CIVIL.

The 23rd July, 1883.

PRESENT :

MR. JUSTICE PIGOT.

Khajah Assenoolla Joo

versus

Khajah Abdool Aziz and others.

Practice— Civil Procedure Code (Act XIV of s. 1882), s. 136—Non-compliance with order for production of documents—Defence struck out.

Where a defendant neglects to comply with an order for production and inspection, the Court will, although in the last resort, order his defence to be struck out.

THIS was a suit praying that the first defendant might be ordered to bring into Court probate of an alleged will of one Khajah Golam Moheooddeen (deceased) to try the factum and validity thereof, and for a declaration that the plaintiff was entitled to a share in the estate of the deceased and for an injunction.

The defendant entered appearance and filed his written statement on the 11th December 1882. On the 8th January 1883 the usual order for production of documents was made, and the same was served on the 12th January on the defendant's attorneys.

The defendant on the 18th January filed his affidavit verifying a list of documents in his possession. The plaintiff experiencing difficulty in obtaining proper inspection of the books produced, moved the Court, and on the 29th March 1883 obtained an order directing the defendant to produce and leave at the office of the Registrar within a certain period certain books and documents, amongst which were certain books in Cashmere relating to the years 1270 to 1277 (1863 to 1870), the plaintiff to have liberty to inspect and peruse the same.

The above order was served personally on the defendant as well as on his attorneys on the 27th April. On the 30th May the defendant produced certain books from Umritsur, and made them over to the Registrar, but the plaintiff was unable to obtain inspection of the same owing to the continued absence of the defendant. After a prolonged correspondence between the plaintiff's and

defendant's attorneys on the matter, the former received on the 2nd July a letter from the latter saying that "you can inspect the Umritsur books in the Registry Office whenever you chose [924] to make an appointment to do so; our client's inspection must be dispensed with." The Registrar, however, would not allow inspection until the defendant should have made a list of the documents. The defendant altogether failed to comply with the order of the 29th March, as regards the Cashmere books, the time for such production having long passed.

The plaintiff, therefore, applied to Mr. Justice NORRIS in Chambers for a summons on the 17th July 1883, calling upon the defendant to appear in Chambers on the 20th July to show cause why he should not, within 48 hours from the order, comply with the order of the 29th March 1883 by leaving and producing the Cashmere books at the Registrar's Office, and why in default of his compliance therewith his defence should not be struck off.

The above summons was duly served on the defendant's attorneys, but the defendant put in no appearance as directed by the summons.

Thereupon the plaintiff applied in Chambers for an order in terms of the summons, and Mr. Justice NORRIS adjourned the matter into Court.

Mr. Hill for the plaintiff applied under s. 136 of the Code of Civil Procedure that the defendant's defence might be struck out, stating that he was not aware that any similar application had ever been made in this Court; the section was taken from the English Order XXXI, rule No. 20 of the Judicature Act, and having regard to the serious consequences to the defendant the Court would necessarily be reluctant to exercise the discretion conferred on it, except in extreme cases; see *Twycroft v. Grant* (W. N. for 1875, p. 201), in which LUSH, J., held that he would only exercise the powers conferred by the rule in the last resort; there, however, an explanation was offered for the non-compliance with the order, and it was said that the defendant was willing to answer the interrogatories within a week, whereas upon the affidavit now before the Court the defendant's whereabouts was unknown even to his attorney, and the latter was wholly uninstructed.

In England the party against whom such an order is made would, it seems, be entitled to come in and ask that the order [925] might be set aside on showing sufficient grounds for such an application; and in this case the order will not be very prejudicial to the defendant.

Pigot, J., made an order striking out the defence of Khajah Abdool Aziz under s. 136 of the Code in consequence of his non-compliance with the order of the 29th March 1883; and at the same time mentioned that the party against whom the order was made might come in and seek to set it aside on showing good grounds for the application.

Attorneys for the Plaintiff: Messrs. *Remfry and Remfry*.

NOTES.

[In (1898) 2 C. W. N., 676 (799) this case was distinguished as being an interlocutory order; it was there held that the position would be different when it was a final one. As to appeal, see 19 Bom., 307; 7 All., 159; revision 14 Cal., 768; as to what may be done on appeal, see Woodroffe and Amer Ali on Civil Procedure Code (1908), p. 774.]

[9 Cal. 925]

APPELLATE CIVIL.

The 29th May, 1883.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND
MR. JUSTICE MACPHERSON.Jugut Shobhun Chunder *alias* Doolal Chunder Dehingur
Gossamy.....Plaintiff*versus*Binaud Chunder *alias* Soda Shobhun Chunder Dehingur
Gossamy and another.....Defendants.**Jurisdiction of Revenue Courts—Question of title—Registration of names—
Declaratory decree, Suit for.*

It is not the province of a Revenue Court to decide questions of title between contending claimants, such questions being within the province of the Civil Courts. It is the duty of the latter in suits brought for declaration of a right to registration to declare the rights of parties in order that the revenue authorities may be duly certified as to the persons whom they ought to register.

IN this case the plaintiff sued to get his name registered on the revenue rolls as a joint holder with his brother, defendant No. 1, in respect of 311 bighas of ancestral lands.

The plaintiff stated that after his father's death in 1277 (1870), he and his brother, defendant No. 1, inherited their father's estate; that at that time both of them were minors, and the lands in [926] question were recorded in the name of their step-mother; that after the death of their step-mother, defendant No. 1, who had attained majority, became the guardian of his minor brother, and applied for and obtained a certificate to collect and receive the amounts due to their father, and further applied to the Collector to have his name registered in respect of his father's ancestral property, and accordingly obtained a pottah in his own name of all these properties; that on the 25th Pous 1285 (10th January 1879) he (the plaintiff) attained his majority, and separated from defendant No. 1, and took ijmali possession of a share of the lands in suit. That defendant No. 1, in order to establish his exclusive right over all the ancestral property, brought a suit against certain tenants to eject them from their holdings; that he (the plaintiff) thereupon applied to the Revenue Court to have his name recorded as a joint holder of these lands with his brother, but his application was refused both in the first Court and on appeal in the Chief Commissioner's Court: and that he thereupon brought this suit against defendant No. 1 and the Deputy Commissioner for declaration of his title and the recording of his name jointly with that of his brother on the revenue rolls.

Defendant No. 1 stated that the plaintiff was not in possession, and that a suit for a declaratory decree would not lie; and he further denied plaintiff's claim to any portion of the land, the land not being subject to the ordinary Hindu law of inheritance.

* Appeal from Appellate Decree, No. 1883 of 1881 against the decree of W. E. Ward, Esq., Judge of Assam Valley District, dated the 13th June 1881, reversing the decree of Baboo Shibo Persad Chuckerbutty, Sudder Munsiff of Gauhatty, dated the 14th December 1880.

Defendant No. 2 stated that he had no interest in the suit and asked for costs.

The Assistant Commissioner found that the lands were ancestral; that the plaintiff had been in possession of the land in suit jointly with his brother, and decided the case in favour of the plaintiff, ordering that the properties claimed by the plaintiff be declared his paternal properties, and he be entitled to get his name registered in respect of a half share therein.

The defendant No. 1 appealed to the Judge of the Valley District of Assam, who, without going into the merits of the case, dismissed the appeal on the ground that the plaint disclosed no cause of action, stating that the plaintiff, being in possession and enjoyment of the lands in suit, the Chief Commissioner's order refusing to register his name as a joint holder with his brother threw no [927] cloud upon the plaintiff's title; and further that the Court had not the power to pass such an order against the revenue authorities as was asked for in the plaint.

The Plaintiff appealed to the High Court.

Baboo *Bhoobun Mohun Doss* for the Appellant.

Baboo *Rash Behari* (those for the Respondent.

The **Judgment** of the Court (GARTH, C. J., and MACPHERSON, J.) was delivered by

Garth, C. J.—In this case, which is somewhat similar in its nature to others which have been appealed from the Assam Valley Districts, we are sorry to find that the District Judge has again taken an erroneous view of the law.

The plaintiff sued to have it declared that he is entitled to an eight-anna share in certain immoveable property, and to have his name registered as the owner of that share in the Revenue Court.

His case is, that his father was the owner of the property in question, and that he and his brother, the defendant No. 1, inherited it in equal shares. At the time of his father's death, which occurred on the 2nd of Joisto 1277 (17th May 1870), the plaintiff and his brother were both minors, and consequently their step-mother, Chunder Coomary, who appears to have acted as their guardian, had her name recorded in the Revenue Court as the owner of one portion of the property, whilst another portion remained in the name of the plaintiff's father, to whom a pottah had been granted.

Chunder Coomary died whilst the plaintiff was still a minor, but his brother, the defendant No. 1, had then attained majority, and he became the plaintiff's guardian after the step-mother's death.

He then applied to the Judge's Court for a certificate authorizing him to collect the amounts due to their father; and taking advantage of his position as the plaintiff's guardian, he also applied to the Collector to have his name recorded as the sole owner of the property, which stood in the names of Chunder Coomary and of his father. His application was granted, and he obtained a pottah, conveying the property to himself alone.

[928] The plaintiff then says that afterwards upon attaining his majority, he separated from his brother, the defendant No. 1, on the 25th of Pous 1285 (10th January 1879); and that he has since been in ijmali possession of a share of the lands in suit.

He then alleges that the defendant No. 1, with a view of excluding him from his interest in those lands, took proceedings in his own name to eject the tenants; whereupon the plaintiff, for his own protection, applied to the Revenue

Court to have his name registered as the owner of an eight-anna share in the property ; but in consequence of objections raised by the defendant No. 1 the Deputy Commissioner refused to register him.

He then appealed to the Commissioner, who confirmed the order, but advised the plaintiff to bring a civil suit. This was no doubt his proper remedy ; and he did bring this suit on the 2nd of July 1880. The defendant No. 1 alleges (amongst other things) that the plaintiff has no interest in the lands in suit.

The Assistant Commissioner, after going into the case very carefully, decided in the plaintiff's favour, and gave him a decree, declaring that he was entitled to an eight-anna share of a part of the property in question, and to have his name registered as the owner of that share.

The defendant No. 1 appealed from that decree ; and the District Judge, apparently without going into the evidence, or considering the judgment of the first Court, held that the plaint disclosed no cause of action, and refused to try the appeal upon its merits.

The District Judge goes on to say, what of course is very true in a literal sense, that the Civil Court has no power to make a binding order upon the revenue authorities in the manner prayed for in the plaint ; but I think if he had only exercised a little of the discretion, which was shown by the first Court, he would have had no difficulty in making such a decree as would have given the plaintiff all the relief which he could properly ask, if after an investigation on the merits he considered him entitled to it ; that is to say, a decree declaring what his rights were, leaving it to the revenue authorities to register him, if they thought fit, in respect of those rights.

Suits of this kind are extremely useful, and of every-day [929] occurrence in this province. It no doubt sometimes happens that plaintiffs, through ignorance or mistake, ask for an order upon the Collector, which the Civil Courts have no power to make ; but that is a mere formal error, which it is the duty of the Judge to correct ; and if he finds upon the evidence that the plaintiff is entitled to the right which he claims, and that the case is one in which a declaratory decree can legally be made, he ought to make such a decree, and then leave it to the revenue authorities to do their duty in the matter.

I observe the District Judge says, that " the revenue authorities in Assam are not legally bound to register the names of all the joint shareholders in a pottah."

I can only say that if this is so, and if the revenue authorities in Assam are at liberty to prefer the claims of any one shareholder in a property, and to register him as the sole owner, to the exclusion of the others, notwithstanding any declaration which may be made by the Civil Court to the contrary, I am afraid that the Revenue Court, instead of being of any service to the public, must of necessity often become an instrument of fraud and oppression ; and if that is the state of the law in Assam, I think the sooner the notice of the Supreme Government is called to it, the better.

It is not, of course, the province of the Revenue Court to decide questions of title between contending claimants. It has neither the knowledge of law, nor the proper machinery, to decide such questions. That is obviously the province of the Civil Courts ; and their duty, as I understand it, is to declare the rights of parties, in order that the revenue authorities may be duly certified as to the person whom they ought to register.

Unless this were so, I see no reason why the Collector or the Commissioner in Assam should constantly refer parties, (as the Commissioner has done

in the present instance), to the Civil Court. It would seem nothing short of mockery to refer a claimant to the Civil Court, and when he has sued there, and had his rights declared, to inform him that the Revenue Court cannot recognize those rights.

The plaintiff in this case has sufficiently explained his title upon the face of his plaint. He has shown how those rights are [930] likely to be jeopardized by the exclusive claim to the property which is made by his brother, and the proceedings which the latter has taken with a view to exclude him from his property. It is obvious from the written statement of the defendant No. 1, and from the judgment of the first Court, that the latter denies the plaintiff's title, and means to oust him if he can, and the case is therefore one which comes directly within the scope of s. 42 of the Specific Relief Act.

The case must therefore be remanded to the lower Appellate Court, in order that the merits of the case may be properly investigated, and the plaintiff's rights declared with a view to registration.

There is nothing in the case referred to by the District Judge which is opposed to this view, because in that case, as explained by the High Court, the plaintiff was not in a position to sue for declaratory decree.

There have been several other cases since the year 1879, which have come up in appeal from Assam, and in which, I regret to say, this Court has been constrained to express its disapproval of the law which has been laid down by the District Judge. (See *Kalindi Dabia v. Komola Kanto Surma* (I. L. R., 7 Cal., 437); *Hootaboo Ravah v. Loom Ravah* (I. L. R., 7 Cal., 440). *Berjoy Keot v. Gorla Keot* (I. L. R., 7 Cal., 439); *Purnamal Deka Kohla v. Mayaram Deka Kohla*; and (10 C. L. R., 201). *Shiboram Surma v. Juggeram Surma* (No. 138 of 1881 not reported).

The costs in this Court and in the lower Appellate Court will abide the result.

Case remanded.

[13 C.L.R. 427]

[931] FULL BENCH.

The 14th August, 1883.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE MITTER,
MR. JUSTICE McDONELL, MR. JUSTICE PRINSEP, AND
MR. JUSTICE TOTTENHAM.

The Maharajah of Burdwan and others.....Defendants

versus

Kristo Kamini Dasi.....Plaintiff.

*Sale for arrears of rent—Reg. VIII of 1819, s. 8—Due publication
of Notice of Sale.*

Where there is a cutcheri upon the land of a defaulting patnidar the notice required by s. 8 of Reg. VIII of 1819 must be served there; but where there is no such cutcheri, the notice should be published, in the manner required by the section, at the principal town or village within the taluk.

THIS was a reference by GARTH, C.J., and MACPHERSON, J., to a Full Bench. The referring order was as follows :—

* Full Bench Reference, No. 82 of 1882, from the original decision of the Subordinate Judge of Hooghly, dated 3rd December 1881.

This suit was brought to set aside the sale of a patni taluk under Regulation VIII of 1819; and one of the grounds relied upon by the plaintiff was, that notice of the sale had not been duly published.

The question was, whether there had been a sufficient compliance with the provision of s. 8, which requires that "a copy of the notice shall be sent to be similarly published at the cutcheri or at the principal town or village upon the land of the defaulter.

The patni taluk in question was called Lot Amarpur; and as the defaulting patnidar had other properties in the neighbourhood of that taluk, he had a small mal cutcheri on the land of this taluk, and another dihi cutcheri at a village called Mahanad, some eight or nine miles distant from the confines of Lot Amarpur.

At this latter cutcheri his principal business was transacted, including that of Lot Amarpur, and it appeared that two durpatnidars, who were the largest tenants on Lot Amarpur, were always, in the habit of paying their rents at the dihi cutcheri.

The other cutcheri within the taluk was used for the purpose of receiving the rents of the smaller tenants, which, when received, were paid into the dihi cutcheri at Mahanad.

[932] The notice in this case was taken to the Mahanad cutcheri, and the serving peon gave it into the hands of one of the amlas at that cutcheri in the presence of the defaulting patnidar and obtained a receipt.

It was contended by the plaintiff, who is a co-sharer to the extent of eight annas in the patni, that this service was bad.

1st.—Because the cutcheri at Amarpur was the one at which the zamindar was bound to serve the notice; and

2ndly.—Because it was delivered to one of the amlas, instead of being stuck up on the wall of the cutcheri.

As regards the first point, it was held in the case of *Mungazee Chaprassee v. Shibo Sunduree* (21 W. R., 369), that the cutcheri at which the notice should be served need not be within the patni as long as it was adjacent to it and upon the land of the defaulter—See also to the same effect *Lotfonissa v. Kowar Ram Chunder* (S. D. A., 1849, p. 371), and *Gouree Lall Singh v. Joodhisteer Hajrah* (I. L. R., 1 Cal., 359: 25 W. R., 141), where the service of the notice appears to have been effected at the house of the defaulter.

We entertain some doubt, whether, so long as there is a cutcheri or a town or village of the defaulter upon the land of the taluk, the service of the notice can be effectually made otherwise than upon the land of the taluk.

With regard to the second point, the words of the section seem to leave it doubtful whether the service must be published by sticking it up on the walls of the cutcheri, or whether it may be delivered to some person at the cutcheri for that purpose; and the authorities seem equally doubtful.

It would seem from the case of *Gouree Lall Singh v. Joodhisteer Hajrah* (I. L. R., 1 Cal., 359: 25 W. R., 141), that the learned Judges in that case considered that the notice should be published by the zamindar; whereas other cases seem to show that service upon the patnidar or his amla personally at the cutcheri is sufficient—(See *Mungazee Chaprassee v. Shibo Sunduree* (21 W. R. 369).

We entertain considerable doubt as to both these points, and as the authorities upon the subject are by no means uniform, and it is desirable that some definite rule upon the subject should be [933] laid down, we think it right to refer the question to a Full Bench.

Whether the service of the notice under the above circumstances was sufficient in point of law to satisfy the requirements of the Regulation ?

The Advocate-General (Mr. Paul) with him Baboo Bosunt Coomar Bose, Baboo Umbica Churn Banerjee, and Baboo Bama Churn Banerjee for the Appellants. Section 8 of the Regulation refers to publication ; the reason for the section is, and it was intended to provide, that notice of the sale should be given to the patnidar and durpatnidar. All the regulation intended was to lay down some rule to provide against fraud ; the meaning of the word "cutcheri" in the section is the nearest large cutcheri at which the business of the landlord is ordinarily carried on. The Legislature never intended that the notice should be posted in a cutcheri on the land of the defaulter, for to mean this, the words "at the" must be struck out. In *Hunooman Doss v. Bipro Churn Roy* (20 W. R., 132), it was held that it was more in compliance with the section to post the notice at a place where the gomastha carried on his business than at the cutcheri which was not in use. In *Mungazee Chaprassee v. Shibo Sunduree* (21 W. R., 369), it was held that so long as the cutcheri, at which notice was served on the defaulter, was an adjacent one, at which all the business of the defaulting patindar was carried on, that was sufficient. In the present case the tenants never paid their rents till a notice was served on them, and it was in this very cutcheri where such notice was always served on them, and this had been done for the last twenty years. Is the zamindar now entitled to turn round and say, "this is not the cutcheri in which a notice to avoid my patni ought to have been served ?" The words in the Regulation do not necessarily mean the patni land of the defaulter ; there is nothing to indicate that it was the patni land alone. In *Lootfonissa v. Kowar Ram Chunder* (S. D. A., 1849, p. 371), it was held that a posting at any cutcheri of the defaulter was sufficient.

[934] The Court did not call on Mr. Evans, who appeared with Baboo Troylokho Nath Mitter, Baboo Guru Das Banerjee, and Baboo Gogesh Chunder Dey for the Respondents.

The following was the **Opinion** of the Full Bench :--

We are of opinion that in this case the notice was insufficient.

If there is a cutcheri upon the land of the defaulting patnidar, (by which expression we mean the land of the taluk in question), we think that the notice must be published at that cutcheri.

If there is no such cutcheri, the notice must be published at the principal town or village within the taluk.

We think also, that the mere delivery of the notice to the patnidar, or one of his amlas, is not sufficient ; but that it must be published in the manner required by the section. The necessity for accurately conforming to both provisions of the Regulation is laid down authoritatively by the Judicial Committee in the case of the *Maharajah of Burdwan v. Tara Soondery Debia* (L. R., 10 I. A., 19 : S.C., ante, p. 619).

NOTES.

[See also (1885) 12 Cal. 67 (69).]

[9 Cal. 934]

FULL BENCH.

The 16th August, 1883.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE MITTER,
MR. JUSTICE McDONELL, MR. JUSTICE PRINSEP,
AND MR. JUSTICE TOTTENHAM.

Srinath Kur and others.....Plaintiffs
versus
Prosunno Kumar Ghose.....Defendant.*

*Limitation Act (XV of 1877), Sch. II, Art. 140† — Act IX of 1871, Sch. II,
Art. 141 — Suit by reversioner for possession.*

Under Article 141 of Schedule II, Act XV of 1877, a reversioner who succeeds to immoveable property has twelve years to bring his suit for possession from the time when his estate falls into possession.

THIS was a reference to a Full Bench by CUNNINGHAM and MACLEAN, JJ. The referring **Judgments** were as follows :—

Maclean, J.—The plaintiffs are the grandsons (daughter's sons) of Radha Madhub Pal Chowdhry, by his daughter Shantomoni who died in 1284 (1877) : the defendant is his grandson by his daughter Anundmoyi, who died in 1270 (1863). The property in [935] suit is the residue of Radha Madhub's estate, exclusive of what has been alienated. Plaintiffs claim their share as having descended to them on their mother's death.

The defence is that by adverse possession of his father and himself since 1270 (1863) the defendant has acquired a good title.

The first Court decided that the plaintiff's mother alienated her share, and so effected a partition, and that therefore she did not hold any title after her sister's death. The Subordinate Judge did not agree with this part of the Munsif's decision, but both Courts find as a fact that plaintiff's mother was out of possession from 1270 (1863); and applying the rule that adverse possession which would have extinguished her right also extinguished the reversioner's right, they have dismissed the plaintiffs' suit.

The question, therefore, is whether the rule which was laid down under Act XIV of 1859 is good law under the Limitation Acts of 1871 and 1877.

In *Saroda Soonulury Dossee v. Doyamoyee Dossee* (I. L. R., 5 Cal., 938), the rule is re-affirmed in clear terms. That was a case governed by Act IX of 1871. I am not, however, prepared to adopt the qualification there put upon

* Full Bench Reference, No. 82 of 1882, against the decree of the Additional Subordinate Judge of Dacca, dated 26th November 1881, affirming the decree of the Second Munsif of Munshigunj, dated 25th April 1881.

† [Art. 140 :—

Description.	Period of limitation.	Time from which period begins to run.
By a remainder man, a reversioner (other than a landlord), or a devisee, for possession of immoveable property.	Twelve years ...	When his estate falls into possession.]

the words "entitled to possession." These words seem to me sufficiently clear and I am not disposed to say that they only mean entitled to possession if the last female also was entitled to possession at the time of her death.

In *Pursut Koer v. Palut Roy* (I. L. R., 8 Cal., 442), the last female owner had been out of possession for 36 years before her death, and while it was held that the case (although time had run out under Act XIV of 1859) was really a case of improper alienation rather than of adverse possession, it was also decided that the suit was certainly not barred under Act XV of 1877, Art. 141, unless it had been barred under some former Act. In the case before us time had not run out under Act XIV of 1859; and as the Acts of 1871 and 1877 are identical in this respect, the only question was whether the suit has been brought within 12 years of Shantomoni's death. This is not disputed.

I have some doubts about the correctness of the decision in *Saroda Soon-dary Dossee v. Doyamoyee Dossee* (I. L. R., 5 Cal., 938). I was a party to the decision in *Pursut Koer v. Palut Roy* (I. L. R., 8 Cal., 442) and also to a recent [936] decision, dated 14th March 1883, in appeal from Appellate Decree No. 1306 of 1881, in which, however, time had not run out against the late female owner.

In *Chunder Nath Das v. Asaram Das* (1 Shome, 165) it was laid down that limitation ran under Art. 141 from the date of the plaintiffs' mother's death. This case is in support of the view I have taken. I think the question should be authoritatively settled by a Full Bench.

Cunningham, J.—The question raised in this appeal is whether under Art. 141 of the Limitation Act of 1877, the person entitled to the possession of property on the death of a Hindu or Mahomedan female can sue within 12 years of the death of the female, notwithstanding that the female's right of action was barred by 12 years' adverse possession.

As there appears to be some conflict of decision as to this point, and also as to whether time, which has begun to run against the female continues to run against the remainderman, or whether a new period of limitation arises on the death of the female, I concur in referring both questions to the Full Bench.

Babu Kalichurn Bannerjee, for the Appellants. In this case the widow's right is barred by 12 years adverse possession, so the question before the court is whether the reversioner is also barred. Limitation runs not from the date of actual dispossession, but from the date when the estate falls into the reversioner's possession, i.e., from the date of the death of the widow. *Chunder Nath Das v. Asaram Das* (1 Shome, 165); see also *Pursut Koer v. Palut Roy* (I. L. R., 8 Cal. 442).

In an unreported case, Special Appeal 1306 of 1881, *Dwarkanath Gupta v. Komulmoney Dossee*, decided by CUNNINGHAM and MACLEAN, JJ., on the 14th March 1883, it was held that the meaning of Art. 141 is, that, although limitation has begun to run against a widow, yet a fresh period of limitation begins for the reversioner on her death. [GARTH, C.J.—The reversioner does not claim through the widow, but through the husband, so if limitation had run against the widow, he would not be bound by it.] As regards the case of *Nobin Chunder Chuckerbutty* [937] v. *Guru Pershad Doss* (B. L. R., Sup. Vol., 1008: s.c. 9 W. R., 505) it was decided on the limitation Act of 1859, and it is very probable that the Legislature intentionally modified the effect of that case in passing the later Limitation Acts.

Baboo Srinath Banerjee for the respondent cited *Nobin Chunder Chuckerbutty v. Guru Pershad Doss* (B. L. R., Sup. Vol., 1008 ; s.c. 9 W. R., 505), and *Saroda Soondury Dossee v. Dayamoyee Dossee* (I. L. R., 5 Cal., 938).

The following **Opinions** were delivered by the Full Bench :—

Garth, C. J. (MITTER, J., McDONELL, J., and TOTTENHAM, J., *concurring*).

We think that the rule which was laid down under the Limitation Act of 1859 is no longer the law under the Acts of 1871 and 1877.

A reversioner who succeeds to immoveable property has now twelve years to bring his suit *from the time when his estate falls into possession*. (See Art. 141* of the Act of 1871, and Art. 140 of the Act of 1877.) Under the Act of 1859 the language was very different. The suit under that Act must have been brought *within twelve years from the time when the cause of action arose* ; and as it was considered by the Full Bench of this Court that the cause of action arose at the time when the owner of the inheritance was first dispossessed, they held that a twelve years dispossession, which barred the owner of the inheritance for the time being (although a female), barred also the reversioner. See *Nobin Chunder Chuckerbutty v. Guru Pershad Doss* (B. L. R., Sup. Vol., 1008 : s.c. 9 W. R., 505).

The provision in the present Act, as well as that in the Act of 1871, as regards remaindermen and reversioners, assimilates the law in this country to the law of England. (See 3 and 4 Will. IV, Ch. 27, s. 4). As the Subordinate Judge has decided in the plaintiffs' favour upon the merits, we think that they are entitled to a declaration of their rights, and to possession of the shares in question. They should also have their costs in all the Courts.

Prinsep, J.—No doubt the terms of the Limitation Acts of 1871 and 1877 are materially altered in respect of the point now before us, from the Act of 1859, on which the judgment of the [938] Full Bench in the case of *Nobin Chunder Chuckerbutty v. Guru Pershad Doss* (B. L. R., Sup. Vol., 1008 : s.c., 9 W. R., 505) proceeded ; and although I do not wish to differ from the opinion of my learned colleagues, I have some hesitation in coming to the conclusion that the Legislature in 1871 deliberately altered the law thus laid down in 1868. I further observe that this point has never, that I can find, been before any Division Bench of the Court, except in the case of *Saroda Soondury Dossee v. Dayamoyee Dossee* (I. L. R., 5 Cal., 938), when the rule laid down in the Full Bench case abovementioned was followed.

NOTES.

[LIMITATION—REVERSIONARY HEIRS—SUIT FOR POSSESSION—

The ruling in this case has been accepted by all the High Courts and Chief Courts. At one time it was thought that the Privy Council decision in 22 Cal. 445 virtually overruled this case. See (1897) 20 All. 42 (46). But this view is not now maintained :—(1901) 23 All., 448 (454) ; (1903) 25 All., 435 (440) ; (1898) 26 Cal., 285 (295). In 23 All., 448, the said Privy Council case was explained as only laying down that the reversioner, *during the female heir's lifetime*, had no right to possession though such female heir's right had been extinguished by adverse possession against her ; and that it did not decide the case

* [Art. 141 :—

Description of suit.	Period of limitation	Time when period begins to run.
By a remainder man, a reversioner, other than a landlord or a devisee for possession of immoveable property.	Twelve years ...	When his estate falls into possession.]

of the reversioner suing *after* the female heir's death. The latter case was decided (in the same way as in this case) in (1899) 23 Bom., 725 P.C., by the Privy Council.

The principle applies to all reversioners whether entitled to qualified estates or absolute estates:—11 Cal., 791 (795); and to reversioners coming at the end of *several successive* limited estates:—23 Cal., 460; 13 Mad., 512; 27 All., 494.

Under the Limitation Act of 1877 (the provision is the same in the Limitation Act, 1908, all the Courts have decided as in this case:—

Privy Council:—(1899) 23 Bom., 725.

Calcutta:—(1885) 11 Cal. 791; (1893) 20 Cal. 906; (1883) 12 C. L. R., 548; (1895) 23 Cal., 460; (1898) 26 Cal., 285 (295); (1908) 9 C. L. J., 296.

Allahabad:—(1901) 23 All. 448; (1903) 25 All. 435; (1892) 14 All. 156; (1897) 19 All. 357.

Bombay:—23 Bom. 725; 21 Bom. 646; (1889) 14 Bom. 482; 512; (1893) 18 Bom. 216 (220); (1894) 19 Bom. 809; (1895) 20 Bom. 801; (1899) 2 Bom. L.R. 106.

Madras:—(1890) 13 Mad. 512; (1897) 20 Mad. 493; 26 Mad. 143 (147); 12 M.L.J., 197.

Punjab:—(1903) P.R. 41; (1898) P.R. 79.

C.P.:—(1900) 13 C.P.L.R., 81; (1906) 3 N.L.R., 35.

As regards suits questioning adoption, *see* 29 Mad., 390 F.B.]

[— 8 Ind. Jur. 140]

[939] ORIGINAL CIVIL.

The 14th, 15th, 16th, 21st, 25th, 28th, and 31st May, and 1st, 5th and 11th June, 1883.

PRESENT:

MR. JUSTICE NORRIS AND MR. JUSTICE WILKINSON.

Ralli
versus
Gau Kim Swee

Evidence taken on Commission—Commissioner—Documentary evidence, Objection to admissibility of—Evidence taken by Commissioner beyond jurisdiction

—Notice to produce original document—Refusal to produce—

Evidence Act (1 of 1872), s. 63, sub-section 3, 65, 66.*

If, when evidence is taken before Commissioners, a document is tendered and objected to on any ground, the opposite party is not precluded from objecting to the document at the trial

* [Sec. 65:—Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:—

Cases in which secondary evidence relating to documents may be given.

(a) When the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in section sixty-six, such person does not produce it;

(b) when the existence, condition, or contents, of the original have been proved to be admitted in writing by the person against whom it is proved, or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) when the original is of such a nature as not to be easily moveable;

(e) when the original is a public document within the meaning of section seventy-four;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in British India, to be given in evidence;

(g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection. In cases (a), (c), and (d), any secondary evidence of the contents of the document is admissible. In case (b) the written admission is admissible. In case (e) or (f) a certified copy of the document, but no other kind of secondary evidence, is admissible. In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.]

on any other ground. It is not necessary to state all the objections to the admissibility of a document when it is first tendered, but the party objecting is at liberty to take any fresh objection whenever the party producing the document tenders it in evidence.

Where a commission to take evidence is issued to any place beyond the jurisdiction of the Court issuing the commission, it is not necessary, in order to admit secondary evidence of the contents of a document, that the party tendering it should have given notice to produce the original, nor is it necessary for him to prove a refusal to produce the original.

ON reading the evidence taken under the Commission, it appeared that the Commissioners had received and marked as an exhibit a document which had not been formally proved. An objection had been taken by the defendant's counsel before the Commissioners that the document was "immaterial and irrelevant," but no objection was taken as to want of proof.

Mr. *Evans* for the Plaintiff now tendered the document.

Mr. *Jackson* for the Defendant objected. Until a document is finally admitted in evidence, it is open to every objection that may be taken to the admission of a document. If the objection is that some link is wanting, the Court cannot admit it without consent.

Mr. *Evans*.—The defendants were represented by counsel before the Commissioners, and if their counsel did not choose to object that the document was not formally proved, it is too late to take the objection now. In *Robinson v. Davies* (L. R., 5 Q. B. D., 26), LUSH, J., said: "The only question is whether, no objection having been taken before the Commissioners to the non-production of the original invoices, it is now competent to the defendants to object that copies only [940] were produced. It seems to me clear, that if the defendants had been represented by counsel, and counsel had made no objection, no objection could be made now. If secondary evidence is received at *nisi prius* without objection, it cannot be objected to afterwards. The defendants did not choose to be represented by counsel, but each party was represented by a Commissioner, and it was competent to the defendant's commissioner to have objected. If he had done so, and his objection had been overruled, it would have been a different thing. He made no objection, and I am clearly of opinion that it is too late to make one now."

Mr. *Jackson, contra*.—I don't wish to impugn the proposition laid down in *Robinson v. Davies* (L. R., 5 Q. B. D., 26), that if secondary evidence is allowed to go in without objection, no objection to it can afterwards be entertained. But if the evidence is illegal it may be struck out at the hearing, though no objection has been made before the Commissioner—*Hutchinson v. Bernard* (2 Moo. and Rob., 1);—*Lumley v. Gye* (3 E. and B., 114). The objection is open until the document is properly proved; additional evidence may be adduced hereafter, and the plaintiff may be able to prove the document. But I can object whenever it is tendered if the proof is not sufficient. There is no such thing as a half-admitted document.

Mr. *Hill* on the same side.—With regard to *Robinson v. Davies* (L. R. 5 Q. B. D., 26), the real question decided was, that primary evidence ought to be offered, but that secondary evidence can be given by consent, and the decision comes to this: that if secondary evidence is tendered and the other side are silent, that is evidence of consent and they cannot withdraw it; but if a document is not proved silence does not give proof. Either the document is in or not in. It is not necessary to raise all objections at the same time; an objection may be taken on the ground of insufficiency of stamp. That may be cured, but the person objecting would be entitled to object afterwards on the ground of want of proof of execution.

[NORRIS, J.—We are of opinion that the document ought not to be admitted. When counsel objects to a document being admitted he is not bound to state all his objections. If at a subsequent stage the counsel tendering the document thinks he has got over the first objection, the opposing counsel have the right to make any further objections to the admissibility of the document that they may think proper. It is open to the plaintiff to prove the document hereafter.]

A witness was called before the Commissioners to prove that a certain portion of the catch shipped by the plaintiffs in the ship *Gertrude* had been appropriated to a particular Company in America. The following questions and answers were recorded :—

“*Question.*—Do you know what was done with the shipment per *Gertrude* so far as that appropriation that you speak of is concerned, that is, to whom it was appropriated ?

“*Answer.*—To the Boston Dye Wood and Chemical Company. It was done by letter : the paper I now produce is a copy of the original letter, and I know it to be a copy.”

The defendant's counsel objected on the ground that it was immaterial and irrelevant.

Mr. *Evans* now tendered the copy.

Mr. *Jackson* objected on the ground that the absence of the original document had not been accounted for ; that notice to produce it had not been given ; and that a refusal to produce it had not been proved.

Mr. *Evans.*—Section 65 of the Evidence Act provides that “secondary evidence may be given of the existence, condition or contents of a document

“(a) When the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when after the notice mentioned in s. 66 such person does not produce it.” And s. 66 provides that “secondary evidence of the contents of the documents referred to in s. 65, clause (a) shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his attorney or pleader, such notice to produce it as is prescribed by law, and if no notice is prescribed by law, then such notice as the Court considers reasonable under the [942] circumstances of the case. Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it.” And clause (b) of the section provides that the notice may be dispensed with, “when the person in possession of the document is out of reach of, or not subject to, the process of the Court.”

The reason of the rule is, that it is useless to serve notice on a person beyond the jurisdiction of the Court when there would be no means of enforcing the production of the original.

It is a relaxation of the English rule. We had no power to compel the attendance of witnesses before the Commissioners, and no means of issuing notices to any person to attend through any Court. I have only to show that there was an original written, and that this is a copy of it in order to use it as secondary evidence. I am entitled to do so because the original is in the possession or power of some person beyond the jurisdiction of the Court. No objection was taken before the Commissioners that the document spoken to

by the witness was only a copy. If that objection had been taken we might have been able to produce the original. In any case the Court has the power under the section to dispense with a notice.

Mr. Jackson, contra.—The document was objected to when originally tendered. On the Evidence Act it is clear that this copy is not admissible. Is the Court to assume that it was intended to alter the English law? The Evidence Act merely condenses Taylor on Evidence with some alterations which are manifest. There is no code in England; the law of evidence is Judge-made law and can be modified from time to time.

The first five exceptions in s. 66 * are clearly in accordance with English law. As to the sixth it can be interpreted to be also in accordance with the English law. In England it would be necessary to prove that notice had been given, and that the person to whom it was given refused to comply with it. The reason is that it is necessary to get the best evidence if possible, and to satisfy the Court that an endeavour has been made to get it—Taylor on Evidence, 7th Edition, p. 409. There is no question, but that according to English law, notice and a refusal to comply with it [943] would have to be proved. Clause (b) of s. 66 provides that notice is not required "when the person in possession of the document is out of reach of or not subject to the process of the Court." Section 65 provides for the admission of secondary evidence "when, after the notice mentioned in s. 66, such person does not produce" the original document. That shows that there must be proof of refusal to produce. The mere fact that the document is not produced is not sufficient to allow the admission of secondary evidence. The words must be read, "if such person after such notice does not produce." If that is so the law is in entire accordance with the English law. There must be evidence explaining the non-production of the original, otherwise the original might be in Court and secondary evidence be given of its contents. Upon what principle can it be said that, because a person is out of the jurisdiction, he is not to be asked to produce an original document? In England there are no degrees of secondary evidence; here there are—see s. 63. This copy could only come under clause (3) of s. 63. There is no evidence to show that it was made from or compared with the original. Merely saying that it is a copy is not a sufficient compliance with the Act.

Mr. Phillips on the same side.—Section 63 provides that where the person is out of the jurisdiction, secondary evidence may be given after the notice

* [Sec. 66 :—Secondary evidence of the contents of the documents referred to in section sixty-five, clause (a), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case:

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it :—

- (1) When the document to be proved is itself a notice;
- (2) When from the nature of the case, the adverse party must know that he will be required to produce it;
- (3) When it appears or is proved that the adverse party has obtained possession of the original by fraud or force;
- (4) When the adverse party or his agent has the original in Court;
- (5) When the adverse party or his agent has admitted the loss of the document;
- (6) When the person in possession of the document is out of reach of, or not subject to the process of the Court.]

required by s. 66 has been given. The last paragraph of (a) applies to everything which has gone before. If the Legislature meant to exempt such documents from the rules as to notice it would not have included them in a provision which refers to all. "Such notice" is the notice prescribed by law, and if no notice is proscribed by law, then such notice as the Court considers reasonable. It is not said that no notice need be given. There must be at least such notice as the Court considers reasonable. All notice is not dispensed with. It is not reasonable that no attempt should be made to produce the original.

Norris, J.—We are of opinion that the document is admissible. *Mr. Jackson* says that it is not proved to be a copy within the meaning of s. 63 of the Evidence Act, and that if it is a copy at all it comes under sub-section 3. The witness says: "The copy now produced is a copy of the original, and I know it to be so." [944] *Mr. Jackson* says that that is not sufficient to show that the document is a copy made from or compared with the original. I think the fair interpretation is that the witness knew it to be a copy made from the original from personal knowledge. Then was there an original document? The evidence shows that a letter was sent to the Boston Dye Wood Company, and that certain action was taken upon it.

Then, is this copy admissible in evidence? Section 65 says: "Secondary evidence may be given of the existence, condition or contents of a document in the following cases:—

"(a) When the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when after the notice mentioned in s. 66 such person does not produce it." There is therefore a clear legislative enactment that notice, or a reasonable notice, must be given, but that is qualified by s. 66, clause (b) which dispenses with notice "when the person in possession of the document is out of reach of, or not subject to, the process of the Court."

Mr. Jackson argued that there must be evidence of a refusal to produce the original document. I do not see that that is required by the Act at all, and I do not think that it is requisite.

Mr. Phillips wishes us to read "such notice" as applying to statutory notice first and then to reasonable notice. That I think would be governed by or subject to sub-section 6 of s. 66. The Boston Dye Works are persons out of the jurisdiction of the Court, and we think therefore that notice was not requisite and that the copy is admissible.

Solicitors for the Plaintiffs: Messrs. *Sanderson & Co.*

Solicitors for the Defendants: Messrs. *Watkins & Watkins.*

NOTES.

[SECONDARY EVIDENCE—

As regards admissibility when person in possession cannot be brought before Court, *see* also, 2 Mad., 295; 27 Cal., 639; as regards conditions of admissibility *see* 26 Cal., 53; 16 Cal., 753.]

[—10 I.A. 45 : 13 C.L.R. 330 : 7 Ind. Jur. 443 : 4 Sar. P.C.J. 442—*Rafique and Jackson's P.C. 72*]

[945] PRIVY COUNCIL.

The 16th March, 1883.

PRESENT :

LORD BLACKBURN, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH,
AND SIR A. HOBHOUSE.

Ahmad Hossein Khan.....Defendant

versus

Nihal-ud-din Khan.....Plaintiff.

[On appeal from the Court of the Commissioner of the Faizabad Division of Oudh.]

*Res-judicata—Suit for maintenance—Limitation Act (XV of 1877),
Sch. 2, Art. 132.*

An allowance for the maintenance of a younger member of a family, was charged upon the inheritance to which the eldest male member alone succeeded. In a suit for such an allowance brought by a younger brother against the elder, who had succeeded their deceased father in the possession of the estate, *held* that an order made dismissing a claim for maintenance preferred by such younger brother against their father in his life-time founded on an *ekrarnama*, did not afford a defence under s. 3 of the Code of Civil Procedure.

Held, also that the brothers having made an agreement, fixing the allowance for maintenance at a certain sum, the younger brother agreeing to receive a less sum for a defined period, he could only obtain a decree for the allowance so reduced.

An objection taken on this appeal, that this suit should have been brought on that agreement, *held* taken too late ; the defendant having been made aware of the agreement at the hearing, and not having objected on this ground in the first Appellate Court. A suit for arrears of such maintenance, within twelve years, is within time under Act XV of 1877.

APPEAL from a decree (30th January 1879) of the Commissioner of the Faizabad division, confirming a decree (1st June 1878) of the Deputy Commissioner of the Lucknow district.

The question raised on this appeal related to a charge for maintenance on the village Kalispur in the Lucknow district, and others in Pertabghar in Oudh, which were granted *maafi*, in the time of the Nawabi, to one of the ancestors of the late Mahomed Hossein, the father of the parties to this suit, who were brothers by different mothers.

These *maafi* estates had been charged, at the time of the grant, with the payment of sums for the maintenance of the younger members of the family in the hands of the *maafidar*.

[946] Mahomed Hossein in 1861 received from the British Government a *sanad* confirming the rent-free holdings, as they had existed under the Mahomedans ; and, he being in bad health, his mother Fatima Bibi acted as manager of the estates for him.

On the 10th July 1862, a claim for Rs. 1,128 brought by Nihal-ud-din against his father for a monthly allowance due on an *ekrarnama* purporting to be signed by Fatima Bibi, was dismissed by an Assistant Commissioner in the Lucknow district.

Upon the death of Mahomed Hossein in 1863, Nihal-ud-din disputed his elder brother's right to the inheritance, and in proceedings, taken both before

and after the passing of Act I of 1869, unsuccessfully claimed to exclude his brother.

On the 5th March 1878, he brought this suit for a declaration of his right to maintenance, claiming arrears for eleven years and eight months, at Rs. 140 per mensem. At the hearing in the Court of First Instance an agreement, dated 11th December 1869, was produced, whereby Nihal-ud-din, giving up his claim to the estates, accepted an allowance of Rs. 75 per mensem for one year, with Rs. 100 per mensem for the next six years, and after that Rs. 140 per mensem.

The Court held that neither with reference to the Assistant Commissioner's order of 1862, nor on the ground of limitation, was the suit barred; and that there was no doubt that the Government grant contemplated the maintenance of this rent-free holding, as it had existed under the Nawabi, subject to the charge for the benefit of the younger members of the family. The suit was decreed in favour of the plaintiff, and an appeal was dismissed by the Commissioner, who, as the Court exercising the final appellate jurisdiction, gave to the defendant, on his application, a certificate for appeal to Her Majesty in Council under Chapter XLV of the Code of Civil Procedure, Act X of 1877.

On this appeal,—

Mr. *J. H. W. Arathoon* appeared for the Appellant.

Mr. *C. W. Arathoon* for the Respondent.

For the appellant it was argued that this claim, regarded as [947] of doubtful validity in regard to the altered circumstances of the maafi estate after 1858, and again after 1869, had been concluded by the proceedings in 1862. Again, the production of the agreement of 1869 showed that the alleged charge on the maafi estates was not the ground on which the respondent relied. If maintainable at all, this claim could only be based on that agreement.

For the respondent it was argued that the judgments of the lower Courts were correct. Any objection to the suit not having been framed upon the agreement of 1869 should have been taken in the lower Court. But it was not a tenable objection; the undertaking to pay the allowance confirming the right of the plaintiff rested on the original charge on the estate.

Their Lordships' **Judgment** was delivered by

Sir R. Couch.—This is a suit between two brothers, the sons of Mahomed Hossein Khan, who died in November 1863. The plaintiff in the suit, the respondent before their Lordships, was the second son of Mahomed Hossein Khan, and the defendant, the appellant, was the elder son. It appears that upon the death of their father there was considerable litigation between the brothers with regard to the right to the estate of the father. That litigation began in 1863, and the result of it was that the defendant, the appellant, was declared to be entitled to the estate. After that the respondent brought a suit against his brother in which he claimed to recover Rs. 19,600 for arrears of maintenance for 11 years, and 8 months, *viz.*, from the 1st July 1866 to the end of February 1878, at Rs. 140 a month, and a declaration of his right to maintenance in perpetuity, and to have it judicially declared that the maintenance was a debt due from the estate of Khalispur, situated in the Lucknow district, as also from Mamni and Motka, being the estates which the defendant had recovered by means of the litigation. He appears to have fixed the 1st July 1866 for the beginning of this claim for maintenance, and claimed arrears from that date, as being the day on which he was himself dispossessed of the estate and the defendant got possession of it. His case was that he was legally

entitled to maintenance at the rate of Rs. 140 a month from the estate of his deceased father; and in his plaint he founded his claim [948] upon an order of the Deputy Commissioner of Lucknow in a suit between the father and Mussamut Bibi Fatima his grandmother and the present defendant, who was the plaintiff in that suit. He also said that he was dispossessed of the property under an order dated 29th June 1865, which was upheld by Her Majesty in Council. The defendant, by his written statement, set up various answers to the claim. The material defences were that the plaintiff was not entitled to any maintenance as the son of Mahomed Hossein; that the claim was barred by limitation, as the plaintiff himself said that he had not received maintenance since September 1863; and that the defendant was not bound by the document which was filed by Bibi Fatima, being a document alluded to in the plaint, nor by any document filed by Mahomed Hossein; and, lastly, in the 11th paragraph of his written statement, he alleged that the claim was barred by the fact of its being *res judicata*. Issues were settled which raised what are the substantial questions between the parties, and they were: (1) is the suit barred by *res judicata*; (2) is the suit barred by limitation; and, (3) and (4) which may be taken together, was the plaintiff entitled to the maintenance, and if so at what rate, and from whom? Both the lower Courts have made decrees in favour of the plaintiff, and the defendant has appealed to Her Majesty in Council from the decree of the Commissioner which affirmed the decree of the first Court.

With regard to the first question, whether the suit was barred by *res judicata*, the document which is relied upon by the defendant appears to be an order made in a suit brought by the plaintiff against Mahomed Hossein the father, in which he claimed to be entitled to a monthly allowance for maintenance founded on some ekrarnama, which would appear to have been executed by the grandmother, who had the management of the property in consequence of Mahomed Hossein being incapable of taking care of his affairs. That is clearly not an order which would be *res judicata* in the present suit. It was not an adjudication between these parties but between the plaintiff and his father, and it was altogether upon a different sort of claim. There is no ground for saying that the lower Courts were wrong in deciding against the defendant upon that issue.

[949] Another question was raised which perhaps it may be well for their Lordships to notice. It was said that, there being an agreement, which will be presently mentioned, and which was put in as evidence on behalf of the plaintiff, a suit should have been brought upon that and not in the present form. If there had been ground for this objection, it might and should have been taken when the defendant appealed to the Commissioner. It was said that he could not know of the objection when the written statement was filed, because the agreement was produced for the first time at the hearing of the cause when evidence was given, and it had not been filed; but after the hearing, and after the production of the agreement, the defendant knew perfectly well that it was being used against him, and when he made his appeal to the Commissioner he could have taken this objection. If there is any ground for the objection it cannot be taken in the present stage of the proceedings.

The next question, in the order in which the issues were framed, is the law of limitation; but perhaps it will be better first to consider the other, which is the main question in the case, and which arises upon the third and fourth issues, namely, whether the plaintiff is entitled to receive the maintenance.

The lower Courts have come to this conclusion upon that question. As to his being entitled to receive the maintenance, the Officiating Deputy Commissioner says: "Moreover it appears to me that the defendant, as *maafidar*

merely takes that estate in trust, subject to the rent-charges, and that he is bound to pay the stipends with which the estate is charged. Sanad or act of Government does not absolve him from this charge. As regards plaintiff's right to the allowance claimed, there is, in my opinion, no doubt; the documentary evidence referred to and filed fully establishes this fact, that the cadets of the family were assigned certain specified allowances payable to them from the estate by the eldest male member managing the estate." The Commissioner says, "Regarding the payment of the allowance, I consider the evidence on the file of the lower Court amply sufficient. It clearly establishes that the cadets of the family were assigned certain allowances payable to them from the estate by the eldest uncle in possession." There is this finding of both the [950] Courts to the effect that the allowance for maintenance was charged upon the estate; and there is evidence in the case upon which they might well come to that conclusion.

It appears that in December 1869 the parties came to an agreement. The defendant's part of agreement states "that Mahomed Nihal-ud-din Khan"—that is the plaintiff—"has waived his claim to succession of the estate, and, having filed a registered deed of compromise (razinama) in Court, has caused the suit to be withdrawn. That for his personal expenses I have fixed an allowance of Rs. 75 per mensem for a term of one year, and then for the next six years Rs. 100 a month; and as at present I am very much in debt, owing to the law expenses incurred, so much so that many of my maafi (revenue-free) villages are mortgaged and hypothecated and the estate yields very little profits; I cannot afford at present to pay the old allowance of Rs. 140 per mensem to Mahomed Nihal-ud-din Khan. But after the expiration of the aforesaid term of seven years I shall continue to disburse the old pay of Rs. 140 a month in perpetuity. If at any time I may offer any objection or hesitate in paying up each of the three descriptions of monthly allowances, Mahomed Nihal-ud-din Khan will be at liberty to realise the same by a suit in Court. If for my own necessity I may mortgage or hypothecate the maafi villages, so that the property left may be insufficient to meet the monthly allowance fixed, I will in that case pay the said allowance out of the estate Khalispur Amoliha." And there is a corresponding agreement, of the same date, by the plaintiff, which recognises this agreement. This document was put in by the plaintiff, and formed a very important part of the evidence in support of his case. Besides that, there was evidence of some previous proceedings with reference to this estate and the allowances for maintenance, in which there was a report of the extra Assistant Commissioner of Lucknow made under the order of the Deputy Commissioner, stating that, in the opinion of the Extra Assistant Commissioner, it was proved that the parties mentioned received the allowances shown opposite to their names. There is mentioned the name of "Nihal-ud-din Khan, Rs. 140," which would seem to be the allowance that was at one time paid. Their Lordships think that the lower Courts, [951] with this evidence before them, were quite justified in finding that the plaintiff was entitled to an allowance for his maintenance as a charge upon the property which had come from the father, Mahomed Hossein Khan. If that is the case, the plea of the law of limitation is answered, because it is shown that the maintenance was a charge upon the property, and 12 years is the term which is applicable to the suit. The plaintiff only seeks to recover arrears from the 1st of July 1866, which is within the 12 years. Therefore, the issue raised as to the law of limitation was properly found against the defendant.

But there remains this question: Although it would appear that at one time Rs. 140 had been paid monthly for the maintenance, when the parties came to the agreement which has been read in consequence apparently of the

state of the property, the plaintiff was willing to receive less than the Rs. 140 for a part of the time. It was then arranged that Rs. 75 should be paid from the date of that agreement for the year 1870; that Rs. 100 should be paid up to the 14th December 1876, and after that time that the Rs. 140 should be paid. Now the plaintiff's case was mainly supported by this agreement, Exhibit A: it was put forward at the outset of the case as his evidence by the pleader who appeared for him; and it does seem right that he ought not to be allowed to recover more than he agreed by that document to receive. If he had had to sue upon the agreement he could only have recovered that. He has sued in a different way; but their Lordships are of opinion that this is all that he ought to recover in the present suit.

The consequence will be that their Lordships will humbly advise Her Majesty that the decree which has been made in the plaintiff's favour by the lower Courts should be altered by giving to the plaintiff the arrears, calculated in the manner provided for in the agreement, with interest upon those arrears from the date of the decree at the same rate as has been given by the lower Courts upon the sum which they awarded. The decrees of the lower Courts as to the costs will stand, and with regard to the costs of this appeal, the respondent has really substantially succeeded in it. The objections of law which were taken by the appellant, [952] and without which he would have had no right of appeal, have entirely failed, and their Lordships therefore think that the appellant ought to pay the costs of the appeal.

Decree modified.

Solicitor for the Appellant: Mr. T. L. Wilson.

Solicitor for the Respondent: Mr. Horace Earle.

NOTES.

[Sec (1905), 32 Cal., 527=1 C. L. J., 167; (1884) 8 Bom. 426 (432).]

[9 Cal. 952--10 I.A. 51- 13 C.L.R. 62- 7 Ind. Jur. 321--4 Sar. P.C.J. 439]

PRIVY COUNCIL.

The 29th February, and 2nd March, 1883.

PRESENT:

LORD BLACKBURN, SIR B. PEACOCK, SIR R. P. COLLIER,
AND SIR A. HOBHOUSE.

Tarokessur Roy.....Plaintiff
versus

Soshi Shikhuressur Roy.....Defendant.

Soshi Shikhuressur Roy.....Defendant
versus

Tarokessur Roy.....Plaintiff.

[On appeal from the High Court at Fort William in Bengal.]

Hindu Law--Will, Construction of--Gift ineffectual so far as it departs from the law of inheritance--Gift over of accrued share.

A gift by will, attempting to exclude the legal course of inheritance, is only effectual, in favour of such person as can take, to the extent to which the will is consistent with the Hindu law. And it is a distinct departure from that law to restrict the order of succession to males excluding females.

A testator gave by his will to three sons of his brother certain estates "for payment of the expenses of their pious acts." He also directed as follows :—"The said three nephews shall hold possession of the above in equal shares, and shall pay the Government revenue of the same into the Collectorate. They shall have no right to alienate the same by gift or sale, but they, their sons, grandsons, and their descendants in the male line shall enjoy the same, and shall perform acts of piety as they respectively shall think fit for the spiritual welfare of our ancestors. If any die without leaving a male child, which God forbid, then his share shall devolve on the surviving nephews, and their male descendants, and not on their other heirs."

In a suit between the survivor of the three nephews and the testator's heir, held, that the attempt to alter the legal course of inheritance failed, and that the estate taken under the above clause was only for life.

The gift over of a life estate was competent; it being to persons alive, and capable of taking on the death of the testator, and to take effect on the death of a person or persons then alive.

On the death of one brother his share went to the two other brothers, and on the death of one of the latter his augmented share, made up of his original and accrued share, went to the survivor.

[933] APPEAL and cross appeal from a decree of the High Court (9th September 1880) (see *Shoshi Shikhuressur Roy v. Tarokessur Roy*, I. L. R., 6 Cal., 421), modifying a decree of the first Subordinate Judge of the Rajshahye district (2nd May 1878).

Chandra Shikhuressur Roy and Moheswar Roy were brothers, of whom the former dying in 1865 left a son Kumar Shikhuressur Roy, the respondent and cross appellant. He had made a will containing a bequest in favour of Moheswar's three sons, of whom the survivor, Tarokessur Roy, was the appellant and cross respondent.

The material clause of the will, and the facts relevant to this report, appear on their Lordship's judgment.

In the Original and Appellate Courts it was found that the will was genuine, and the only question now raised was as to its legal effect. The Subordinate Judge of the Rajshahye district held that the appellant, Tarokessur Roy, was entitled to an absolute interest in the estates given by the will; but the High Court (GARTH, C.J., and MITTER, J.), held that the gift, in so far as it restricted the inheritance to male descendants, was inoperative; that on the authority of the *Tagore* case (*Jotendromohun Tagore v. Ganendromohun Tagore*, 4 B. L. R., O. C., 103; 9 B. L. R., 377; S. C. L. R., Sup. Vol. 47), the three brothers were entitled to the estate in equal shares for their respective lives; and that the particular estate of inheritance which the testator had attempted to create was void. But that the gift over to the surviving brothers was valid according to the Hindu law, as declared in the above cited case, and also in *Soorjeemoney Dossee v. Denobundhoo Mullick* (9 Moore's I. A., 123). On the remaining question, whether the share of the brother who died first went over, with the share of him who died next, to the surviving brother, they held that it was the intention of the testator that the whole share, original and accrued, should pass. The judgment is reported in I. L. R., 6 Cal., 424.

Against this decision Tarokessur appealed on the ground that he was entitled to the absolute interest. The respondent, Shikhuressur Roy, contesting his right to more than a life estate, filed a cross appeal to the effect that the will, properly construed, [934] gave no more than a life estate on the one-third share as it originally stood, without the accrued shares.

Mr. R. V. Doyne and Mr. C. W. Arathoon appeared for Tarokessur Roy.

Mr. J. D. Mayne and Mr. J. T. Woodroffe for Soshi Shikhuressur Roy.

For the appellant it was argued that the clause in the will now in question gave, when only due effect was given to the ineffectual attempt to restrict the right to inherit to males, an absolute interest, as well in the survivor's one-third part as in the accrued shares to which he had succeeded, under the gift over, on the deaths of his brothers, respectively.

The testator having attempted to effect what was contrary to the Hindu law, his will was to that extent inoperative. But it did not follow that he was intestate as to the estate of inheritance, of which he had attempted the disposal. For the latter proposition the *Tugore* case (9 B. L. R., 377), in which, in the most express terms, the estate given to the first taker was a life estate only, was hardly to be considered an authority.

That case did not precisely apply to what had arisen here, the testator in this instance having attempted to create an estate of inheritance in the first taker. The conditions which he had attempted to impose could not indeed be held valid; but the intention of the testator, to the extent to which it was consistent with the Hindu law, should receive effect. This it would hardly receive if the absolute interest were cut down to a life estate. It would be sufficient to strike out the words of the will attempting to control the course of descent; and the gift of the absolute interest could be maintained on the principles indicated in *Soorjeemoney Dossee v. Denobundhoo Mullick* (9 Moore's I. A., 123). In connection with this argument reference was made to *Bhoobun Mohini Debia v. Hurrish Chunder Chowdhry* (L. R., 5 I. A., 138: s.c., I. L. R., 4 Cal., 23); *Ranlal Mookerjee v. The Secretary of State for India* (I. L. R., 7 Cal., 304); *Soudamoney Dossee v. Jogesh Chunder Dutt* (I. L. R., 2 Cal., 262); [955] *Srimati Bramamayi Dossee v. Jageschandra Dutt* (8 B. L. R., 400); *Kherodemoney Dossee v. Doorgamoney Dossee* (I. L. R., 4 Cal., 455); the Hindu Wills' Act (XXI of 1870); and the Indian Succession Act, 1865.

For the respondent and cross appellant, it was submitted that the surviving nephew was entitled only to a life estate, and that he took his one-third without the addition of the shares of his deceased brothers. The will was valid only to the extent of giving a life estate to the three nephews—a proposition clearly resting on the principle of the *Tugore* case, which was applicable here. The testator had attempted to make the property descend in three lines, restricted in a manner not permitted by Hindu law. That being the state of things, to give an absolute estate to the first taker, striking out the restriction as to the mode of descent, and to let the gift operate as a gift of the inheritance, would be to make another, and a distinct line, which (however well it might accord with law), would not accord with the testator's intention. The creation of a life estate in such a case as the present agrees with what the testator certainly, at least, intended; but the creation of an unrestricted estate of inheritance would not. Again, as a gift of the inheritance, the disposition would form a gift to a class some of whom were not in existence at the death of the testator; and it was, as regards the inheritance, affected by the invalid restriction. That the gift over was valid would appear doubtful if the case were put (which might have arisen) of two of the nephews surviving the third, and then one of the survivors dying, leaving sons who would stand in his place. Forming a class, and entitled to take as a class if at all, they could not all take, so much of the gift as related to the sons being invalid; and it being the rule that, in gifts to a class, there could not be a choice between two objects thereof, so as to give effect to one part, and not to another—*Leake v. Robinson* (2 Mer., 363); *Pearks v. Moseley* (L. R., 5 App. Cas., 714). This doctrine has been recognized in India—see *Callynauth Naugh Chowdhry v. Chundernath*

Naugh Chowdhry (I. L. R., 8 Cal., 378); and *Soudaminy Dossee v. Jogesh Chunder Dutt* (I. L. R., 2 Cal., 262). [956] Reference was also made to the *Tagore* case (4 B. L. R., 103, at p. 179), and *Kherodemoney Dossee v. Doorgamoney Dossee* (I. L. R., 4 Cal., 455). Tried by this test the gift over was of questionable validity.

Mr. *Doyne* replied.

On a subsequent day (March 17th) their Lordships' **Judgment** was delivered by

Sir R. P. Collier.—The question in these appeals arises upon the construction of a clause in a Hindu will, which is in these terms :—

"My brother's sons, Kumar Jogodesur Roy, Kumar Tarokessur Roy, and Kumar Sibesur Roy, shall receive, for defrayment of the expenses of their pious acts, the following out of the properties left by me, to wit, my one-half share in pergunnahs Chowgaon and Khord Chowgaon, recorded as No. 278 in the Collectorate of Zillah Rajshahye, in Dehi Dalil, and others, appertaining to tuppa Byas, and recorded as No. 456, and in mouzah Dehi Gobindpore, in pergunnah Santosh, recorded as No. 96 in the touzi or rent-roll of the Collectorate of Zillah Dinajpore. The said three nephews shall hold possession of the same in equal shares, and shall pay the Government revenue of the same into the Collectorate. They shall have no right to alienate the same by gift or sale; but they, their sons, grandsons, and other descendants in the male line, shall enjoy the same, and shall perform acts of piety as they respectively shall see fit for the spiritual welfare of our ancestors. If any of them die without leaving a male child (which God forbid), then his share shall devolve on the surviving nephews and their male descendants, and not on their other heirs."

The facts necessary to be stated are, that the three nephews of the testator were living at his death, that two of them died before the institution of the present suit, one unmarried, the other leaving a widow but no issue; that the suit was instituted by Kumar Tarokessur Roy, the survivor, against the infant son of the testator, represented by Hurgobind Bose, appointed manager of the estate by the Court of Wards, to obtain a declaration of title to and possession of half of pergunnahs Chowgaon and Khord Chowgaon. No question rises as to Gobindpore in this suit.

[937] The plaintiff based his claim on the clause of the will above set out, contending that by its terms an absolute estate was given in undivided shares to the three nephews; that upon the death of his brothers their shares devolved on him, and he was thus entitled to the whole.

The defendant denied the execution and validity of the will, both of which issues have been disposed of by concurrent Judgments of the Courts against him. He further contended that upon the true construction of the will, which is narrowed to that of the clause in question the plaintiff was entitled only to a life estate in one-third of the property devised.

The Court of First Instance gave the plaintiff a decree for his whole claim.

This decree was altered by the High Court which gave him a life interest only in the whole of the property.

From the Judgment of the High Court there are cross appeals. The first by the plaintiff, on the ground that he was entitled to an absolute estate in the whole. The second by the defendant, on the ground that the plaintiff was entitled to a life estate in one-third only. It will be convenient to deal firstly with the first appeal.

The grounds of the judgment of the High Court that the plaintiff was entitled to a life estate only may be thus shortly stated.

They held, on the authority of *Jottendromohun Tagore v. Ganendromohan Tagore* (L. R. Sup. Vol. Ap., 47), commonly called "the *Tagore case*," that the testator, having attempted to create an estate of inheritance unknown to and opposed to Hindu law, that estate of inheritance was void, and that the will operated only to confer on the plaintiff an estate for life.

The *Tagore case* is so well known, and has been so often referred to by this Board, that it is unnecessary to cite it at length, and it is enough for the present purpose to refer to the following passage:—

"If the gift were to a man and his heirs to be selected from a line other than that specified by law, expressly excluding the legal [938] course of inheritance, as, for instance, if an estate were granted to a man and his eldest nephew and the eldest nephew of such eldest nephew, and so forth forever, to take as his heirs, to the exclusion of all other heirs and without any of the persons so taking having the power to dispose of the estate during his lifetime, here, inasmuch as an inheritance so described is not legal, such a gift cannot take effect, except in favour of such persons as could take under a gift to the extent to which the gift is consistent with the law. The first taker would, in this case, take for his lifetime, because the giver had at least that intention. He could not take more, because the language is inconsistent with his having any different inheritance from that which the gift attempts to confer, and that estate of inheritance which it confers is void."

It is true that the departure from Hindu law in the present case is not as great as in the case supposed in this passage, or as in the *Tagore case*, where the attempt was to establish what would be called an estate in tail-male according to English law. But the attempt to confine the succession to males, to the entire exclusion of females, is, though not so great, yet a distinct departure from Hindu law, "excluding," in the terms of the judgment quoted, "the legal course of inheritance."

It has been contended on the part of the appellant, that the present case is distinguishable from the *Tagore case*, on the ground that, in that case, the first estate given was in terms an estate for life; that in the present case, if the words relating to succession, *viz.*, "that their sons, grandsons and other descendants in the male line shall enjoy the same, and shall perform acts of piety as they respectively shall think fit, for the spiritual welfare of our ancestors," were struck out, the gift would be of an estate of inheritance; and that the intention of the testator to confer an estate of inheritance may be effectuated by striking out so much of the clause above quoted as excludes females from the succession.

Their Lordships are unable to accede to this view.

Considering that the gift to the nephews is expressed as to be received for the defrayment of their pious acts, and that alienation is forbidden, they do not construe the gift, independently of the words prescribing the course of succession, as conferring an absolute estate. They are further of opinion that to alter the [959] words prescribing the course of succession, so as to admit females, would be in effect to make a new will for the testator, and one which, so far from carrying his intentions into effect, would be in direct opposition to his intention, and indeed to his main object expressed in other parts of his will, as well as in this clause, *viz.*, to exclude females.

The case of *Bhoobun Mohini Debia v. Hurrish Chunder Chowdhry* (L. R., 5 A., 138; I. L. R., 4 Cal., 23) has been cited on behalf of the appellant, in

which the following words of a grant,—“ You are my sister ; I accordingly grant you a taluk for your support, . . . being in possession of the lands, and paying rent, &c., to the tahut jamma, do you and the generations born of your womb successively (Santan sreni krame) enjoy the same, no other heir of yours shall have right or interest,”—were construed as conferring an absolute estate, defeasible on the failure of issue living at the death of the donee. In that case the words of gift (of which the original in the native language are given) were held to have no technical meaning, signifying much the same as “ children and grandchildren,” and indicating an estate of inheritance, while the only words which created a difficulty, “ no other heir of yours shall have right or interest ” were held to be satisfied, by giving them the effect of making the absolute estate defeasible in the event of the failure of issue living at the time of the death of the donee, in which event the estate was to revert to the donor and his heirs. This case has no bearing on the present.

For these reasons they are of opinion that the first appeal should be dismissed.

The second appeal arises on the construction of the concluding paragraph of the clause :—

“ If any of them die without leaving a male child (which God forbid), then his share shall devolve on the surviving nephews and their male descendants, and not on their other heirs.”

Their Lordships construe this clause thus, in accordance with the construction put upon it by both the Indian Courts : “ Any of them ” means any of the three nephews, not any of their descendants ; on the death of any of three nephews his share shall [960] go to the surviving nephews or nephew, not to the descendants of a dead nephew ; but on the estate getting into the hands of the surviving nephew or nephews, it is to descend, as had been before provided, to males only. This construction disposes of an ingenious argument of Mr. Mayne—based on the hypothesis that upon the death of the second nephew his share would go to his surviving brother, and to the “ male descendants ” of his dead brother—that this would be a gift to a class, some of whom, *i.e.*, the male descendants, could not take, and would therefore, by a well-known rule of law, be altogether invalid.

According to the construction which their Lordships adopt, the gift over was to persons alive and capable of taking on the death of the testator, to take effect on the death of a person or persons also then alive, and was competent, according to the authority of *Sreenuttu Soorjammonee Dossee v. Denobundhoo Mullick* (9 Moore's I. A., 135), as explained in the *Tagore* case. For the reasons above given it could only confer an estate for life.

One point only remains to be considered, which was indeed not argued before their Lordships, but is suggested in the judgment of the High Court, *viz.*, whether upon the death of the brother dying secondly, his original share only, or the share also of his deceased brother which had accrued to him, went over to the surviving brother. It is undoubtedly a rule of English law that, when a fund is given to a class of persons with a direction that, on the death of any them, their shares are to go over, the original shares only and not the accruing shares, will go over. This rule was stated by Lord Hardwick in *Pain v. Benson* (3 Atk., 80), and has been followed, not always without expressions of reluctance, by a long series of decisions.

But an intention that the accruing shall go over with the original shares has been inferred where there is what has been called “ an aggregate fund ” which the testator desires to keep unsevered (when the gift has been to several with benefit

of survivorship), (*Worldidge v. Churchill*, 3 *Brown's Ch. Rep.*, 465. *In re Crawhall's Trust*, 8 De G., M. & G., 480), when, in addition to the word "share," the word "interest" [961] is used (*Douglas v. Andrews*, 14 Beavan, 347), or where the words are his "or her share or shares" (*Wilmot v. Flewitt*, 11 Jur., N. S., 820), so that the application of the doctrine to English wills has sometimes given rise to questions of some nicety. What might have been the effect of the words in question had they been found in an English will, their Lordships think it unnecessary to decide, as they are of opinion that the rule, founded in a great measure on our peculiar doctrine, that the heir-at-law is not to be disinherited, but by express words or necessary implication, has no application to the wills of Hindus. It may be observed that such a course of devolution is the ordinary course for Hindu property as between brothers inheriting from brothers, and would present itself most readily to the mind of a Hindu testator; so that, even if the English rule should be applied anywhere beyond the domain of English law, it could hardly be applied to Hindu wills without defeating the intention. Their Lordships feel constrained by no rule of law to read the words in any other than their natural sense, viz., that, on the death of the first brother, his share goes to his two brothers, and that, on the death of one of these, the share which he had at his death, made up of his original and his accrued share, goes to the surviving brother.

For these reasons their Lordships will humbly advise Her Majesty that the judgment appealed against be affirmed, and that both appeals be dismissed.

Appeals dismissed.

Solicitor for the Appellant in the appeal and respondent in the cross-appeal: Mr. T. L. Wilson.

Solicitor for the Respondent in the appeal and appellant in the cross-appeal: Mr. H. Treasure.

NOTES.

[HINDU WILLS—

(1) *Bequests imposing a new line of succession are void:—*

9 Cal., 952, 6 All. 560; 11 Cal., 692; 16 Cal., 383; 20 Cal., 906; 9 Bom. 198; 14 Bom., 360; 24 Cal., 839; 38 Cal., 603; 32 Mad., 315; 4 Bom. L. R. 509, which were cases of exclusion of certain classes of heirs.

(2) *Primary and secondary intentions:—*

Where the estate of inheritance fails, the first taker has been given an estate of inheritance:—The *Tagore* case, 9 B. L. R. 377; 16 Cal., 383, unless an absolute gift is intended (1882), 8 Cal., 376.

(3) *Estate for life:—*

An estate for life can be created by a Hindu will:—9 B. L. R., 377; 9 Cal. 952; 19 Cal., 383; 19 Bom., 401.

(4) *Limited estate:—*

Prohibition against alienation may indicate a limited gift:—21 Mad., 425; 9 Cal., 952.

(5) *Disinheriting:—*

There must be an actual gift away, otherwise it will not have effect:—*Tagore* case, 9 B. L. R., 377; 36 Cal., 75; 21 Bom., 646; 17 Bom., 351; 16 Bom., 492; 15 Bom., 326.]

PRIVY COUNCIL.

The 15th, 16th and 17th February, and the 15th March, 1883.

PRESENT :

LORD BLACKBURN, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH,
AND SIR A. HOBHOUSE.

Mohesh Lal.....Plaintiff

and

Mohant Bawan Das.....Defendant.

[On appeal from the High Court at Fort William in Bengal.]

Mortgage, Payment of—Extinction of charge—Intention of parties—Presumption.

Whether a mortgage, paid off, has been kept alive or extinguished depends upon the intention of the parties ; the mere fact that it has been paid off [962] not deciding the question whether or not it has been extinguished. Express declaration of intention will cause either the one result or the other, and in the absence of such expression, the intention may be inferred, either one way or the other.

A lender of money upon a mortgage, which, however, having been made by a person not having authority to charge the greater part of the property included in it, was to that extent invalid, relied upon a charge effected in a prior paid-off mortgage to another mortgagee of the same property. The balance due for the prior mortgage-debt had been paid out of the money advanced on the later, and the prior instrument had come into the possession of the present mortgagee.

Held, that it must be presumed, in the absence of any expression of intention to the contrary, that the borrower, who claimed to be the owner of the property which he attempted to charge, intended that the money should be applied in paying off and extinguishing the prior mortgage, there being no intermediate incumbrance. It being, also, presumable that the lender lent the money upon the security of the later mortgage, he did not become entitled to an additional security, merely, because that which he had taken had thus proved invalid in part. *Held*, therefore, that the prior mortgage had been extinguished.

APPEAL from a decree of a Divisional Bench of the High Court (22nd August 1879), reversing a decree of the Subordinate Judge of Bhagalpore (30th June 1877).

The appellant, a mahajan trading by his *gomashtas* at Bhagalpore, brought the suit, out of which this appeal arose, against two defendants ; one being the respondent Bawan Das, mohant of the *asthal*, or religious institution of Jankinagar, endowed with lands in *zillah Purneah* ; the other being one Mangal Das, who had acted for some years as *am mukhtar*, or general agent, of former mohants of Jankinagar.

The principal questions now raised were : *First*, whether or not a valid mortgage had been made to the appellant of three villages in *Purneah*, *viz.*, Kankerghat, Bishenpur Kantahi, and Ganeshiampur Patharghat, belonging either to the institution Jankinagar, or to Bawan Das, as the mohant thereof. *Secondly*, whether a prior undisputed mortgage of the same property to another person on which the balance due had been paid off out of the money advanced by the appellant, and which was in the possession of the latter, could be held available to charge the property in his favour for so much of the money as had been thus appropriated.

[963] The suit was brought in 1876 to recover from Bawan Das and Mangal Das Rs. 33,989-12-6, made up of Rs. 18,421-7-6, due on a mortgage bond executed by Mangal Das on the 12th May 1872, and of Rs. 15,568-5 due on an account stated in 1873 between the plaintiff's firm and Mangal Das, together with interest on those amounts; also to obtain an order for the sale of the above-mentioned villages, together with one-third of another named Puraini Kalan, as having been mortgaged by the instrument of the above date.

The plaintiff obtained a decree in his favour in the Court of First Instance. As Mangal Das did not appeal against that decree, it remained in force against him personally, and bound that part of the property which consisted of the third part of Puraini Kalan; that alone, it being in fact the property of Mangal Das himself, being held (on the appeal of Bawan Das) to be subject to the mortgage of 1872. The three other villages above named were held by the High Court (MITTER and TOTENHAM, JJ.) not to have been mortgaged by Mangal Das, with due authority; and the Court also held that Bawan Das had not been rendered liable as principal.

The following summary of the facts was given in the judgment of the High Court:—

"In the year 1815, the then mohant, Girdhari Das, first opened an account with the plaintiff's *kothi*. The mohant used to remit money to the plaintiff's bank from time to time; the plaintiff, on the other hand, used to pay the Government revenue of estates standing in the mohant's name in the Collector's rent-roll. Girdhari was succeeded by the mohant Jairam Das, who died in 1858. Before his death, Jairam Das appointed Mangal Das, the defendant, as his *am mukhtar* and appointed Balgobind as his own successor, associating Mangal Das with him as *karpurdaz*, with authority over all affairs and law suits, both of *sudder* and *mofussil*.

"After Balgobind became mohant, the affairs of the *asthal* being embarrassed, and a decree having been made against him, a deed of sale, or *kobala* dated 15th August 1860, purporting to have been executed by him, was registered." This purported to grant the three above-named villages to Mangal Das, in whose name an entry of them was made in the Collector's register in place of that [964] of the mohant of Jankinagar. In the plaintiff's *kothi* the account, which had been up to that time carried on with Balgobind, were thenceforth, *i.e.*, from September 1861, entered in the books in the name of Mangal Das, who in 1864 purchased Puraini Kalan out of money advanced by the plaintiff, Mangal Das being debited with it by the *kothi*.

"In the execution of the decree against Balgobind certain villages were sold which Mangal Das purchased for Rs. 5,849. In order to raise this amount Mangal Das, on the 2nd July 1869, executed a bond for Rs. 9,000 in favour of one Lachminarain, mortgaging the three villages transferred by the *kobala* of 15th August 1860, and also Puraini Kalan.

"Balgobind died in October 1869. Immediately after his death, a dispute arose between Mangal Das and one Gorib Das, as to the succession in the mohant's *gaddi* of the *asthal* of Jankinagar. As usual, the contest opened with petitions and counter-petitions for certificates under Act XXVII of 1860; Gorib's application being dated the 1st of April 1870, and that of Mangal Das the 21st April 1870. On the 30th November 1870, the certificate case was decided by a Division Bench of the High Court in favour of Gorib Das.

"About this time Mangal Das removed from the *asthal* of Jankinagar, and set up a new *asthal* at a place called Alinuggur. In the plaintiff's account-books up to this time, the place of residence of Mangal Das was described to

be Jankinagar. But the accounts of the year 1279 (September 1871), describe him to be of Alinuggur, which is retained in the accounts of all the subsequent years.

"On the 19th Bysack 1279, corresponding with the 12th May 1872, there was an adjustment of accounts between Mangal Das and the plaintiff's *kothi*, and the result was, that Rs. 9,358-2-9 were found due to the latter. On the same date, Mangal Das took from the plaintiff's *kothi* Rs. 10,641-13-3 in cash, and for the aggregate amount of Rs. 20,000 executed a bond in favour of the plaintiff. Out of Rs. 10,641-13-3 taken in cash, Lachminarain's bond-debt, which had then amounted to Rs. 8,266-8, was paid off. The cancelled bond was made over to the plaintiff, and has been produced by him in the record of this case. The [963] same four parcels of property, which had been hypothecated in Lachminarain's bond, were again hypothecated in this bond.

"On the 9th of August 1872, Gorib Das having been successful in his contest as to the succession in the gaddi of the mohants of Jankinagar, commenced a suit against Mangal Das for the recovery of possession of the four parcels of property hypothecated in Lachminarain's, as well as in the plaintiff's bond, described in the schedule of the plaint in that suit, as items 1, 2, 3, and 4, and also for seven other parcels, of which the four parcels purchased by Mangal Das in June 1869, mentioned above, formed items of claim Nos. 8, 9, 10, and 11. The Subordinate Judge of Bhagalpore, in whose Court this suit was brought on the 21st of May 1873, dismissed it so far as the aforesaid eight parcels were concerned. Gorib Das died while this suit was pending in the original Court, and the present defendant No. 1, Bawan Das, who succeeded him in the gaddi of the asthal of Jankinagar, was substituted in his place. Against the decree of the Subordinate Judge Bawan Das appealed.

"While this appeal was pending, the accounts between the plaintiff's *kothi* and Mangal Das were again adjusted, and Rs. 8,893, besides the bond-debt, were found due from the latter on the 30th September 1873, corresponding with the 24th Assin 1281. It appears that, in the meantime, in the month of July 1872, Rs. 9,000 had been paid by Mangal Das, between whom and the plaintiff's *kothi* the dealings under *bahi khata* continued down to the 13th August 1875. And the result of the appeal was that, on the 5th September 1874, the High Court reversed the judgment dismissing the suit, and decreed possession of three of the four parcels, *viz.*, the three villages above named to the mohant of Jankinagar. On an appeal to Her Majesty in Council, this was confirmed, Puraini Kalan being found to have been purchased by Mangal Das with money which he had borrowed from the banking firm on his own security, was not taken from him.

"Meantime the present suit had been brought in 1876."

That part of the judgment of the High Court which related to the absence of authority in Mangal Das to bind the lands of the asthal, by the mortgage of 12th May 1872, was as follows:—

"It has been contended before us, that the finding of the lower [966] Court that the property in dispute is not trust property, is against the weight of evidence. In the view which we take of this case, it is unnecessary to pass any opinion upon this contention. Because, in our opinion, the disputed three parcels of property should not be made liable, whether they constitute trust property or not.

"We shall consider the correctness of the decree, assuming first that the disputed three parcels are not trust property.

"It seems to us that the mortgage lien, which the bond of the 12th May 1872 purports to create, can be enforced only upon either of these grounds,

viz., (1) that Mangal Das had at that time full power, as agent of the mohant of Jankinagar, to execute the bond in question; or (2) that the mohants of Jankinagar having, by their conduct, led the plaintiff to believe that Mangal Das was the owner of the hypothecated property, are estopped from repudiating the transaction as not binding upon them.

"Now, as to the first of these grounds. It is not disputed that Mangal Das was appointed *karpurdaz* and *mukhtar* by the mohant Jairam Das. Nor can it be questioned, upon the evidence, that he was retained in that office by Jairam's successor, Balgobind. But after Balgobind's death in October 1869, it is alleged by the appellant that he was dismissed from that office. That an agent's power generally terminates upon the death of the principal is a proposition which requires no authority to establish. There is nothing on the record which goes to show that the successor of Balgobind re-appointed Mangal Das as his agent. On the other hand, on the death of Balgobind, a contest arose between Gorib Das and Mangal as to the right of succession to the gaddi.

"The Subordinate Judge is of opinion that Gorib Das was bound to inform the plaintiff that Mangal's power had ceased. We do not think that he was under any such obligation. The fact that, in the plaintiff's accounts, since the month of September 1871, Alinugger, instead of Jankinagar, was described to be the place of residence of Mangal, leads to the inference that the existence of an open rupture between him and the mohant of Jankinagar was known to the plaintiff. Then having regard to the fact deposed to by the plaintiff's principal witness, Baijnath Sahai, [967] that the *kothi* dealt with Mangal Das, not as an agent for any person but as the principal, and also to the fact that the parcels of property in dispute were in possession of Mangal Das, who claimed them as his own, we do not agree with the Subordinate Judge that the circumstance of the Government revenue being paid through the plaintiff's *kothi* and the omission on the part of the mohants of Jankinagar to pay the same, affords any valid ground for concluding that Mangal's agency continued even after the death of Balgobind.

"We are of opinion, therefore, that the plaintiff has failed to establish that, on the 12th May 1872, Mangal Das had any authority to execute the bond of that date so as to bind the mohant of Jankinagar."

The other ground for enforcing the mortgage of 12th May 1872 against the villages, *viz.*, that the plaintiff had been led to believe that they were the property of Mangal Das, was held untenable, because the real nature of the transaction between Mangal Das and the *asthal* had been fully disclosed to the banking firm. This is set forth in the extract from the judgment of the High Court given by their Lordships.

After finding that Lachminarain's mortgage-bond of 2nd July 1869 had been paid off, and that the claim in respect of the balance due on the account down to October 1869 (when Balgobind died) was barred by limitation, the High Court concluded thus:—

"As to the other portion of the claim decreed against the appellant, it seems to us that the reasons upon which the decree of the Subordinate Judge proceeds are not tenable. The amounts in question were not paid by the plaintiff with the object of saving the estates from being sold, nor had he any interest in so saving them. The payments were made as mere advances to Mangal Das, in whose possession these estates were at that time, and who had then set up an independent title in respect of them. One or two instalments have been paid by the plaintiff even after the appellant had recovered

possession of the mortgaged property. But when these payments were made, Mangal Das's appeal before the Judicial Committee was pending, and it is evident that they were made on account of Mangal Das."

[968] "Therefore, as regards the parcels of the mortgaged property, except Puraini Kalan, the plaintiff's suit cannot be sustained against the appellant, even if they are not trust-property. If they are trust-property, there cannot be any doubt that the plaintiff is not entitled to enforce the lien created by the bond of the 12th May 1872, or recover other advances made by him, because he made no enquiries as to the necessity for the loans."

On this appeal,—

Mr. J. T. Woodroffe appeared for the Appellant.

Mr. R. V. Doyle for the Respondent.

The argument for the appellant was that the mortgage-bond of the 12th May 1872 should have been held to be binding on the respondent, and also to have created a charge on all the villages comprised in it, on the ground that Mangal Das, when he executed it, had implied authority as agent. The appellant's banking firm had reason to regard him as the manager empowered to deal with the property of the *asthal*; and the respondent's position, he having been successor, as *chela* of Gorib Das, of the former mohant Balgobind Das, precluded him from disputing his liability as principal in respect of the acts done by the agent, Mangal Das, under an authority given by him, the respondent's, predecessors. The mohants who had followed Balgobind Das in the succession had stood by, with knowledge that advances were made by the banking firm for payment of the revenue upon the villages and similar charges, and Bawan Das could not be allowed, in the admitted absence of express notice of termination of the agency, to allege that the agent's authority had ceased at the date of the mortgage. The evidence had failed to fix the period when this authority had come to an end, and debits to the account of Mangal Das had continued in the books of the firm in respect of payments of which the *asthal* had obtained the benefit. Reference was made to Act I of 1872, (the Indian Evidence Act), s. 115.

It was further contended that, even if the three villages were not affected by the mortgage executed in 1872, the appellant was entitled to maintain a charge upon them in respect of his connection with the payment of the balance of the mortgage-debt due under the instrument of the 2nd July 1809. This prior [969] mortgage had been paid off out of the advance made by him in 1872, and having come into his possession thereupon, remained available as a security to him in equity for so much of the money raised in 1872 as had been thus appropriated for the payment of the prior charge upon the villages.

Reference was made to *Hooper v. Keay* (L. R., 1 Q. B. D., 178); *Thompson v. Hudson* (L. R., 6 Ch. Ap., 320); *Moran v. Mittu Bibee* (I. L. R., 2 Cal., 58).

For the respondent it was argued, as to the first of the above contentions, that the appellant could not be held to have been misled as to the real position of Mangal Das, in regard to the *asthal* and its property, at the time of the execution of the mortgage of 1872. The whole of the circumstances attending the substitution of the name of Mangal Das in the books of the firm, and in the Collectorate register, were known to the appellant, who, therefore, could not contend that the respondent was precluded from insisting on the actual state of things. The whole of this argument, however, was disposed of when the fact was regarded that the appellant had not accepted the mortgage of 1872 in reliance upon the agency of Mangal Das. On the contrary, he had

chosen to deal with the latter as if he had been owner of the villages, though he had complete knowledge of the facts, and was aware that the three villages in question belonged to the asthal.

In answer to the argument that the mortgage of 2nd July 1869 should be held to constitute a charge for the benefit of the appellant to the amount advanced by him for the payment of it off (but advanced upon another and different security, on different terms), it was insisted that this prior mortgage had been extinguished. The intention of the parties to it had evidently been to extinguish it, for Mangal Das could have had no other object in paying it off.

Mr. J. T. Woodroffe replied.

He cited *Brojosoondery Debia v. Ramee Luchmee Koonwaree* (15 B. L. R., 176 note; s.c., 20 W. R., 95); *In re Hallett's Estate* (L. R., 13 Ch. D., 696); *Madhub Anund Moitra v. Gunesh* [970] *Persad* (1 W. R., 91); *Kishen Chunder Ghose v. Babu Nund Kishor Singh* (Marsh., 651).

Their Lordships' **Judgment** was delivered on a subsequent day (March 15th) by

Sir B. Peacock.—This is an appeal from a judgment and decree of the High Court of Judicature at Fort William in Bengal, upon appeal in suit brought by the appellant against the respondent and Mangal Das, in the Court of the Subordinate Judge of Bhagalpore.

In that suit the appellant sought to recover with interest the sum of Rs. 33,989-12-6, of which Rs. 18,421-7-6 were alleged to be due upon a mortgage-bond, dated the 12th of May 1872, and the balance upon a running account from that date to the 13th of August 1875.

The plaintiff, appellant, is a banker, who for many years carried on business at Bhagalpore, not personally, but by means of gomashtras. The respondent, Bawan Das, the defendant No. 1, was the mohant of the asthal, at Jankinagar, in zillah Purneah. He is described in the plaint as *chela*, or disciple of mohant Gorib Das, deceased, and heir of mohant Balgobind Das, deceased.

The plaintiff claimed to recover the whole amount from the two defendants, and an order for auction sale of the property mortgaged and hypothecated under the bond for the satisfaction of the bond money. The property hypothecated by the bond consisted of one-third of mouzah Puraini Kalan, the whole of mouzah Kankerghat, the whole of mouzah Bishenpur Kantahi, and the whole of mouzah Ghuneshyampur Pathurghat, of which the last three mouzahs at the date of the bond were the property of the asthal of Jankinagar, or of the respondent, the mohant thereof.

The case was tried in the first instance by the Subordinate Judge of Bhagalpore, who decreed, amongst other things, in favour of the plaintiff for the amount sued for, with costs and interest at the rate of 6 per cent. per annum, and further ordered that the amount covered by the bond, as well as that portion of the money included in the running account, amounting to Rs. 3,166-11-6, [971] expended in payment of the Government revenue, dak contribution, and road cess be realized from the mortgaged property, and the remaining amount recovered from Mangal Das, the defendant No. 2 alone, who was also declared to be bound to pay the entire amount of the decree.

Mangal Das did not appeal from the decree of the Subordinate Judge, but the respondent mohant Bawan Das appealed to the High Court, who reversed the decree, so far as it affected him, and ordered, amongst other things, that the

plaintiff's suit against him be dismissed ; and, further, that the three mouzahs, Kankerghat, Bishenpur Kantahi, and Ghuneshyampur Pathurghat were not liable for any portion of the plaintiff's claim.

It having been decided by the High Court, and by Her Majesty in Council, in a suit brought by the present respondent against Mangal Das, that mouzah Puraini Kalan was not the property of the appellant, or of the aethal of Jankinagar, the decree of the High Court was silent as to that mouzah.

The first question in this appeal is, whether the High Court was right in holding, contrary to the opinion of the Subordinate Judge, that the other three mouzahs, in respect of which the decree of the Subordinate Judge was reversed, were not liable to be sold under the mortgage bond of the 12th of May 1872.

A question was raised before their Lordships whether the property of the aethal was inalienable, except for the benefit of the aethal in cases of necessity; but in the view which their Lordships take of the case, it is unnecessary to determine that question. They will, therefore, do as the High Court did consider the question, assuming, without deciding, that the three mouzahs were not inalienable. In that view of the case the mortgage bond of the 12th of May 1872, which was executed by Mangal Das, and not by the respondent, did not bind the property, unless Mangal Das had authority, as agent of the respondent, or of the aethal, to execute the bond, or the plaintiff was induced by some act or neglect of the respondent, or of the aethal to believe that Mangal had such authority, or that he was the actual owner of the property, and, acting under the belief so caused, dealt with Mangal as such agent or owner.

As regards the agency, it seems clear from the evidence, and [972] from the findings of both the lower Courts, that Mangal Das acted as, and was the duly authorized agent of the aethal, and of the mohants thereof, and had the management and control of their property from the time of Jairam up to the time of Mohant Balgobind's death, in or about the months of October or November 1869.

It was stated correctly by the High Court that an agent's power generally terminates upon the death of his principal, and their Lordships are of opinion that there is nothing to show that Gorib Das, who succeeded Balgobind, or the respondent who succeeded Gorib, ever re-appointed Mangal Das as agent, or led the defendant to believe that Mangal's agency continued.

The Subordinate Judge says : " It appears that, after the death of Balgobind, a dispute arose as to who was to be his successor. Both Mangal Das and Gorib Das were claimants to the succession, but Mangal failed to establish his claim, and Gorib Das obtained certificate of heirship of Balgobind. Mangal then declared himself to be absolute owner of the properties."

The finding of the High Court is to the same effect. They say that Balgobind died in October 1869, and that the certificate case was decided in favour of Gorib Das, on the 26th of November 1870.

The Subordinate Judge considered that Gorib Das was bound to give notice to the plaintiff that Mangal's authority as agent had ceased, but the circumstances are such as to render it incredible that the bank was not fully aware of Balgobind's death, and of the termination of Mangal's authority. But whether the plaintiff had or had not notice that the agency had ceased, it is clear that he cannot rely upon such want of notice unless he was thereby induced to deal with Mangal as agent. This the plaintiff did not do, for throughout, after the death of Balgobind, he dealt with Mangal as the proprietor of the estates and as a principal, and not as an agent.

It was held by the Subordinate Judge, and contended at the Bar, that the defendant was estopped from showing that the property mortgaged to the plaintiff in 1872 was not then the property of Mangal.

[973] It appears that after Balgobind became mohant, a decree for a large amount was passed against him, and there is on the record a registered deed of sale, dated the 15th August 1860, purporting to have been executed by Balgobind, in favour of Mangal Das, of the three mouzahs which were included in the mortgage bond of 1872, and are the subject of this appeal. As regards two of the mouzahs which were revenue-paying estates, the third Pathurghat Ghuneshyampur, being lakheraj, there was contemporaneously with the deed of sale, a mutation of names, and the name of Mangal Das was substituted in the Collector's register for that of the mohant of Jankinagar. In the plaintiff's *kothi* also the accounts, which had been previously kept in the name of Balgobind, were, in September 1861, opened, and from that time kept in the name of Mangal Das.

The following extract from the judgment of the Subordinate Judge explains the grounds of his decision on this part of the case. He says:—

"It is most true, as alleged by the defendant, that Mangal Das was believed by the plaintiff and his agents to be the absolute owner of the whole properties which belonged to the asthal. But how were they led to believe so, and who made them to believe the same? It was the defendant's ancestor, Balgobind Das, who put Mangal Das into the position of being the true owner of the asthal properties, and allowed him to deal with the plaintiff's firm as such owner. All the properties belonging to the asthal were in his name; he had absolute control over them, and no sort of objection was raised by any member of the asthal to his power; how, then, could an outsider believe him to be otherwise than a true owner of the asthal properties? Under such state of things, I cannot think the defendant can take any advantage of such belief of the plaintiff to deprive him of the money lent to Mangal Das on security of the asthal properties."

That argument of the Subordinate Judge is, in their Lordships' opinion, completely answered by the High Court. They say:—

"Although there is no evidence to show that the bill of sale of the 15th August 1860 was really executed by Balgobind, [974] yet from the fact that, shortly after that date, the name of Balgobind was removed from the Collector's register, and that of Mangal Das placed in its stead, and that the accounts in the plaintiff's *kothi* were transferred from one name to the other, it may be reasonably deduced that Balgobind was fully cognizant of the contrivance of putting the mortgaged property in the benami of Mangal Das, to protect it against the claims of a certain decree-holder against himself. But the plaintiff was not misled by this fraudulent device. The witness, Mohan Misser, who was the managing gomashtha of the plaintiff's *kothi* at that time, distinctly admits that the real nature of the transaction was fully disclosed to him by Balgobind, when the transfer of names in the accounts was effected at the instance of the latter.

"We are, therefore, of opinion that, so far as the claim relating to the bond is concerned, the grounds upon which the Subordinate Judge thinks that the parcels of mortgaged property in possession of the appellant are liable, are not tenable."

Nor can it be disputed with success, in the face of the evidence of Baijnath Sahai and of Mohan Misser, both gomashthas of the plaintiff, that, although the dealings in the time of Balgobind were with Mangal Das as principal and not

as agent, they were merely nominally so, and that the credit was in reality given to the asthal in the name of Mangal Das as trustee and *farzi* for the purpose of concealing the names of the real parties to the transaction.

Mangal was not the real proprietor, and he was not the agent of the defendant No. 1. These facts must have been known, to the plaintiff or to his agents after the certificate case when Mangal repudiated the agency, claimed to be the absolute proprietor, and dealt with the property on his own account.

For the above reasons their Lordships are of opinion that the High Court was right in holding that the bond of the 12th May 1872 was not binding upon the asthal or upon the defendant.

It was further contended on the part of the plaintiff that, even if the bond of the 12th May 1872 was not binding upon the defendant No. 1, the plaintiff was entitled to fall back upon the mortgage bond of the 2nd July 1869 in favour of Lachmi-[975]narain, which was binding upon the asthal and the mohants thereof, inasmuch as it was executed at the time when Mangal was merely the apparent owner for the protection of Balgobind from his creditors, and whilst the relationship of principal and agent existed.

This raises the question whether that mortgage was extinguished when Lachminarain was paid, or was intended to be kept alive for the benefit of the plaintiff. Their Lordships are of opinion that it was extinguished.

It has already been shown that, at the time of the execution of the mortgage of the 12th of May 1872, the relationship of principal and agent which had existed between Mangal and the asthal in Balgobind's time had terminated, and that after Balgobind's death Mangal Das claimed to be the mohant of the asthal in his own right, and the proprietor of the estates. In that mortgage he is described as the proprietor of mouzah Puraini, etc., and after a recital, amongst other things, that he has taken a loan from Mohesh Lal of Rs. 20,000 on interest at 1 per cent. per month, of which the sum of Rs. 8,266-8 was for the payment of the balance of the debt due on Lachminarain's mortgage of 1869, he declares that he will pay in cash in one lump, the principal with the interest in the month of Jeyt 1280 Fasli, etc., and further, that until the payment of that money he has mortgaged the estates to Mohesh Lal, etc.

There is nothing in the bond, or in the evidence, or even in the surrounding circumstances, to show that Mangal intended to keep Lachminarain's mortgage alive, or that he or the plaintiff intended that the latter should hold that mortgage as an additional security for the loan.

On the 15th of May 1872 the sum of Rs. 8,382, the balance due to the estate of Lachminarain on his mortgage, was paid *through* the plaintiff, and on the deed a receipt for that amount was endorsed in the following words: "Received in full Rs. 8,382, up to the 15th May 1872, through Mohan Misser, gomashtha of Babu Mohesh Lal, Mahajun, and returned the bond." The bond was then delivered to the gomashtha, and was retained by the plaintiff.

It should be remarked that the mortgage to Lachminarain [976] carried interest at the rate of Re. 1-8 per month, whereas the mortgage to the plaintiff was at the rate of Re. 1 per month. It therefore seems to have been the intention of Mangal to borrow money at 1 per cent per month, partly to pay off and extinguish the mortgage debt at Re. 1-8 percent. per month, which was a charge upon the estate which he claimed in his own right. There was no intermediate mortgage between Lachminarain's mortgage and the mortgage to the plaintiff of 1872. Mangal, if the proprietor of the estate, as he then claimed and was stated in the recitals to be, had no interest in keeping alive Lachminarain's mortgage; on the contrary, it was his interest, and he must

therefore, in the absence of any evidence to the contrary, be presumed to have intended, that the mortgage bearing interest at Re. 1-8 a month should be paid off and extinguished. Nor upon the hypothesis that Mangal was himself the proprietor of the estates had the plaintiff any interest in keeping Lachminarain's mortgage alive, inasmuch as under the mortgage of 1872 he had the security of all the estates included in Lachminarain's mortgage, and it is clear that, even if he had taken an assignment of it, he could not have held it as a security for a higher rate of interest on the new loan than 1 per cent. a month. The only benefit that the plaintiff could have derived from taking an assignment of Lachminarain's mortgage of 1869 was that he might have the benefit of that security if it should turn out that Mangal was not the proprietor of the estates, as he represented himself to be, and, therefore, could not legally charge them. But such an event could not have been contemplated by the plaintiff. It is not probable that Mangal, would have admitted his inability to bind the property by the deed of 1872 or would have consented to do anything which could raise a doubt as to his power to bind the property as a security for so much of the Rs. 20,000 as was in excess of the amount secured by Lachminarain's mortgage. Even if he would have consented, it is not probable that the plaintiff would have advanced the full amount of Rs. 20,000 upon the security of the estates if he had had any doubt as to Mangal's title or right to charge them.

In *Adams v. Angell* (L. R. 5 Ch. D., 634) it was held that the question [977] whether a mortgage paid off was kept alive or extinguished depended upon the intention of the parties. The Master of the Rolls, in delivering his judgment, stated that, "in a Court of Equity it has always been held that the mere fact of a charge having been paid off does not decide the question whether it is extinguished. If it is paid off by a tenant for life without any expression of his intention, it is well established that he retains the benefit of it against the inheritance; for, although he has not declared his intention of keeping it alive, it is presumed that his intention was to do so, because it is manifestly for his benefit. On the other hand, when the owner of an estate, in fee, or in tail, pays off a charge, the presumption is the other way, but in either case the person paying off the charge can, by expressly declaring his intention, either keep it alive or destroy it. If there is no reason for keeping it alive, then, especially in the case of an owner in fee, equity will, in the absence of any declaration of intention, destroy it; but if there be any reason for keeping it alive, such as the existence of another incumbrance, equity will not destroy it." Applying that rule to the present case, it must be presumed, in the absence of any expression of intention to the contrary, that Mangal, who, when he borrowed the money to pay off Lachminarain's mortgage, claimed to be the owner of the estate, and was stated on the face of the bond to be so, intended that the money should be applied in paying off that mortgage, and in extinguishing the charge, there being no intermediate incumbrance. Although the money was paid by the plaintiff's gomastha to Lachminarain's estate, it was paid with money borrowed from the plaintiff by Mangal, and for which Mangal was liable to him. The mortgage was therefore paid off by Mangal, and not by the plaintiff.

It must be presumed that, when the plaintiff lent the money to Mangal to pay off the mortgage, he lent it upon the security expressed in the bond, and for which he stipulated. Equity cannot give him an additional security because the security relied upon turns out to be bad, as regards a portion of the lands included in it. If an equitable transfer of Lachminarain's mortgage is held to have been included in the mortgage of 1872, it must be as a security for the whole Rs. 20,000, and thus the [978] mortgage at Re. 1-8

per mensem interest, though intended to be paid off, would be a security for Rs. 20,000 at one per cent. a month, contrary to the expressed intention of Mangal to pay it off.

It was contended on the part of the plaintiff that it must have been intended to keep alive Lachminarain's mortgage for the benefit of the plaintiff, because, when he paid the money to Lachminarain's representative, he took possession of and subsequently kept that mortgage deed. Lachminarain's representative was paid by the plaintiff as the banker of Mangal. It was paid, not by the plaintiff as the payer, but through him as the agent of Mangal the payer, and with money lent to Mangal upon the mortgage of 1872. The receipt was written on the mortgage bond in accordance with the terms of the bond, by which it was stipulated that the mortgagor should cause all payments which should be made within or after the stipulated time to be endorsed on the bond, and that besides the payments so endorsed the mortgagor should not claim the benefit of payments made in any other way. It would not have been in the course of business for the plaintiff as Mangal's banker to pay off the mortgage without taking a receipt for the money, or to take a receipt otherwise than by an endorsement on the bond. Having taken that receipt, it was the ordinary course of business for the plaintiff to retain it as a voucher for the payment made by him on behalf of his customer. He could not take, or keep the receipt without taking and keeping the bond on which it was endorsed, and it was therefore necessary for him to take and keep the bond, independently of the course of business, by which an agent paying off a mortgage on behalf of his principal takes back the mortgage on his behalf, instead of leaving it outstanding in the hands of the mortgagee.

Mr. *Woodroffe*, after the close of his argument, referred to several cases, but none of them show that a mortgage when paid off and intended by the parties to be extinguished is presumed to have been intended to be kept alive.

Another question is whether the plaintiff is entitled to recover the Rs. 5,849 applied out of the moneys raised by Lachminarain's mortgage in purchasing four small properties, which [979] may be called 8, 9, 10, and 11, and which, by the High Court and by Her Majesty in Council, in a suit brought by the present defendant against Mangal Das, were held to be the property of the *asthal*, because they were purchased with money raised by the mortgage to Lachminarain. Those four properties were not included in the mortgage of 1872, nor are they included in the suit now under appeal. It is difficult to conceive how, if Lachminarain's mortgage was not kept alive and transferred to the plaintiff as a security for his loan of 1872, the right of Mangal, if he had any, against the *asthal* in consequence of the application of Rs. 5,849 raised by that mortgage in the purchase of property now held to be that of the *asthal*, can, in the absence of an express intention to that effect, be presumed to have been included in the mortgage of 1872 as an additional security for the loan of that date. The *asthal* may be liable to Mangal, but that must depend upon the state of accounts between them, as stated by the Judicial Committee, on the 27th June 1877, in their reasons for the advice given to Her Majesty in Council in the appeal of Mangal Das and the present respondent. Mangal Das claiming to be the proprietor of the estates included in the mortgage of 1872 retained possession and received the profits of those estates, as well as of the four small properties purchased with the Rs. 5,849. Mangal must render his accounts before he can be held to be entitled to any portion of the Rs. 5,849. Unless Mangal's claim against the *asthal* was included in the mortgage of 1872, and can be held to have been assigned to the plaintiff as a security for the loan, there is no privity between the plaintiff and the defendant No. 1 in respect of the Rs. 5,849.

At all events, the plaintiff cannot be entitled to any greater or other rights than those of Mangal in respect of the Rs. 5,849.

It is scarcely necessary to refer to the fact that the plaint does not contain a claim on the part of the plaintiff to recover on Lachminarain's mortgage, or to recover the Rs. 5,849 expended by Mangal in the purchase of the lots above referred to as 8, 9, 10, and 11. This is not a mere technical objection, for, if the claim had been made, or an issue raised relating to it, the defendant No. 1, respondent, might have called witnesses to prove that there was no intention to keep alive Lachminarain's mort-[980]gage, or to include it or Mangal's right to the Rs. 5,849, claimed on account of the purchase of lots 8, 9, 10, and 11, in the security to the plaintiff for the loan of Rs. 20,000.

As to the sum of Rs. 3,166-11-6 awarded by the first Court to be realized from the mortgaged estates on account of money expended on account of the payment of revenue, road cesses, etc., on account of the estates, the credit was given to Mangal and not to the plaintiff, and there is no privity between the plaintiff and defendant No. 1 in respect of it. Mangal may possibly be entitled to it, but that must depend upon the state of accounts between him and the aethal, which cannot be taken in the suit now under appeal.

Their Lordships will humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal. The appellants must pay the costs of this appeal.

Appeal dismissed.

Solicitors for the Appellant : Messrs. *Borrow and Rogers*.

Solicitor for the Respondent : Mr. *T. L. Wilson*.

NOTES.

[SUBROGATION—INTENTION—

Intention has been held to be the decisive test :—(1902) 29 Cal., 154=6 C.W.N., 209. *See also* (1904) 8 C.W.N., 690 ; (1905) 1 C.L.J., 531 ; (1905) 2 C.L.J., 202 ; 288 ; 574 ; (1905) 29 Mad., 37 ; (1906) 28 All., 778 ; (1895) 19 Mad., 105 ; (1911) 14 C.L.J., 500 ; (1910) 9 I. C., 138=21 M.L.J., 180.

In the following cases the mere fact of payment has been held to be evidence of the intention :—(1897) 20 Mad., 486 ; (1891) 13 All., 432 ; 521, but this view is opposed to this case ; *see also* (1906) 33 Cal., 1133=10 C. W. N., 1010=4 C.L.J., 121. *See also* (1894) P.R., 38 ; (1903) P.L.R., 54.

The principle of subrogation has in *Gokal Das v. Puranmal* 10 Cal., 1035 P. C. been held applicable to Indian transactions.

This subject is dealt with *in extenso* in the Notes to that case in the Law Reports Reprints.]

[9 Cal. 980—13 C. L. R. 182=8 Ind. Jur. 143]

APPELLATE CIVIL.

The 23rd July, 1883.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE AND
MR. JUSTICE MACPHERSON.

Khatija Bibi.....Plaintiff

versus

Taruk Chunder Dutt.....Defendant.*

*Transfer of case—Civil Procedure Code (Act XIV of 1882),
section 23—Practice—Ground for transfer.*

Section 23 of Act XIV of 1882 is only intended to provide for those cases where, on the ground of expense or convenience, or some other good reason, the Court thinks that the place of trial ought to be changed.

Parties desirous of obtaining the transfer of a case from one forum to another ought clearly to explain to the Court by petition and affidavit what is the nature of the claim and defence ; they should further state what are the issues and the evidence required, and then satisfy the Court [981] that, either on the ground of expense or convenience, or otherwise the place of trial ought to be changed. *

THIS was a reference under the provisions of s. 23 of Act XIV of 1882.

The defendant in the suit asked that the case might be transferred from the file of the Second Judge of Dacca to that of the Sub-Judge of Furrirdpore, on the ground that the bulk of the property in suit was situate in Furrirdpore, and that some of his co-sharers in the ijara were residents of Furrirdpore, and that it would be inconvenient to take his witnesses to Dacca. The plaintiff among his objections stated that, though the bulk of the property was situate in Furrirdpore, a portion of it was in Dacca ; that the defendant resided at Dacca ; and that the witnesses likely to be summoned also resided at Dacca.

Baboo Akhil Chunder Sen for the Plaintiff.

No one appeared for the Defendant.

The **Order** of the High Court (GARTH, C.J., and MACPHERSON, J.) was as follows :—

Garth, C.J.—We see no sufficient ground for transferring this suit from the Dacca Court to that of Furrirdpore.

Prima facie, the plaintiff as the *arbiter litis* has a right to bring his suit in any Court which the law allows ; and s. 23 is only intended, as we consider to provide for those cases, where, on the ground of expense or convenience, or some other good reason, the Court thinks that the place of trial ought to be changed.

If for instance, in this case, the defendant could have shown us that great expense could have been saved, or that the balance of convenience was strongly in favour of the case being tried at Furrirdpore, we might have thought it right to grant his application. But looking at the allegations on both sides, we think it very difficult to say where the balance of convenience lies.

* Civil Reference No. 7 of 1883 made by J. Pratt, Esq., Officiating District Judge of Dacca, under s. 23, Civil Procedure Code, for transfer of a case from one Court to another, dated the 18th June 1883.

The plaintiff, on the one hand, says that, though a great part of the property in suit is in Furridpore, some of it is in Dacca; that the defendant himself lives at Dacca, and carries on business there; and that all the witnesses who are likely to be summoned in the cause reside at Dacca.

The defendant, on the other hand, says that the bulk of the property in suit is situated in Furridpore; that some of the persons who are co-sharers with him in the ijara, and who ought, [982] therefore, to have been made parties to the suit, reside at Furridpore; and that it would be very inconvenient to bring the necessary evidence relating to the estate to Dacca.

It would seem from those counter allegations that, notwithstanding all the defendant says, the balance of convenience may be in favour of the case being tried at Dacca. It certainly does not follow that, because the bulk of the land in suit may be at Furridpore, and that some of the co-sharers may live there, the balance, either of convenience or of expense, is in favour of trying the case there.

Parties who desire to have a case transferred from one forum to another ought clearly to explain to the Court by petition and affidavit what is the nature of the claim and defence, and what the issues are; they should state what evidence will be required, and then satisfy the Court that, either on the ground of expense or convenience or otherwise, the place of trial ought to be changed.

Application dismissed.

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Abscinding of Accused—

Attachment by Magistrate—Sale in execution of decree—Sale by Magistrate—Code of Criminal Procedure, (Act X of 1872), ss. 172, 173. A, having been accused of an offence under the Indian Penal Code absconded, and his property was, on the 7th of August 1878, attached by the Magistrate, under s. 172 of the Code of Criminal Procedure, Act X of 1872. While the property was so under attachment, it was attached by B in execution of a money-decree against A, and sold on the 15th of January 1879, B being the purchaser. On the 21st of April 1880, the Magistrate sold the property to C. It did not appear whether the time fixed by the Magistrate's proclamation for A's appearance had expired at the date of the sale to B. Held, in a suit for possession by B against C, that the title obtained by C under the Magistrate's sale was superior to the title (if any) obtained by B at the sale in execution of the money decree. *Scilicet*, that after the date of the attachment by the Magistrate under s. 172 of the Code of Criminal Procedure and during its continuance, no title could be conferred by an attachment and sale subsequently made in execution of a money-decree.

GOLAM ABED v. TOOLSEERAM BERA ... IX 861

Acceptor—

See PRINCIPAL AND AGENT.

Account—

Suit for, Against executor. See LIS PENDENS.
Stated. See KISTIBANDI.

Accretion—

See ENHANCEMENT OF RENT.

Accused—

Examination of. See CONFESSION.
Presence of. See EVIDENCE.

Acknowledgment—

See PROMISSORY NOTE: STAMP ACT, 1879, SCHED. I, CL. 1.
In writing. See LIMITATION ACT, 1877, s. 19; ART. 179.
Of debt. See STAMP ACT, 1879.
Of title of mortgagor. See LIMITATION ACT, 1871, ART. 148.
Of sons. See MAHOMEDAN LAW, ACKNOWLEDGMENT.

Acquiescence—

See CO-SHARER.
In Alienation. See LIMITATION ACT, 1877, SCHED. II, ART. 127.

Acquittal—

Order of. See REVISION.
Of prisoner. See CRIMINAL PROCEDURE CODE, 1872, s. 349.

Act—

IX of 1850, s. 53. See SMALL CAUSE COURT, PRESIDENCY TOWNS.
 XVIII of 1850. See LIABILITY OF PUBLIC SERVANT.
 XXVIII of 1855, s. 2. See HINDU LAW, CONTRACT.
 XXXV of 1858. See LUNATIC.
 XXXVI of 1858, s. 4. See LIABILITY OF PUBLIC SERVANT.
 XI, of 1858—s. 3. See GUARDIAN.

s. 3—*Minor—Certificate of administration—Majority—Majority Act (IX of 1875), s. 3.*
 A certificate of guardianship under Act XI, of 1858 takes effect, not from the date when it is applied for, nor when an order granting it is passed, but from the date when it is actually issued. Therefore, where an application for a certificate was made in 1877, and an order granting it was passed in December 1879, but the certificate was not issued until December 1881, *held*, that the minor, in respect of whose property the certificate was applied for, who had between the date of the application and the issue of the certificate attained the age of 18 years, and signed a promissory note, was not entitled to take advantage of s. 3 of the Majority Act, 1875, and set up the plea of minority as a defence to a suit on the note.

STEPHEN v. STEPHEN ... IX 901

Minor—Certificate of administration—Majority Act (IX of 1875), s. 3. In the interval between an application for a certificate of administration to the property of a minor under s. 3 of Act XL of 1858 and the issue of the certificate, the minor attained the age of 18 years and signed a promissory note.

Held that the certificate afforded no defence to a suit on the note.

STEPHEN v. STEPHEN ... VIII 714

VIII of 1859. See CIVIL PROCEDURE CODE, 1859.

X of 1859—

See RIGHT OF OCCUPANCY.

Suits under. See BENGAL ACT VIII OF 1869, s. 27.

s. 23. See JURISDICTION OF REVENUE COURT.

ss. 23 ; 77 ; 160. See SUPERINTENDENCE OF HIGH COURT.

XI of 1859 —

ss. 6 ; 20 ; 37. See SALE FOR ARREARS OF REVENUE.

s. 10. See CO-SHARERS.

s. 39. See EVIDENCE.

XIV of 1859. See LIMITATION ACT, 1859.

XXVII of 1860. See CERTIFICATE OF ADMINISTRATION : PRESIDENCY BANKS ACT, 1876, s. 4.

XLV of 1860. See PENAL CODE.

IX of 1861. See MINOR.

XX of 1863. See RELIGIOUS ENDOWMENT.

s. 14—*Jurisdiction—Leave to sue—Right to suit.* A Committee appointed under Act XX of 1863 may, without leave of the Court previously obtained, sue their manager, or superintendent, for damages for misappropriation, and for an injunction. The provisions of Act XX of 1863, s. 14, do not apply to such suits by the Committee themselves.

PUDDOLABH ROY v. RAM GOPAL CHATTERJEE ... IX 139

XVI of 1864. See REGISTRATION ACT, 1877.

XXII of 1864, s. 11. See LIABILITY OF PUBLIC SERVANT.

X of 1865. See SUCCESSION ACT.

XI of 1865, s. 21. See SMALL CAUSE COURT, MOFUSSIL.

I of 1868. See GENERAL CLAUSES CONSOLIDATION ACT.

s. 6. See LIMITATION ACT, 1871, ART. 167.

X of 1870. See LAND ACQUISITION ACT, 1870.

VIII of 1871. See REGISTRATION ACT, 1871.

IX of 1871. See LIMITATION ACT, 1871.

I of 1872. See EVIDENCE ACT.

IX of 1872. See CONTRACT ACT.

X of 1872. See CRIMINAL PROCEDURE CODE 1872.

XVII of 1873. See NAWAB NAZIM'S DEBT'S ACT, 1873.

XI of 1874, s. 6. See CRIMINAL PROCEDURE CODE, 1872, s. 47.

IX of 1875. See MAJORITY ACT, 1875.

X of 1875. See HIGH COURT'S CRIMINAL PROCEDURE ACT.

XII of 1875. See INDIAN PORTS ACT, 1875.

III of 1877. See REGISTRATION ACT, 1877.

Act—(continued.)

- X of 1877. See CIVIL PROCEDURE CODE, 1877.
- XV of 1877. See LIMITATION ACT, 1877.
- XII of 1879, s. 52. See COURT FEES ACT, SCHED. II, ART. 11, CL. (b).
- XXI of 1879, s. 9. See JURISDICTION OF CRIMINAL COURT.
- X of 1882. See CRIMINAL PROCEDURE CODE, 1882.
- XIV of 1882. See CRIMINAL PROCEDURE CODE, 1882.
- XV of 1882. See SMALL CAUSE COURT, PRESIDENCY TOWNS.

Adhesive Stamp—

- Hundi stamped with.* See STAMP ACT, 1879, s. 3.

Administration—

- Suit.* See APPEAL.
- Suit for.* See MAHOMEDAN LAW, DEBTS. MORTGAGE.

Admissibility in Evidence—

- See STAMP ACT, 1879, s. 3.

Admission—

- See EVIDENCE ACT, 1872, s. 35.
- Of appeal after time.* See SECOND APPEAL.

Adopted Son—

- Succession of.* See HINDU LAW, INHERITANCE.

Adoption—

- See HINDU LAW, ADOPTION.
- Power of.* See HINDU LAW, WIDOW.

Adult Son—

- Sale of interest of.* See HINDU LAW, ALIENATION.

Adverse Possession—

- See LIMITATION ACT, 1877, ARTS. 139 ; 141 : POSSESSION : ' ONUS PROBANDI ' : LIMITATION.

Affidavits—

- Refusal of Bench of Judges to hear.* See CHIEF JUSTICE, POWER OF.

Agent—

- Authority of.* See PRINCIPAL AND AGENT.
- Liability of, for possession of liquor.* See BENGAL EXCISE ACT, 1878, s. 61.
- Performance of duties of Mutwali by.* See MAHOMEDAN LAW, WARF.
- Service on.* See SERVICE OF SUMMONS.

Agreement—

- As to amount of maintenance.* See ' RES JUDICATA '.
- As to succession to property.* See COMPROMISE OF FAMILY DISPUTES.
- Contrary to public policy.* See COMPROMISE OF FAMILY DISPUTES.
- Illegal.* See COMPROMISE OF FAMILY DISPUTES.
- Mortgage, Assignment of.* See PRINCIPAL AND SURETY.
- Not to appeal.* See ESTOPPEL.
- To lease.* See REGISTRATION ACT, 1877, s. 17.
- To suppress criminal proceedings.* See CONTRACT ACT, s. 23.
- With covenant sounding in damages.* See STAMP ACT, 1869.

Alienation—

- See HINDU LAW, ALIENATION : PARTITION.
- By Hindu widow.* See DECLARATORY DECREE, SUIT FOR. LIMITATION ACT, 1871, SCHED. II, ART. 144. LIMITATION ACT, 1877, ART. 141.
- By Tenant without consent.* See LANDLORD AND TENANT.
- Of debutter lands, suit to set aside.* See PARTIES.
- Of impartible estate.* See HINDU LAW, CUSTOM.

Alteration—

- Of contract of tenancy.* See LANDLORD AND TENANT.
- Of will.* See WILL.

Alternative Relief—

See SPECIFIC RELIEF ACT, s. 19.

Ameen—

Amount found due by, larger than amount claimed in plaint. See MESNE PROFITS.

Amendment—

Time fixed by Court for. See CIVIL PROCEDURE CODE, 1877, s. 245.

Ancestral Property—

See HINDU LAW, ALIENATION ; PARTITION.

Appeal—

See APPELLATE COURT, POWER OF ; JURISDICTION ; LETTERS PATENT, cl. 15 ; LIMITATION ACT, 1877, ART. 179 ; LUNATIC.

Abatement of. See COSTS.

Administration suit—Order directing an account—Civil Procedure Code (Act X of 1877), s. 244. An order directing an account is not an order in the nature of a final decree, and is unappealable ; such an order merely directs certain proceedings to be taken, in order that a final decree may thereafter be made.

SREENATH ROY v. RADHANATH MOOKERJEE ... IX 773

Admission of, after time. See SECOND APPEAL.

After agreement not to appeal. See ESTOPPEL.

Amendment on. See PLAINT.

Arbitration, Reference to—Award—Decree confirming award. Where an award, i.e., a legal award, has been made, and judgment is passed in accordance therewith, the judgment is final ; but where a question arises whether the award is a legal award or not, an appeal lies from a judgment of a Court passed in accordance with such award.

DEBENDRA NATH SHAW v. AUBHOY CHURN BAGCHI ... IX 905

Civil Procedure Code, 1877, s. 588—Order of single Judge of High Court. Section 588, Act X of 1877, restricting appeals against orders, does not apply to prevent an appeal to the High Court from the order of a Judge of that Court.

HURRISH CHUNDER CHOWDHRY v. KALISUNDERY DEBI ... IX 482

Civil Procedure Code (Act X of 1877), ss. 2, 244, cl. (c), ss. 546, 588—Appeal from order in execution of decree—Security for restitution of property. Where an order, requiring the decree-holder to give security within three days, is made, under s. 546 of the Code of Civil Procedure, by the Judge of the Court in which the decree was passed, and in which the execution is pending, such order is appealable as a decree under the provisions of the Code of Civil Procedure, s. 2, and s. 244, cl. (c).

LUCHMEEPUT SINGH v. SITA NATH DOSS ... VIII 477

Costs—Appealable order. If an order is itself appealable as affecting the jurisdiction of the Court or the merits of the case, an appeal will lie from that part of the order which relates to costs ; but, as in the case of decrees, in those cases, and those cases only where the order is appealable, will an appeal lie against the direction as to costs, which is ancillary to the order.

BALKISSEN DASS v. LUCHMEEPUT SINGH... VIII 91

Decision of Bench of Magistrates—Criminal Procedure Code, 1872, ch. XVIII. No appeal lies to a District Magistrate from the decision of a Bench of Magistrates composed of an Assistant Magistrate with second class powers and two or more Honorary Magistrates, in a case tried under chap. xviii of the Criminal Procedure Code.

IN THE MATTER OF THE PETITION OF HAVALDAR ROY ... IX 96

Dismissal of suit—Summons. Non-service of—Civil Procedure Code (Act X of 1877), ss. 97, 588. An order under s. 97 of the Civil Procedure Code, dismissing a suit on its being found that the summons has not been served on the defendant, in consequence of the failure of the plaintiff to pay the Court-fee leviable for such service, is not appealable.

LUCKY CHURN CHOWDHRY v. BUDURRUNNISSA ... IX 627

Execution of decree—stay of execution—Appeal from order granting—Civil Procedure Code (Act X of 1877), s. 243. A decree-holder having attached the property of his judgment-debtor in execution, the latter applied for a stay of execution

Appeal—(continued.)

until the decision of a pending suit brought by him against the judgment-creditor. The Court allowed the application, continuing the attachment on the property, and struck the execution-case off the file. The decree-holder applied to the High Court. *Held*, that no appeal lay.

NIHAL CHUND, *alias* CHUTTO LAL *v.* RAMESHARI DASSEE ... IX 214

Failure to produce evidence at hearing. At the hearing of a suit a party, though he had sufficient warning of what was necessary, did not take the proper steps to cause the production of the documentary, and only admissible, evidence of a material fact which had to be proved by him; and the decision was against him. The record of another proceeding would, it was said, have supplied this evidence; and an application had been previously made on which the order of the Judge was that "the matter would be decided when the case was tried, and the record would be sent for, if necessary." No further application to the Court was made, and no attempt to supply this evidence. *Held*, that if there had been, as there might have been, an oversight by the party in not calling the attention of the Judge to the above order, and in not tendering the evidence, there had been no omission on the Judge's part affording ground for appeal.

CHANDICHURN SHASHMAL *v.* DURGA CHURN MIRDUA ... IX 260

From order under s. 331, Civil Procedure Code, 1877. See COURT FEES ACT, SCHED. II, ART. 11, CL. (b).

Grounds of. See COSTS.

In Criminal case—Criminal Procedure Code (Act X of 1872), s. 36 (Act X of 1882), s. 108—Effect of Repeal of Act. On the 9th of December 1882, a person was convicted under ss. 457 and 109 of the Indian Penal Code, and sentenced to three years' rigorous imprisonment by a Deputy Magistrate in Assam, exercising special powers under s. 36 of the old Code of Criminal Procedure, Act X of 1872. The new Code of Criminal Procedure came into force on the 1st of January 1883. The prisoner presented an appeal to the High Court from the conviction and sentence abovementioned on the 23rd of January 1883. *Held*, by FIELD, J. (MITER, J., expressing no decided opinion) that the case was governed by s. 108 of the new Code of Criminal Procedure, and that no appeal lay to the High Court.

RONGAI *v.* THE EMPRESS ... IX 513

In suits under Registration Act, 1877. s. 77. See COURT FEES ACT, SCHED. IV, CL. 12, ART. 17.

Irregularly brought after time granted to apply to Original Court. See EXECUTION OF DECREE.

Non-appearance of defendant—Application to defend refused—Ex parte decree against defendants—Right of defendants to appeal without taking steps to set aside the decree—Civil Procedure Code (Act X of 1877), s. 101, 108.—Defendants who put in no appearance at the original hearing, and who have subsequently been refused leave to appear and defend, great liberty, where an 'ex parte' decree has been passed against them, to appeal to a higher Court, without previously taking any steps to have the 'ex parte' decree set aside under s. 108 of Act X of 1877.

ASHRUFFUNNISSA *v.* LEHARAI X ... VIII 272

Order in execution of decree—Civil Procedure Code (Act X of 1877), ss. 214 and 558, cls. (j) and (r). An order for attachment and sale of property in execution of a decree, is an order "of the same nature with" an order made in the course of a suit for attachment of the debtor's property. The latter order is appealable under s. 588, cl. (r), of the Code of Civil Procedure. It follows that an order for attachment and sale in execution of a decree is [according to the requirement of s. 558, cl. (j)] "of the same nature with appealable orders made in the course of a suit;" and therefore is appealable under that section.

POLOKDHARI RAI *v.* RADHA PERSAD SINGH ... VIII 28

Partly successful. See COSTS.

Point decided by lower Court, but not dealt with on. See RES JUDICATA.

Revisional jurisdiction—Death of sole defendant—survival of cause of action—Legal representative—Civil Procedure Code (Act X of 1877), ss. 368, 372—Limitation Act (XV of 1877), sched. II, arts. 171b, 178. In a suit for the recovery of land against a sole defendant, the latter died before the hearing. Sixty-three days after the death of the defendant, the plaintiff applied to the Court to enter on the record the legal representative of the deceased defendant. On the 22nd of November 1880, the Court rejected the application under the provisions of Act XV

Appeal—(concluded.)

of 1877, sched. ii, art. 171*b*, and ordered the suit to abate. On the same day, the plaintiff applied to the Court to set aside the order directing the suit to abate, but this application was also rejected on the 20th of September 1881. On appeal to the High Court—

Held, that no appeal lay against the order of the 20th of September 1881, and that an appeal against the order of the 22nd of November 1880 was out of time; but that the High Court would take cognizance of the case under s. 622 of the Code of Civil Procedure.

Held also, that the application, which was rejected on the 22nd of November 1880 was an application under s. 372, and not under s. 368, of the Code of Civil Procedure, and that the applicant was entitled to make the application within three years, as allowed by Act XV of 1877, sched. ii, art. 178.

Gocool Chunder Gossamee v. The Administrator-General of Bengal referred to.

BENODE MOHINI CHOWDHRAIN *v.* SHARAT CHUNDER DEY CHOW.

DHRY VIII 837

Right of. See BENGAL ACT, VIII OF 1869, s. 102.

Second appeal—Civil Procedure Code (Act X of 1877), ss. 588, 622. After a decree had been made *ex parte*, the defendant applied to have it set aside. The Subordinate Judge refused the application, but his order was reversed by the District Judge.

Held, that the order of the District Judge was final under s. 588, and that no second appeal would lie; nor would the Court interfere under s. 622 of the Code.

AUBINASH CHUNDER MOOKERJEE *v.* MARTIN ... VIII 832

Security for good behaviour—Code of Criminal Procedure (Act X of 1882), s. 128. No appeal lies to the High Court from an order passed by a District Magistrate under the provisions of s. 123 of the Criminal Procedure Code, and on reference by the Magistrate confirmed by the Sessions Judge under the same section, requiring a person to be detained in prison, until he should provide security for his good behaviour.

CHAND KHAN *v.* THE EMPRESS ... IX 878

Stamp-fee payable on. See COURT FEES ACT, 1870, s. 17.

To Privy Council—Value of Suit—Civil Procedure Code (Act X of 1877.) s. 596.

A and B purchased the same properties, deriving title through different persons. The value of the properties with mesne profits was over Rs. 10,000. B granted two *pattai* leases of the properties to different persons. A was, therefore, obliged to bring two suits for the recovery of the properties, and the value of the subject-matter in each suit was less than Rs. 10,000.

Held, that an appeal would lie to the Privy Council.

JOOGULKISHORE *v.* JOTENDRO MOHUN TAGORE ... VIII 210

Withdrawal of. See PRACTICE.

Appellant, Death of

See COSTS.

Appellate Court—

Objection taken for the first time in. In a suit for maintenance, the amount of which had been fixed by agreement, an objection taken on appeal, that the suit should have been brought on that agreement, *held*, taken too late; the defendant having been made aware of the agreement at the hearing, and not having objected on this ground in the first Appellate Court.

AHMAD HOSSEIN KHAN *v.* NIHALUDDIN KHAN ... IX 945

Order of. See MAGISTRATE, POWER OF.

Power of. See PARTIES: PLAINT.

Limitation Act XV of 1877, s. 4 Appeal—Question of limitation not raised in cross appeal. On an application for execution of decree, the application was granted, but the interest claimed by the decree-holder on the amount of the decree was disallowed. The decree-holder appealed from the order, but the judgment-debtor filed no cross appeal. On the hearing of the appeal the application for execution was dismissed, on the ground that the execution of the decree was barred by limitation. *Held*, that under the circumstances of the case, the Appellate Court was not competent to take the question of limitation into consideration. *Alimannassa Khatoun v. Syed Hossein Ali*, followed.

RUGHU NATH SINGH MANKU *v.* PARESHRAM MAHATA ... IX 635

Appellate Court—(continued.)

Remand Order—Civil Procedure Code (Act X of 1877), s. 562. An Appellate Court has no power to remand a case except under the provisions of s. 532 of the Code of Civil Procedure.

MUDUN MOHUN PODDAR v. BHOGGOMANTO PODDAR ... VIII 923

See LIMITATION ACT, 1877, ART. 179.

Application—

For appointment of another bench to hear and determine case. See CHIEF JUSTICE, POWER OF.

In aid of execution. See LIMITATION ACT, 1877, SCHED. II, ART. 179, CL. 4.

To file award. See ARBITRATION.

To revive suit. See LIMITATION ACT, 1877, SCHED. II, ARTS. 171, 171a, AND 178.

Apportionment—

Of debt. See PARTITION.

Of mortgage debt. See MORTGAGE.

Appropriation—

Of payments, agreement for. See NAWAB NAZIM'S DEBTS ACT.

Approval—

Of Court. See COMPROMISE OF SUIT.

Approver—

Withdrawal of pardon granted to. See CRIMINAL PROCEDURE CODE, 1872, s. 349.

Arbitration—

See APPEAL.

*Arbitrators, Absence of—*See ARBITRATION.

See CONTRACT : STAMP ACT, 1879, SS. 37, 40.

Award—Application to have an award filed in Court—Private arbitration—Civil Procedure Code (Act X of 1877), ss. 525, 526. Where an application is made under s. 525 of the Code of Civil Procedure to have an award filed in Court, and it appears to the Court, on cause shown, why the award should not be filed, that there is a reasonable dispute between the parties on any of the grounds mentioned in ss. 520 or 521, the application should be dismissed. Under s. 525 of the Code of Civil Procedure, sufficient cause may be shown by affidavit or verified petition. *See Ram Choudhry v. Denobundhoo Choudhry*, and *Sashli Charan Chatterjee v. Tarak Chandra Chatterjee* referred to.

ICHAMOYEE CHOWDHURANEE v. PROSUNNO NATH CHOWDHRI ... IX 557

Award—Time to file an award—Limitation (Act XI of 1877), sched. II, Art. 176—Civil Procedure Code, 1877, ss. 525, 526—Powers of Court—Cause shown against filing award, Validity of—Powers of Arbitrators—Review of Award. Where an award was made and signed by the arbitrators on the 5th of August 1881, but was not delivered to the parties till the 13th of September following, *semble*, that an application to file the award, made on the 25th of February 1882, under the provisions of s. 525 of the Code of Civil Procedure, was not barred by limitation. It is clearly the intention of the Legislature that a party to an arbitration should have six months to enforce the award, under s. 525 of the Code of Civil Procedure, from the time when he is in a position to enforce it. Under ss. 525 and 526 of the Code of Civil Procedure, the Code has full power to enter into the question of the sufficiency of the cause shown against the filing in Court of an award. *Dandekar v. Dandekars*, followed; *Ichamoyee Chowdranee v. Prosunno Nath Chowdhri*, dissented from. After an award has been made and handed to the parties the functions of the arbitrators cease. They have no power afterwards to deal with an application for review of their decision.

IN THE MATTER OF THE PETITION OF DUTTO SINGH ... IX 575

Validity of Award—Absence of some of the Arbitrators. A case was referred to the arbitration of five persons, with a proviso that in the event of any two of the arbitrators being absent, the arbitration should be continued by the other three. Two of the arbitrators named were the pleaders on either side, and these two, with the consent of the parties, ceased to act as arbitrators, but argued the matter before the other arbitrators. *Held*, that the award made by the other three arbitrators named was a valid award.

DEBENDRA NATH SHAW v. AUBHOY CHURN BAGCHI ... IX 905

Arbitrators—

Powers of. See ARBITRATION.

Arms Act—

XI of 1878, ss. 19, (f), and ss. 25, 30.—*Arms in a temple—Confiscation of arms used for purposes of worship—Police Inspector specially empowered—License to possess arms—Criminal Procedure Code (Act X of 1872), s. 579, and sched. iv—“Offences against other laws.”* A collection of fire-arms, consisting of four small cannons, four pistols, and thirty-one muskets, had been kept as objects of worship in a Sikh temple in Patna for upwards of two centuries. The Mohunt of the temple neglected to take out a license in respect of these arms under Act XI of 1878. A Police Inspector, who was appointed to see that the provisions of the latter Act were obeyed, searched the temple on information received, and, having found the arms, prosecuted the person who had charge of the temple. The latter was convicted by the Deputy Magistrate of Patna under s. 19, cl. (f) of Act XI of 1878, and sentenced to pay a fine of Rs. 50, or to be rigorously imprisoned for two months. The Deputy Magistrate also ordered the arms to be confiscated, and directed that their value and the fine should be divided between the informer and the Police Inspector. On a reference from the Sessions Judge of Patna—

Held, with reference to Act X of 1872, s. 579, and the last heading to sched. iv of the same Act, and to s. 19, cl. (f) of Act XI of 1878, that the proceedings of the Police Inspector and the conviction of the accused were not illegal.

There is nothing in the Arms Act to exempt the custodians of a temple from complying with the requirements of the Arms Act, either by taking out a license or obtaining exemption under s. 27.

Section 25 of the Arms Act appears to refer to cases in which the Magistrate considers that arms, whether under a license or not, are possessed for an illegal purpose, or under circumstances such as to endanger the public peace.

Section 30 of the Arms Act appears to contemplate the presence of some specially empowered officer besides the officer conducting the search.

EMPRESS v. TEJHA SINGH VIII 473

Arrears of Rent—

Suit for. See BENG. ACT VIII OF 1869, s. 59: ENHANCEMENT OF RENT: LIMITATION: PARTIES: RES JUDICATA.

Payment of patni rent by darpatnidar to save patni from sale under Reg. VIII of 1819. In a suit by the purchaser of a patni against a darpatnidar for arrears of rent of the year 1285 (1878), it appeared that before the plaintiff's purchase, the darpatnidar had paid the amount of arrears of patni rent for the year 1284 (1877), in order to save the patni from being sold under Reg. VIII of 1819, and that the amount so paid considerably exceeded the darpatni rent due at the date of suit.

Held, that the defendant was entitled to deduct from the rent claimed the amount paid under the Regulation in excess of the darpatni rent due up to the end of 1284.

NOBO GOPAL SIRCAR v. SRINATH BUNDOPADHYA VIII 877

Articles of Association—

Borrowing in excess of power given by. See COMPANY.

Assam—

See RIGHT OF OCCUPANCY.

Assessment—

See MUNICIPAL CONSOLIDATION ACT, 1876, s. 77.

Of lakeraaj lands. See LIMITATION ACT, 1877, ARTS. 121, 130, 149.

Of land occupied by Government salt-works. See REG. I OF 1821.

Assessors—

Delivery of opinions of. See CRIMINAL PROCEDURE CODE, 1882, s. 309.

Trial by. See CRIMINAL PROCEDURE CODE, 1882, s. 309.

Assignment—

By minor. See LIMITATION ACT, 1877, s. 7.

Of agreement to mortgage. See PRINCIPAL AND SURETY.

Attached Property—

Stay of sale of. See CIVIL PROCEDURE CODE, 1877, s. 326.

Attachment—

See RIGHT OF SUIT: SALE IN EXECUTION OF DECREE.

By Magistrate. See ABSCONDING OF ACCUSED.

And sale liability to. See JAGHIR.

Attempt to enforce Deed—

See LIMITATION ACT, 1871, SCH. II, ART. 93.

Authority—

To adopt, Termination of. See HINDU LAW, ADOPTION.

To appear and defend a suit. See PRINCIPAL AND AGENT.

To sign acknowledgment. See LIMITATION ACT, 1877, s. 19.

Avoidance of Conveyance—

See MORTGAGE.

Award—

See ARBITRATION : STAMP ACT, 1879, SS. 37, 40.

Decree confirming. See APPEAL.

Validity of. See ARBITRATION.

Banker and Customer—

• See PRINCIPAL AND AGENT.

Bastu Land—

See LANDLORD AND TENANT.

Benami Transaction—

See ONUS PROBANDI.

Bench of Magistrates—

Decision of. See APPEAL.

Power of—Bengal Act V of 1876, ss. 215, 216—Omission to remove obstruction. A notice was issued under s. 215, Bengal Act V of 1876, requiring A to remove an alleged obstruction. The requisition was not complied with, and A was prosecuted for non-compliance therewith, under s. 216, before a Bench of Honorary Magistrates. *Held*, that the Court had power to inquire whether the alleged obstruction was, in point of fact, an obstruction or not.

IN THE MATTER OF THE MUNICIPAL COMMITTEE OF DACCA ... IX 38

Benefit—

To arise out of land. See JURISDICTION.

Bengal Act—

VII of 1869, SS. 12. See SALE FOR ARREARS OF REVENUE.

II of 1869. See CHOTA NAGPORE TENURES ACT.

VIII of 1869, SS. 4 ; 6, 14, 22. —See LANDLORD AND TENANT.

ss. 6, 22 and 52. See RIGHT OF OCCUPANCY.

ss. 27 ; 29, s. 30. See LIMITATION.

s. 27.—*Ejectment—Limitation.* Section 27 of Beng. Act VIII of 1869 applies only to such suits for possession as the Court is asked to decide irrespectively of any title, but simply on the ground that the plaintiffs have been ousted otherwise than by legal means.

FORBES v. SREE LAL JHA ... VIII 365

Landlord and Tenant—Suit under Act X of 1859—Breach of Contract in planting trees in land let for agricultural purposes. Section 27 of Bengal Act VIII of 1869 only relates to such suits as could be brought either by the landlord or tenant under Act X of 1859, and will not apply to an alternative claim, put forward in a suit for ejectment, to compel the defendant to remove trees from certain lands leased to him for agricultural purposes.

GUNESH DASS v. GONDOUR KOORMI ... IX 147

s. 32.—*Parties—Principal and Agent—Plaintiff—Gomashta.* Under s. 23 of Bengal Act VIII of 1869 a gomashtha has no right to bring a suit in his own name. He can only sue in the name of his employer, and conduct the suit for him like any other agent.

KOONJO BEHARY ROY v. POORNO CHUNDER CHATTERJEE ... IX 450

s. 38.—*Ex parte Orders—Proceedings for measurement of Land.* In proceedings under s. 38 of the Beng. Rent Law, Act VIII of 1869, the Collector should, as a rule, pass no order *ex parte* without previously giving timely notice to the other party or parties sought to be affected by the order.

IN THE MATTER OF THE PETITION OF PROTAP CHUNDER GHOSE—KALLY CHURN DUTT v. PROTAP CHUNDER GHOSE ... VIII 848

s. 44. See DAMAGES, SUIT FOR.

4 CAL.—b.

Bengal Act—(continued.)

- s. 52—*Covenant to forfeit lease if rent be unpaid—Payment of rent after suit but before decree—Relief against forfeiture—Landlord and tenant.* Section 52 of Bengal Act VIII of 1863 is applicable both to cases where the right to cancel a lease arises under the provisions of the Act, and to cases where the right arises under agreement between the parties. But, the object of the section being to prevent a forfeiture, if the rent be paid within the time specified by the section, the Courts will grant relief against a forfeiture where the rent is so paid.
- DULI CHAND *v.* RAJKISSORE ... IX 88
- See LANDLORD AND TENANT: PAYMENT INTO COURT.
- s. 58 See LIMITATION.
- s. 59—*Landlord and Tenant—Suit for arrears of rent—Ejectment.* The term 'under-tenure,' as used in s. 59 of Beng. Act VIII of 1869, is not confined to a tenure intermediate between the zamindar and the ryot, but includes any tenure which "by title-deeds, or by the custom of the country, is transferable by sale"; and therefore a zamindar, who has obtained a decree for arrears of rent against a ryot who has a transferable jote, is not entitled to eject the ryot, but his only remedy is to sell the holding under s. 59 of the Act.
- Nund Lall Ghose v. Seedee Nazir Ally Khan* followed.
- KRISHNENDRA ROY *v.* AENA BEWA ... VIII 675
- ss. 59 and 60. See INSOLVENCY.
- ss. 59, 66 and 69. See SALE FOR ARREARS OF RENT.
- s. 102—*Practice—Appeal, Right of—Second Appeal.* In a suit for arrears of rent and ejectment the right of appeal is taken away by s. 102, Bengal Act VIII of 1869, only when it is shown that the amount sued for and the value of the property claimed is less than Rs. 100. Unless that fact appears, either from the finding of the District Judge or elsewhere upon the proceedings, the High Court has no right to draw any inference to that effect.
- TULSI PANDAY *v.* BUCHU LALL ... IX 596
- Suit for Rent below Rs. 100—Landlord and Tenant—Special Appeal.* In a suit for rent below Rs. 100, the defendant set up the title of a third person (the third person was, however, no party to the proceedings), and the lower Court finding that the relationship of landlord and tenant existed between the parties and that the rent was unpaid, decided the suit on that ground in favour of the plaintiffs. The defendant appealed to the District Judge, who decided that the defendant had paid the rent, and reversed the decision of the Court below. The plaintiffs appealed to the High Court, but were met with the objection that no special appeal would lie. *Held*, that s. 102 of Beng. Act VIII of 1869 prohibited the appeal, the case being one between landlord and tenant, and there consequently being no question relating to title as between parties having conflicting claims.
- ROMAPROSAD ROY *v.* SHORUP PARAMANICK ... VIII 712
- X of 1871. See ROAD CESS ACT, 1871.
- s. 25. See DAMAGES, SUIT FOR.
- V of 1876, ss. 215, 216. See BENCH OF MAGISTRATES, POWER OF.
- See LAND REGISTRATION ACT.
- VII of 1876—
- s. 55. See EVIDENCE ACT, s. 35.
- s. 78. See LANDLORD AND TENANT.
- VIII of 1876, s. 10. See PARTITION.
- VII of 1878. See BENGAL EXCISE ACT, 1878.
- VII of 1878 ss. 53, 60, 61—*Sale by servant of licensed vendor—Cooly employed by servant.* The servant of a licensed vendor sold eight quart bottles of country spirit, and employed a cooly to carry them as he directed. The servant was convicted under s. 60, Bengal Act VII of 1878; and the cooly was convicted under s. 61 of the same Act. It was suggested that the servant should have been convicted under s. 53, and that the cooly had committed no offence. *Held*, that the conviction of the cooly was illegal, and must be set aside. *Held*, also, that the servant was properly convicted, and whether under s. 60 or s. 53 was immaterial. *Queen v. Ishan Chunder Shaha*, and *Empress v. Baney Madhub Shaha*, followed.
- EMPRESS *v.* ISHAN CHUNDRA DE ... IX 847
- s. 61—*Imported liquor, possession of—Consignee—Agent.* Certain liquors arrived in Calcutta per S. S. *Navarin* consigned to Messrs. A. & Co. at Agra, who requested A to pay on their behalf the duty and landing charges, and forward the goods to Agra.

Bengal Act—(concluded.)

While on the way from the steamer to the railway station, the goods were seized as being in the possession of A without a pass, within the meaning of s. 61 of Bengal Act VII of 1878, and A was convicted and sentenced to a fine under the provisions of that Act. *Held*, that the conviction was bad.

IN THE MATTER OF THE PETITION OF HENRY KYTE ...

IX 223

See EXCISE ACT.

Bhowli Tenures—

See ROAD CESS ACT, 1871, SS. 5 AND 7.

Bill of Exchange—

See PRINCIPAL AND AGENT : STAMP ACT, 1879, s. 3.

Blank Transfer—

See COMPANIES' ACT, s. 34.

Boarding-House Keeper—

See MUNICIPAL CONSOLIDATION ACT, 1876, s. 77.

Bond—

See REGISTRATION ACT, 1877, s. 49.

Of Indemnity. See PRINCIPAL AND SURETY : STAMP ACT, 1869.

Stamp Act (XVIII of 1869), s. 2, cl. 5—Definition of Bond—Promissory Note. The definition of the word 'bond' in the Stamp Act of 1869 is not exhaustive; the word 'includes' in cl. 5 of s. 2 has an extending force, and does not limit the meaning of the term to the substance of the definition.

IN THE MATTER OF THE PETITION OF NASIBUN—NASIBUN v. PREOSUNKER
GHOSE VIII 534

Breach of Contract—

See INTEREST.

In planting trees in land let for agricultural purposes. See BENGAL ACT VII OF 1869, s. 27.

British India—

Offence committed out of. See JURISDICTION.

Brother's Daughter's Son—

See HINDU LAW, INHERITANCE.

Buildings—

Erection of. See CRIMINAL PROCEDURE CODE, 1882, s. 133. See LANDLORD AND TENANT.

On Land. See LANDLORD AND TENANT.

Removal of. See CO-SHARERS.

Butwara Proceedings—

Suit to stay, after private partition. See VALUATION OF SUIT.

Cantonments Act—

1864, s. 11. See LIABILITY OF PUBLIC SERVANT.

Case—

Withdrawal of. See CRIMINAL PROCEDURE CODE, 1872, s. 47.

Cause shown against filing award—

See ARBITRATION.

Cause of action—

See CIVIL PROCEDURE CODE, 1859, s. 7. LIMITATION ACT, 1877, ARTS. 139, 144; RIGHT OF SUIT : SALE IN EXECUTION OF DECREE.

Jurisdiction—Promissory Note—Place of performance of Contract—Code of Civil Procedure (Act X of 1877), s. 17, Illus. Where a promissory note is executed in one district, and it is agreed that the amount of the note shall be paid in another, the Courts of the latter district have jurisdiction to entertain a suit on the note. The illustrations to s. 17 of the Code of Civil Procedure afford no safe guide as to what is meant in the Code by the term 'cause of action.' *Gopi Krishna Gossami v. Nil Konal Banerjee*; *Mahomed Abdul Kadar v. E. I. Ry. Co.*; and *Vaughan v. Weldon*, followed.

LALJEE LALL v. HARDEY, NARAIN ...

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Cause of action—(*continued.*)

See EXECUTION OF DECREE.

Survival of. See APPEAL.**Certificate**—

See MAJORITY ACT, s. 3.

Enabling Court to entertain suit. See PENSIONS ACT, SS. 4 AND 6.*Of Administration.* See ACT XI, OF 1858, s. 3.*Of Guardianship.* See MAHOMEDAN LAW, GUARDIAN.*Sale.* See SALE FOR ARREARS OF RENT : SALE IN EXECUTION OF DECREE : PRESIDENCY BANKS ACT, 1876, s. 1.

Act XXVII of 1860—Object of Act—Trustee. The object of Act XXVII of 1860 is not to enable parties to litigate questions of disputed title, but to enable debtors to pay the debts due by them with safety to the representatives of deceased Hindus and others ; and to facilitate the collection of such debts by removing all doubts as to the legal title to demand and receive the same. In other words, the objects of the Act are to enable debtors to get sufficient acquittances when they pay money due to the estate of a deceased ; and to preserve that estate from loss by giving some one the right to collect the debts, lest they should be lost, e.g., by the operation of the law of limitation. The holder of a certificate is a trustee liable to account for the moneys received by him to the legal heirs or representatives of the deceased.

IN THE MATTER OF THE PETITION OF NOBODIP CHUNDER BISWAS—PRAN-
KISTO BISWAS *v.* NOBODIP CHUNDER BISWAS ... VIII 868

Cess—*Suit to recover road and Public works.* See SMALL CAUSE COURT, MOFUSSIL.**Charges**—*Adding new.*

See CRIMINAL PROCEEDINGS.

Amendment of. See CRIMINAL PROCEDURE CODE, SS. 145, 416, 453.

Form of Charge—Penal Code, s. 300—Murder. A prisoner was charged with "causing the death of A by inflicting a wound on him with a 'chheni,' with the intention of causing bodily injury, such as was sufficient, in the course of nature, to cause death, or which he knew to be likely to cause death."

Held, that the charge was defective and inexact as regarded the second and third clauses of the definition of murder in s. 300 of the Penal Code. With reference to the second clause, it should have run "likely to cause the death of A, the person to whom the harm was caused." With reference to the third clause, it should have said "ordinary course of nature."

THE EMPRESS *v.* SAMIRUDDIN, ... VIII 211

On Property. See SALE IN EXECUTION OF DECREE.**Chief Justice**—

Power of—Refusal by Bench of Judges to hear Affidavits in support of application for transfer of trial to another District—Application to the Chief Justice to appoint another Bench to hear and determine case—Interlocutory order in Criminal matters, Finality of—High Court Charter Act (24 and 25 Vict. c. 104), s. 14. Where a rule had been obtained on behalf of a prisoner, calling on the prosecution to show cause why the case should not be transferred for trial to some other Court of Session than that in which it was then pending, on the ground that such strong feeling and prejudice existed in the district against the accused as to render it unlikely that he would get a fair trial, a Division Bench of the High Court, duly constituted, consisting of two Judges, refused to allow the affidavits in support of the application to be read, and discharged the rule. Subsequently, an application was made to the Chief Justice to appoint another Bench of the High Court to hear and determine the rule, on the ground that it had not been heard, and that, consequently, the order passed by the Bench discharging it was null and void,—

Held, that the Chief Justice, having once appointed a Bench under s. 14 of the Charter Act (24 and 25 Vict., c. 104) to hear any particular case, has no power to interfere when the case has been disposed of by that Bench,

Chief Justice—(concluded.)

Held also, that the refusal of the Bench to hear the affidavits read, if an error at all, was simply one of law in the course of dealing with a matter clearly within their jurisdiction; and that, therefore, the decision could not be treated as a nullity, or its legality questioned by the Chief Justice.

Held further, that whether the judgment had been signed or not, previous to the application being made to the Chief Justice, an interlocutory order of such a nature in a criminal matter is not final, but may be reviewed or reconsidered, or a similar application may be entertained as often as the Court in its discretion may think proper.

IN THE MATTER OF THE PETITION OF ABDOOL SOBHAN ...

VIII

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Children—

Right to custody of. See KIDNAPPING.

Chota Nagpore Tenures Act—

Beng. Act II of 1869—Powers of Special Commissioner. The scope and object of Beng. Act II of 1869 is to determine the quantity of lands of certain specified descriptions within villages to which the Special Commissioner, named under the Act, may have been appointed. Nothing in the Act empowers an officer so appointed to determine a question of disputed boundary between two villages, and to oust the Civil Courts of their ordinary jurisdiction in determining the rights of parties under conflicting titles as proprietors of such villages.

SHAM CHUNDER ADHICARY v. SOBIN BHOOPAL SING ...

VIII

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Citation, Special—

See PROBATE.

Civil Procedure Code—

Act VIII of 1859, ss. 7, 8, 9, 10—Cause of action, including whole claim arising out of—Mesne profits, Suit for Possession, Suit for— Under s. 7, read with ss. 8, 9, and 10 of Act VIII of 1859, a plaintiff suing for mesne profits of land is not precluded from afterwards maintaining a suit for possession of such land. *Pratab Chandra Burua v. Ram Swarnamaji*, commented on.

MONOHUR LALLI v. GOURI SUNKUR ...

IX

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ss. 7 & 15—*Declaratory Decree Subsequent suit for consequential relief—Civil Procedure Code (Act X of 1877), s. 43—Splitting claim.* The plaintiffs brought a suit to have themselves declared entitled to an account, and obtained such a declaratory decree without asking for or obtaining any consequential relief.

The defendants took no steps to render an account, and the plaintiffs brought another suit against them for the amount of such Company's papers and other debts that might be found due by the defendants on an adjustment of accounts."

Held, that the plaintiffs were not barred from bringing such a suit; s. 15 of Act VIII of 1859 being intended to modify the provisions of s. 7 of the same Act.

Tulsi Ram v. Gunga Ram followed and approved.

KALIDHUN CHUTTAPADHYA v. SHIBA NATH CHUTTAPADHYA ...

VIII

483

s. 97—*Suit for possession after release from attachment in execution in another suit—Withdrawal of suit.* A claim to attached property made under Act VIII of 1859, s. 246, was dismissed, and the claimant, in the year 1875, instituted a regular suit against the decree-holder under the provisions of that section. The decree-holder then released the property from attachment, and the plaintiff withdrew his suit. The same property was afterwards, in the year 1878, attached again and sold in execution of the same decree.

Held, that a subsequent suit for possession of the property against the purchaser at the execution-sale was not barred under s. 97 of Act VIII of 1859.

Eshen Chunder Sing v. Shama Churn Bhutta cited.

MUKHODA SOONDURY DASI v. RAM CHURN KARMOKAR ...

VIII

871

s. 243—*Power of Manager under s. 243—Notice of Enhancement—Civil Procedure Code (Act X of 1877), s. 503.* A manager appointed under s. 243 of Act VIII of 1859 is appointed merely to collect rent and other receipts and profits of the land, to carry on the existing state of affairs as the proprietor himself had been doing, and he has no power to issue notice of enhancement.

KHETTER MOHUN DUTT v. WELLS ...

VIII

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s. 246. See LIMITATION: LIMITATION ACT, 1871, ART. 15: LIMITATION ACT, 1877, ART. 11; 11 & 120; RES JUDICATA.

Civil Procedure Code—(continued.)

- ss. 246, 247. See RIGHT OF SUIT.
- s. 259. See REGISTRATION ACT, 1871, s. 17.
- ss. 284, 294. See SUPERINTENDENCE OF HIGH COURT.
- 1877, s. 2; J7; 101; 108; 243; 244; 244 cl. (c); 368; 372; 546; 581; 588; 588, cl. (j), (r); 622—See APPEAL.
- s. 13; 97-371. See 'RES JUDICATA.'
- s. 17. See CAUSE OF ACTION.
- s. 19. See EXECUTION OF DECREE.
- s. 28. See PARTIES: SPECIFIC RELIEF ACT, s. 19.
- ss. 28 & 32. See PARTIES.
- s. 30—*Practice—Leave to sue—Suit by one creditor on behalf of others.* A suit by one or more creditors on behalf of other creditors cannot be entertained without the leave of the Court being obtained for its institution. Such leave cannot be granted at the hearing.
- THE ORIENTAL BANK CORPORATION v. GOBIND LALL SEAL ... IX 604
- See RELIGIOUS ENDOWMENT.
- s. 43, *Splitting claims.* On the 27th Joist 1286 F. S. (2nd June 1879) the plaintiff brought a suit to recover damages for the breach of a contract on the part of the defendant, for not having made over possession to him of certain leasehold properties, the damages claimed being for the profits accrued due for the year 1283 F. S. (1875-6). In this suit he obtained a decree. On the 21st Joist 1287 F. S. (14th June 1880), the plaintiff brought another suit against the defendant to recover damages for the profits accrued for the years 1284, 1285, and 1286, F. S. (1876-7 to 1878-9). *Held*, that the plaintiff should have included the damages for the years 1284 and 1285 (1876-7 and 1877-8) in his former suit, and that he was debarred by s. 43 of Act X of 1877 from including in his second suit any portion of his claim for damages which had accrued due at the time of the institution of his first suit, and for which he had omitted to sue; but that he was entitled to recover damages for the year 1286 (1878-9). *Taruck Chunder Mookerjee v. Panchu Mohini Debja*, followed.
- SHEO SUNKUR SAHOY v. HIRDOY NARAIN ... IX 143
- Splitting Remedies—Suit for Declaration of Title and for Possession—Subsequent suit for Possession.* Where a previous suit for a declaration of title and confirmation of possession of certain land has been dismissed on the ground that the plaintiff was not in possession at the time of filing the suit, a subsequent suit on the same title for recovery of possession of the land is not barred under s. 43 of the Code of Civil Procedure.
- Moonshee Buzloor Roheem v. Shumsoonnissa Begum* discussed.
- JIBUNTI NATH KHAN v. SHIB NATH CHUCKERBUTTY... VIII 819
- See CIVIL PROCEDURE CODE, 1859, ss. 7 & 15.
- s. 54. See PLAINT.
- s. 57—*Valuation of suit—Return of Plaintiff—Dismissal of suit.* A Munsif, after hearing the evidence on both sides, found that the suit had been undervalued; but, instead of returning the plaint under s. 57 of ACT X of 1877, he dismissed the suit. *Held*, that the provisions of s. 57 were imperative, and might be put into force at any stage of the hearing; and that such dismissal of the suit was a matter which affected the merits of the case, and formed a proper subject for an appeal.
- BHADESHWAR CHOWDHRY v. GOURIKANT NATH ... VIII 834
- s. 103—*Suit brought after dismissal of former suit for non-appearance.* Per GARTH, C.J.—The operation of s. 103 of the Code of Civil Procedure is confined to those cases only where a second suit is brought for the same object and cause of action as the suit which is dismissed.
- GOBIND CHUNDER ADDYA v. AFZUL RABBANI ... IX 426
- s. 108. See LIMITATION ACT, 1877, ART. 161.
- s. 132. See PARTIES.
- ss. 223, 226. See SUPERINTENDENCE OF HIGH COURT.
- s. 230—*Execution of Decree, Application for—Passing of the Act—Meaning of the expression, 'Granted' in s. 230.* Under s. 230 of Act X of 1877, an application for execution is said to be 'granted' when it is made regularly and formally. The expression 'granted' is equivalent to the expression 'admitted' as used in s. 245.

Civil Procedure Code—(continued.)

Where, therefore, an application for execution under s. 230 of Act X of 1877 is not 'granted' a subsequent regular and formal application under the same section may be allowed if made within time.

DEWAN ALI v. SOROSHIBALA DABBE VIII 297

244, cl. (c). See EXECUTION OF DECREE.

s. 245—*Application for execution of Decree—Amendment—Time fixed by Court—Jurisdiction—Ultra vires.* On the 9th of April 1880 A applied for execution of a decree, which he had obtained against B. On the 20th of April 1880 the Judge of the Court, under the provisions of s. 245 of the Code of Civil Procedure, ordered the application to be amended within seven days. This order was disobeyed, but no order rejecting the application was asked for or passed. On the 11th of May 1880 the applicant prayed leave to make the amendment, which prayer was granted.

Held, that the order of the 11th of May 1880, granting leave to amend, was not *ultra vires* of the Judge, under the provisions of s. 245 of the Code of Civil Procedure.

KAMINY MOHUN SOMODDAR v. GOPAL VIII 479

s. 246. See SET-OFF.

s. 260. See EXECUTION OF DECREE.

s. 266 ; 266, cl. (e) : See SALE IN EXECUTION OF DECREE.

s. 278. See LIMITATION.

ss. 280, 282. See LIMITATION ACT, 1871, ART. 15

s. 283. See LIMITATION ACT, 1877, ART. 11, 120

ss. 287, 289 ; 293 ; 295 ; 311 ; 313. See SALE IN EXECUTION OF DECREE.

s. 326—*Scheme for satisfying decree—Stay of Public Sale of attached property.*

Where the Collector has applied to the Court under s. 326 of the Civil Procedure Code, proposing a scheme for the payment of decretal money in order to avoid a sale of attached property, it is in the discretion of the Court to authorize the Collector or not, as it thinks fit, to provide for the satisfaction of the decree in the manner proposed ; and the Court is bound to hear any objections which may be made by the decree-holder to the feasibility of the proposed scheme, and any evidence that may be offered, in support of those objections ; and if after hearing the decree-holders' objections, and the evidence which may be offered in support of them, the Court is not fully satisfied that the proposal is feasible, or that it can, in all reasonable probability, be carried out within the specified period, the Court ought, in the exercise of its discretion, to refuse its sanction.

HURO PRONAD ROY v. KALI PRONAD ROY IX 290

s. 331. *Appeal from Order under.* See COURT FEES ACT, SCH. II, ART. 11, CL. (b).

s. 366, 582. See COSTS.

s. 424 ; 559. See PARTIES.

s. 433. See JURISDICTION.

s. 503. See CIVIL PROCEDURE CODE, 1859, s. 243

ss. 525, 526. See ARBITRATION.

See 539. See RELIGIOUS ENDOWMENT.

s. 562. See APPELLATE COURT, POWER OF

s. 562 and s. 588, cl. 28—*Second Appeal—Remand.* On an appeal from an order under s. 562 of the Civil Procedure Code remanding the case, the High Court cannot consider the facts on which the lower Appellate Court passed the order of remand. All that it can do under s. 588, cl. 28, is to consider whether, on the findings of fact by the lower Appellate Court, that Court was right in remanding the case.

NOIMOLLAH PRAMANICK v. GRISH NARAIN MOONSHEE VIII 674

s. 588, cl. 28. See CIVIL PROCEDURE CODE, 1877, s. 562.

s. 596. See APPEAL TO PRIVY COUNCIL.

s. 610—*Transmission for execution of order of Her Majesty in Council—Evidence of such order.* The provisions of Act X of 1877, s. 610, are not to be construed as restricting the only admissible evidence of an order of Her Majesty in Council to a certified copy, on an application for execution made under that section. They must be read as directory, having the object that proper information regarding the order shall be supplied to the Courts in India. Where the original order (given, according to the practice in England, to the successful party, or to one of such parties) had not been filed in the High Court, so as to enable the proper officer to supply a certified copy : *Held*, that a copy, though not certified by him, might accompany a petition for execution under s. 610.

HURRISH CHUNDER CHOWDHRY v. KALISUNDERI DEBI IX 482

Civil Procedure Code—(concluded.)

s. 623. See SMALL CAUSE COURT, MOFUSSAL.

s. 630. See REVIEW.

1882, s. 11. See POSSESSION, SUIT FOR.

s. 16. See SERVICE OF SUMMONS.

s. 23. See TRANSFER OF CASE.

ss. 32 ; 136. See PRACTICE.

ss. 42, 43—*Enhancement of rent, suit for—Subsequent suit for rent.* Under ss. 42 and 43 of the Civil Procedure Code, plaintiffs must bring their entire claim and every remedy enforceable in respect of that claim into Court at once, and if they fail to do that in any suit, they cannot afterwards avail themselves of any remedy on which they have not chosen to insist in the first suit. Suits for enhanced rent, and suits for rent, are claims arising in respect of the same subject-matter, and a plaintiff cannot be allowed, after having unsuccessfully sued for rent at an enhanced rate, to sue for the original rent for previous years.

KUNNOCK CHUNDER MOOKERJEE v. GURU DASS BISWAS ...

IX 919

ss. 231, 244, 258. See EXECUTION OF DECREE.

s. 244, cl. (c)—*Question relating to the execution of decree—Separate suit.* In a suit to recover possession of land, the defendants resisted execution on the ground that they were cultivators, and that the decree only authorised the plaintiff to recover possession as proprietor. The objection was overruled, and the defendants were ejected. They then sued to set aside the order made in the execution proceedings and to recover possession.

Held, that the suit was barred under s. 214, cl. (c), of the Civil Procedure Code. NAJHAN v. MAHOMED TAKI KHAN *alias* PEER BUX KHAN ...

IX 872

s. 283—*Hindu Law alienation—Mitakshara Mortgage by father—Liability of sons not made parties.* The L. Bank advanced money to C, a Hindu governed by the Mitakshara school of law upon mortgage of ancestral property. S, who was stated to be C's only son, joined in the mortgage. Subsequently the Bank obtained a decree against C and S for the amount due on the mortgage. On attempting to sell the mortgaged property other sons of C objected. This objection was allowed, and the mortgagees referred to a regular suit. They then sued all the sons of C to establish their lien on the mortgaged property. *Held*, that the suit was maintainable under s. 283 of the Civil Procedure Code. *Nuthoo Lall Choudhry v. Shoukee Lall, and Mussamut Dhree v. Hurry Prosad distinguished.*

SITA NATH KOER v. LAND MORTGAGE BANK OF INDIA ...

IX 888

s. 561—*Limitation Act XV of 1877, s. 5. Cross appeal—Notice of objection.* A notice of objection under s. 561 of the Code of Civil Procedure, Act XIV of 1882, must be filed not less than seven days before the date (if any) fixed for the hearing of the appeal in the notice served upon the respondent. Section 5 of Act XV of 1877 does not apply to an objection under s. 561 of the Procedure Code.

KALLY PROSUNNO BISWAS v. MUNGALA DASSEE ...

IX 631

Claim—

To compel removal of trees from land granted for agricultural purposes. See LIMITATION-ACT, 1877, ART. 120

To mortgaged property sold in execution of decree. See LIMITATION ACT, 1877, SCHED. II, ART. 11.

Co-defendants—

See 'RES JUDICATA.'

Collection Charges—

Stipulation to pay. See LANDLORD AND TENANT.

Collector—

Jurisdiction of. See PARTITION.

Partition by, after partition by private arrangement. See 'ONUS PROBANDI.'

Commission—

See EVIDENCE TAKEN ON COMMISSION.

In Criminal Case—Witness, Examination of—High Courts' Criminal Procedure Act (X of 1875), s. 76. The High Court refused to issue a commission in a criminal case, on the ground that such a course would be unsatisfactory and dangerous to the interests of the prisoner.

THE EMPRESS v. R. P. COUNSELL...

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VIII 896

Commissioner—

Beyond jurisdiction. See EVIDENCE TAKEN ON COMMISSION.

Jurisdiction of. See NAWAB NAZIM'S DEBTS' ACT.

Commitment—

Application to quash. See HIGH COURT'S CRIMINAL PROCEDURE ACT, SS. 14 AND 147.

Company—

Articles of Association—Power to borrow—Borrowing in excess of power in Articles of Association—Ratification. Under the articles of association of a limited company, the directors had power, from time to time as they might see fit, without any previous consent of the shareholders, to borrow any sum of money not exceeding Rs. 50,000, on the bill, bond, note, or other security of the company, upon such terms as they might think proper; and had power, with the sanction of a special resolution of the company previously obtained at a general meeting, to borrow any sum of money not exceeding in the whole, together with the Rs. 50,000, the sum of Rs. 1,00,000. K advanced sums of money to the company amounting in 1879 to over Rs. 80,000. No previous sanction was given to any of these advances. On the 4th October 1879, an extraordinary general meeting of shareholders was held, at which a resolution was passed sanctioning a mortgage to K, of the whole of company's property, except a certain garden, to secure the payment of a sum, not exceeding Rs. 1,00,000, for advances already made and to be made, with interest at 7 per cent. This resolution was confirmed on the 16th of October, and the mortgage was executed on the 22nd of December 1879. Subsequently the company was ordered to be wound up, and K advanced a claim for Rs. 1,20,787.—*Held*, that there is a distinction between loans which a company is empowered to raise under its borrowing powers, and debts which, in meeting its current liabilities and in the actual carrying on of its affairs, the company, or its agents on its behalf, have contracted; and that the advances made by K, did not amount to a borrowing within the meaning of the articles of association. In *re Cefn. Cilcen Mining Company and Waterlow v. Sharp* followed. *Held*, also, that the borrowing powers conferred by the articles of association justified a mortgage, the object of which was in part to cover previously incurred liabilities.

IN THE MATTER OF THE INDIAN COMPANIES ACT OF 1866 AND OF THE MEDLA TEA CO., LIMITED ... IX

14

Companies Act (X of 1866).—

s. 34.—*Blank transfer—Right of transferee under blank transfer to registration—Discretion of Directors—Discretion of the Court to refuse to hear the case under s. 34.* The power given to the Court by s. 34 of the Indian Companies Act of 1866 is discretionary, and the Court will not order a transfer to be registered, where the alleged transferor is not before the Court, and there is any real doubt as to the validity or *bona fides* of the transaction.

IN THE MATTER OF THE INDIAN COMPANIES ACT. IN THE MATTER OF THE PETITION OF LUCHMEE CHUND. LUCHMEE CHUND v. THE BENGAL COAL COMPANY ... VIII

317

Compensation—

Dispute as to right to. See LAND ACQUISITION ACT, SS. 15 AND 30.

In lieu of rent. See LANDLORD AND TENANT.

Competent Court—

See 'RES JUDICATA.'

Compromise—

By Hindu widow, suit to set aside. See HINDU LAW, REVERSIONER.

Construction of document—Release—“All present and future liabilities.” General words used in a deed of compromise or in a release must be confined to matters of the same nature and forming part of the transaction which the parties had in view.

Directors of the London and South-Western Railway Co. v. Blackmore followed.

LEELANUND SINGH v. HAMIDOODIN ... VIII 576

Of family disputes—Hindu Law—Agreement as to succession to property—Suit to enforce the agreement—Mistake in law. In 1859, two brothers, A and B, filed a petition in the Collectorate, by which it was agreed that the family property should be divided in certain shares. B, who had only lately attained his age of majority,

Compromise—(continued.)

acted on his own account and as guardian of his minor brothers. In a suit by A to carry out the terms of the petition, B contended that undue advantage had been taken of his youth and inexperience; that the agreement was invalid; and that there was no consideration. It appeared that, at the time of the agreement, there was a *bond fide* dispute as to the rights of the parties, and no evidence of fraud was adduced.

Held, that the plaintiff was entitled to a decree.

Principles upon which the Court acts in setting aside compromises considered.

There is nothing in Hindu law which makes illegal an agreement, entered into by expectants, to divide a particular property in a certain way, on the happening of a particular contingency.

Nor is such an agreement contrary to public policy.

Wethered v. Wethered, Harwood v. Tooke, Hyde v. White followed.

RAM NIRUNJUN SINGH *v.* PRAYAG SINGH ... VIII 188

Of suit—Suit by minor—Approval of Court. Where a compromise of a suit is entered into on behalf of an infant defendant, the approval of the Court to such compromise must be express, and will not be inferred from the subsequent passing of a decree in terms of such compromise. Without such approval, the compromise will not bind the infant, and will be set aside at his instance. *Rajagopal Takkaya Naiker v. Subramanya Ayyar* cited and followed.

SHARAT CHUNDER GHOSE *v.* KARTIK CHUNDER MITTER ... IX 810

Condition—

Breach of. See LIMITATION ACT, 1871, SCHED. II, ART. 144.

In lease. See LANDLORD AND TENANT.

Precedent. See CONTRACT.

Conditional Contract—

See VENDOR AND PURCHASER.

Conditional Sale—

See EVIDENCE ACT, s. 92.

Conduct of Parties—

See EVIDENCE ACT, 1872, s. 92.

Confession—

Examination of the accused—Question and answer—Recording examination—

Statement of accused person—Criminal Procedure Code (Act X of 1872), s. 346

—Admissibility in evidence. The confession of an accused person was recorded in a simple narrative form instead of in the shape of question and answer as required by the Code of Criminal Procedure, s. 346. There was nothing in the character of the confession, or in the circumstances of the case, to lead to the inference that the accused had been prejudiced by the error.

Held, that the error did not affect the admissibility of the statement in evidence.

IN THE MATTER OF THE PETITION OF MUNSHI SHEIKH. THE EMPRESS *v.*

MUNSHI SHEIKH ... VIII 616

TITU MAYA *v.* THE QUEEN ... VIII 618

Confirmation of Sale—

See SALE IN EXECUTION OF DECREE.

Confiscation—

Of arms used for purposes of worship. See ARMS ACT.

Consent—

Evidence of. See HINDU LAW, WIDOW.

Consequential Relief—

Subsequent suit for. See CIVIL PROCEDURE CODE, 1859, SS. 7 AND 15.

Consideration—

Illegal. See CONTRACT ACT, s. 23.

Consignee—

Liability of, for possession of liquor. See BENGAL EXCISE ACT, 1878, s. 61.

Constructive Murder—

See CRIMINAL PROCEEDINGS.

Constructive Trust—

See SALE FOR ARREARS OF RENT.

Contingent Interest—

See DECLARATORY DECREE, SUIT FOR.

Contract—

See HINDU LAW, CONTRACT.

Admissibility of evidence to vary. See EVIDENCE ACT, 1872, s. 92.

Breach of. See INTEREST.

Condition precedent—Stipulation in restraint of trade—Contract Act, s. 27—Estoppel. The plaintiffs, on the 4th August 1881, entered into a contract with the defendant, for the sale to the latter of a quantity of goods of a certain description "to be delivered up to the 31st December 1881." The plaintiffs stipulated that they would make no sales of goods of the same description to others before the 1st December 1881; and the contract contained an arbitration-clause to the effect, that "if the buyers object to accept all or any of the goods offered to them by the sellers in fulfilment of the contract on the ground of any variance, difference from the sample or muster, inferiority in weight or quality or colour, or damage or defect, or any other ground whatsoever," such objections should, in case of disagreement be referred to two arbitrators, one to be named by the sellers, and the other by the buyers. Such arbitrators to decide "whether the buyers' objections were valid and if so what allowance on the whole contract price will be a reasonable adequate compensation to the buyers for such variance, difference, inferiority, damage or defect, if any, and such decision shall be final and binding on both parties." If either buyers or sellers failed "to name an arbitrator within two days after being requested by the other to do so, the decision of the arbitrators named by the buyers or sellers, as the case may be, shall be final and binding on both parties." The goods arrived in Calcutta between the 4th and 24th November 1881. On the 15th August the plaintiff entered into other contracts with other buyers for the sale of the same description of goods at a lower price than that at which they had sold to the defendant; these contracts were on the terms that the goods were not to arrive in Calcutta until after the 31st December 1881. The defendant refused to accept the goods on the ground that the plaintiffs had committed a breach of the contract by entering into other agreements for sale of the same description of goods before the 1st December, and refused to pay the difference between the contract price and the market value which the plaintiffs demanded from him. The plaintiffs thereupon appointed an arbitrator, who (the defendant declining to appoint an arbitrator) proceeded to act in the matter, and finding that the plaintiffs had not committed a breach of the contract made an award in their favour for Rs. 850, the difference in price of the goods at the contract and market values. The plaintiffs sued to recover the amount due to them under the award, or in the alternative for Rs. 850 as damages for non-acceptance of the goods.

Held, that the defendant was not estopped by the award from setting up the breach of the stipulation not to sell other goods of the same description before the 1st December 1881 as a defence to the suit.

Per GARTH, C.J.—The question whether the plaintiffs, by making the other contracts, had committed a breach of the stipulation was not properly a subject of reference to the arbitrator under the arbitration-clause. The general words in that clause, "or any other grounds whatsoever," mean any other grounds of a like character, and do not include a pure question of law.

Held also, that the stipulation itself amounted to a condition precedent to the defendant's obligation to accept the goods.

Held further, a stipulation in a contract prohibiting any sales of goods to others during a particular period, of a similar description to those bought under the contract, is not a stipulation in restraint of trade under s. 27 of Act IX of 1872.

CARLISLES NEPHEWS & CO. v. RICKNAUTH BUCKTEARMULLI. ... VIII 809

Construction of contract—Printed form of contract—Writing and printing—Sale of goods to arrive. The defendants contracted to purchase certain piece goods from the plaintiffs, who were dealers in those goods. The contract of sale was written out on one of the printed forms of the plaintiffs' firm, which forms contained in print, the words "now in course of landing or in the said godowns" and "now on board ship." As a matter of fact, well known to both parties, the goods contracted for were neither in the godowns nor on board ship. *Held*, that under the circumstances, the printed words above set out formed no part of the contract entered into between the parties.

CARLISLES, NEPHEWS & CO. v. HUMMOCK ROY ... IX 679

Of tenancy. See FRAUD.

Contract—(continued.)

Place of performance of. See CAUSE OF ACTION. *

Rectification or alteration of. See LANDLORD AND TENANT.

Rescission of. See VENDOR AND PURCHASER.

Sale of goods—Delivery by instalments—Tender. A contract made between the plaintiffs and the defendant stipulated for the delivery to the defendant of 7,500 bags of Madras Coast castor seed, which were to be shipped "per steamers," and then stated that shipment of 2,500 bags was to be made in December. On the 12th December 1,690 bags arrived by Steamer 'Shahjehan,' and notice in writing was given to the defendant, who requested that the delivery might be postponed owing to his not having godown room. On the 14th December the defendant refused to take the 1,690 bags, on the ground that he was not bound to take a portion of the 2,500 bags, but only the whole at one time. On the 16th December the defendant tendered the value of 2,500 bags which was refused, and on the same day the plaintiffs resold the 1,690 bags. On the 17th December the plaintiffs informed the defendant that 810 bags, the balance of the 2,500 the December shipment, were due on the 18th, and they did arrive on the 19th, but were refused by the defendant on the same ground as before, and they were accordingly resold by the plaintiffs. *Held*, that according to the terms of the contract there was a legal and proper tender of the December shipment by the plaintiffs, and that the defendant having committed a breach of the contract in not accepting the bags, the plaintiffs were justified in reselling them at once and suing for damages.

SIMSON v. GORA CHAND DOSS IX 473

Surety—Lex Loci Contractus. Under a contract made and to be performed in the territory of an Independent State, between the State and contractors, the latter received an advance of money, for the repayment whereof, in case the contract should fail, a third party became surety to the State. The contract failed and was terminated by the State, to which the surety repaid, on its demand, the money advanced, with some deduction on account of a part performance.

For this amount the surety sued the principals, who were subject to the jurisdiction of the Court in British India. In deciding whether the contract had or had not failed within the meaning of the suretyship undertaken by the plaintiffs—*held* that not the law of British India, but what was in the contemplation of the parties as to the result of the contract when they entered into it, must be regarded.

SUJAN SINGH v. GUNGA RAM VIII 337

To pay for excess land after measurement. See LANDLORD AND TENANT.

Act, s. 11. See WARD OF COURT.

ss. 23 and 30. See GOVERNMENT SECURITIES, CONTRACT FOR SALE OF.

s. 23—*Unlawful agreement—Void consideration—Public policy—Agreement to suppress criminal proceedings.* The plaintiff sued the defendant for possession of a house and premises, which he had bought from the latter. The defence was, that the sale was made for the purpose of raising money to be given to certain third parties as a bribe to induce them to withdraw a charge of criminal breach of trust, which they had preferred against the defendant. The lower Appellate Court held that the defence was bad, on the ground that there was no evidence to show that the plaintiff was a party to, or in any way concerned in, the unlawful agreement, and gave the plaintiff a decree.

Held, that the decree was correct, as there was no evidence to show either that the plaintiff knew of the agreement to suppress the criminal prosecution, or that any money had been paid in pursuance of such unlawful agreement.

RAJKRISTO MOITRO v. KOYLASH CHUNDER BHUTTACHARJEE ... VIII 24

s. 27. See CONTRACT.

s. 62—*Substitution of new contract for old one.* The mere fact of one party alleging that a new contract has been substituted for an old one, does not of itself put an end to the old contract, even as against the party so alleging, unless the allegation is proved to be true.

ROUSHAN BIBEE v. HURRY KRISTO NATH VIII 926

ss. 69 and 70. See CONTRIBUTION, SUIT FOR.

s. 74. See INTEREST.

ss. 170 and 171. See LIEN FOR WORK DONE ON GOODS.

s. 264. See PARTNERSHIP.

s. 265. See JURISDICTION.

Contribution, suit for—

Decree against several defendants jointly—Jurisdiction of Small Cause Court—Second appeal—Contract Act (IX of 1872), ss. 69, 70. A suit for contribution not founded upon contract, but in respect of money for which the plaintiff and the defendants in the contribution-suit had been by a former decree made jointly liable, is not within the cognizance of a Court of Small Causes, which cannot deal with questions of equity. A second appeal will, therefore, lie in such a suit.

Ram Bux Chittangeo v. Modhoocondun Paul Chowdhry followed. *Nath Prasad v. Baij Nath* distinguished.

Quere.—Whether a suit for contribution, where both plaintiff and defendants were liable for the money paid by the plaintiff, fall within the scope of either s. 69 or s. 70 of the Contract Act, which seems rather to contemplate persons who not being themselves bound to pay the money, or to do the act, do it, under circumstances which give them a right to recover from the person who has allowed the payment to be made and has benefited by it?

FUTTEH ALI v. GUNGANATH ROY ... VIII 113

See SMALL CAUSE COURT, JURISDICTION OF.

Government revenue—Payment by one co-sharer for another. Where a co-sharer of a portion of a talook is compelled to pay a quota of the Government revenue due on account of a share, not his own, in order to save the portion of the talook from being sold, he is entitled to a charge upon such share for the money so paid, and such share should be charged even when it has passed subsequently into the hands of a third party. *Enayet Hossain v. Muddun Monce Shahoon* followed.

NOBIN CHUNDER ROY v. RUP LALL DAS ... IX 377

Conveyance—

Avoidance of. See MORTGAGE.

By presumptive heir. See HINDU LAW, WIDOW.

Conviction—

Necessity for alteration of. See REVISION.

On trial improperly originated. See CRIMINAL PROCEDURE CODE, 1872, s. 349.

Cooly—

Employed by servant to carry liquor. See BENGAL EXCISE ACT, 1878, ss. 53, 60, 61.

Co-owners—

In Ship. See JURISDICTION.

Coparcener's—

Rights in moveable property, suit to determine. See SMALL CAUSE COURT, MOFUSSIL.

Co-proprietors—

See LAND REGISTRATION ACT.

Corpus of Estate—

See LIMITATION ACT, 1877, SCHED. II, ART. 123.

Co-sharer—

Payment of revenue by one. See CONTRIBUTION, SUIT FOR.

Co-sharers—

See ENHANCEMENT OF RENT, SUIT FOR : PARTIES : SALE FOR ARREARS OF RENT.

Alienation by one of several. See LANDLORD AND TENANT.

Indigo cultivation—Lease by one co-sharer—Landlord and tenant—Joint property—Estoppel. A and B were joint owners of a certain piece of land. In the year 1874, A leased his share to the defendant for a term ending in October 1880, for the purpose of growing indigo. At the same time B leased his share to the defendant for the same purpose for a term ending in October 1881. A and B sold their shares to the plaintiff in the year 1879. In January 1881, plaintiff sued to prevent the defendant from growing indigo on the land and for khas possession, on the ground that the lease of A's share having expired, the defendant was not entitled to retain the land for the purpose of growing indigo under the lease given by B.

Co-sharers—(continued.)

Held, that the plaintiff having by his own act become the owner of both shares, he could not, as owner of one share, exercise a right which he was precluded from exercising as owner of the other share; and that the suit should have been dismissed.

HOLLOWAY v. MUDDUN MOHUN LALL ... VIII 446

Parties—Enhancement of Rent—Separation of shares—Act XI of 1859, s. 10. Two co-sharers, joint owners of a zamindari, caused their shares to be separately registered in the Collector's office under s. 10, Act XI of 1859. Subsequently one of the co-sharers sued certain persons (who held ryoti tenures in the co-sharers' zamindari) for enhancement of rent without making the other co-sharer a party.

Held, that no such suit would lie.

Guni Mahomed v. Moran followed.

JOGENDRO CHUNDER GHOSE v. NOBIN CHUNDER CHOTTOPADHYA ... VIII 353

Removal of building erected by one of several co-sharers—Acquiescence. In a case where a permanent building has been erected by some or one of several co-sharers on the land jointly held, and another co-sharer subsequently seeks to have the building removed, the principle upon which the Court acts is, that though it has a discretion to interfere and direct the removal of the building, this is not a discretion which must necessarily be exercised in every case; and, as a rule, it will not be exercised unless the plaintiff is able to show that injury has accrued to him by reason of the erection of the building; and, perhaps further, that he took reasonable steps in time to prevent the erection.

NOCURY LALL CHUCKERBUTTY v. BINDABUN CHUNDER

CHUCKERBUTTY ... VIII 708

Under age, relation of manager of joint estate to. See GUARDIAN.

Costs—

See APPEAL: MORTGAGE.

Appeal, abatement of—Death of appellant—No application for substitution—Civil Procedure Code (Act X of 1877), ss. 582, 368, 365, and 366. Per MITTER, J. (GARTH, C. J., *dubitante*). Notwithstanding that s. 582 of the Code of Civil Procedure does not expressly direct that the word 'plaintiff' occurring in s. 366 shall be held to include an 'appellant,' yet the power conferred by s. 366 on the Court of original jurisdiction to award costs against the estate of a deceased plaintiff, may, by analogy, be taken to be conferred on the Appellate Court.

Lakshmibai v. Balkrishna followed.

RAJMONEE DABEE v. CHUNDER KANT SANDEL ... VIII 440

Liability of shares of members of joint-family for. Pending an appeal, the plaintiff, who was the appellant, died, leaving one adult and four minor sons. The adult son prosecuted the appeal, which was dismissed, as was the suit in the Court below, with costs. The decrees for costs were sold by the defendant to a third person, who caused certain property which belonged to the estate of the plaintiff to be sold in execution. *Held*, in a suit by the minor sons to recover possession of the shares in the property sold, that as all the sons were interested in the litigation all their shares were liable for the costs, and the suit was dismissed.

JUTADHARI LAL v. RUGHOOBEER PERSAD ... IX 508

In Criminal Court. See MALICIOUS PROSECUTION.

Practice—Grounds of appeal. If grounds of appeal which are absolutely untenable are joined with grounds which are tenable, in order to bring a case within the rule as to the value authorizing an appeal as of right, this matter may be considered in regard to the question of costs.

HURRO DURGA CHOWDHURI v. SURUT SUNDARI DEBI ... VIII 332

Set-off of costs ordered on the disposal of a preliminary point against costs awarded at the final disposal of the suit—Costs of partly successful appeal. It is not the usual practice, when costs of an interlocutory proceeding have been disposed off, to consider that an award of the general costs of the suit interferes with the order as to the partial costs. A prior decree having given the costs incurred on the disposal of a preliminary point to the party successfully raising it, a later decree without expressly referring to the former, gave the costs of the suit, generally, to the opposite side. *Held*, that the costs due under the prior decree should be set off against those due under the later. Although an appellant only partly succeeded in his appeal, the whole of his claim having been opposed in the Courts below on an untenable ground, *held*, that there was no reason for departing from the general rule that the defeated party should pay the costs.

RADHAPERSAD SINGH v. RAM PARMESWAR SINGH ... IX 797

Counsel—

Right of, to inspect writing. See CRIMINAL PROCEEDINGS.

Court, Discretion of—

See CRIMINAL PROCEDURE CODE (1872), s. 263.

Court Fees Act (VII of 1870)—

s. 7, cl. 5, *Subdivn. (a)*—*Subordinate tenure-holder—Assessment of court-fee in suit for possession of a fractional part of an estate.* The assessment of the court-fee in a suit by a subordinate tenure-holder to recover possession of a definite portion of an entire estate paying a permanently-settled annual revenue to Government, should be made under the first part of subdivision (a), cl. 5 of s. 7 of the Court Fees Act.

Chedi Lal v. Kirath Chand dissented from.

HUBIBUL HOSSEIN v. MAHOMED REZA VIII 192

s. 17—*Suit for possession and mesne profits—Stamp-fee payable on appeal.* For the purposes of determining the stamp-fee payable on an appeal to the High Court, in a suit for possession and for mesne profits, the claim for possession and mesne profits is to be taken as one entire claim.

KISHORI LAL ROY v. SHARUT CHUNDER MOZOOMDAR VIII 593

Art. vi, cl. 17, *Sched. ii*—*Stamp on memorandum of appeal in partition-suit—Valuation of suit.* The stamp-fee payable on appeals to the High Court in suits asking for "partition, the separation of a share and for khas possession of that share after separation," is that leviable under art. vi, cl. 17, sched. ii of the Court-Fees Act.

For the purpose of jurisdiction the Court should be guided by the value of the property in suit, but the amount of the stamp-fee should be governed by a different principle.

KIRTY CHURN MITTER v. AUNATH NATH DEB VIII 757

Art. 11, cl. (b), *sched. ii*—*Appeal from order under s. 331 of the Civil Procedure Code (Act X of 1877) as amended by s. 52 of Act XII 1879.* Appeals from orders under s. 331 of Act X of 1877, as amended by s. 52 of Act XII of 1879, are chargeable with the same court-fee as is required in the case of appeals from decrees.

MAHBUBAN v. UMRAO BEGUM. SHAYAMA SUNDURI DASI v. ROBERT WATSON AND CO. VIII 720

Art. 17, cl. 12, *Sched. iv*—*Stamp-duty on appeals arising out of suits under s. 77 of the Registration Act (III of 1877).* The court-fees payable on all appeals to the High Court arising out of suits brought under s. 77 of the Registration Act of 1877, is a fee of ten rupees, irrespective of the value of the suit.

JANTOO v. RADHA CANTO DOSS VIII 515

Court of Wards Act, 1879—

See WARD OF COURT.

Covenant—

To forfeit lease if rent be unpaid. See BENGAL ACT VIII OF 1869, s. 52.

To repay, absence of. See MORTGAGE.

Creditor—

Of deceased mahomedan, suit by, against heir. See MAHOMEDAN LAW, DEBTS.

Of vendor, right of. See LIEN.

Criminal act of Servant—

See MASTER AND SERVANT.

Criminal Proceedings—

Agreement to suppress. See CONTRACT ACT, s. 23.

Evidence—Writing to refresh memory—Right of counsel to inspect the writing—Neglect to exercise such right—Deposition of medical witness—Criminal Procedure Code (Act X of 1872), ss. 240, 323—Duty of a Judge when charging a jury—constructive murder under s. 340 of Penal Code (Act XLV of 1860)—Effect on others charged under s. 149—Irregularities in procedure and admission of evidence.

Per FIELD, J.—The grounds upon which the opposite party is permitted to inspect a writing, and to refresh the memory of a witness, are three-fold :—(i) to secure the full benefit of the witness's recollection as to the whole of the facts ; (ii) to check the use of improper documents ; (iii) to compare his oral testimony with his written statement.

Criminal Proceedings—(continued.)

Per FIELD, J.—The opposite party has a right to look at any particular writing before or at the moment when the witness uses it to refresh his memory in order to answer a particular question; but if he then neglects to exercise his right, he cannot continue to retain the right throughout the whole of the subsequent examination of the witness.

Per FIELD, J.—Under the provisions of s. 323 of the Code of Criminal Procedure, the examination of a medical witness taken and duly attested may be given in evidence in any criminal trial; but in order that such evidence may be admissible against any individual accused person, the examination must have been taken in the presence of the accused person.

Per FIELD, J.—It is the duty of a Judge to give a direction upon the law to the jury so far as to make them understand the law as bearing upon the fact; and if he does not give them an explanation of the law sufficiently comprehensive to enable them to decide the particular issue, it is a misdirection.

Per FIELD, J.—Where a prisoner is constructively guilty of murder under s. 34 of the Penal Code, it is doubtful if he can be said to have committed the offence of murder within the meaning of s. 149, so as to make other prisoners, by a double construction, guilty of murder.

Per FIELD, J.—Irregularities under s. 240 of the Criminal Procedure Code in the selection of the jurors, and in the admission of the deposition of a medical witness treated, it not being shown that the prisoners had been thereby prejudiced, as being objections which ought not to be entertained for the purpose of interfering with the verdict, regard being had to the provisions of s. 283 of the Criminal Procedure Code and s. 167 of the Evidence Act.

IN THE MATTER OF THE PETITION OF JHUBBOO MAHTON. THE EMPRESS
v. JHUBBOO MAHTON VIII 739

Reasons for finding of Magistrate in case of conviction to be recorded—Criminal Procedure Code (Act X of 1872), s. 227, cl. (h)—Adding new charges. A Magistrate, in cases where no appeal lies, is bound to record a brief statement of his reasons for convicting an accused.

Where a person is arrested, and certain charges are entered against him in the Police book, he should not, on the day of trial, be called upon to meet other charges without previous intimation being given to him of the additional charges.

IN THE MATTER OF THE PETITION OF RADOINATH SHAHA. THE EMPRESS v.
RADOINATH SHAHA VIII 195

Criminal Procedure Code—

Act X of 1872—

Chap. XVII. See APPEAL.

s. 36. See APPEAL IN CRIMINAL CASES.

ss. 47, 491—*District Magistrate—Withdrawal of Case—Act XI of 1874, s. 6.* The provisions of s. 47 of the Code of Criminal Procedure, Act X of 1872, as amended by s. 6 of Act XI of 1874, are wide enough to empower a District Magistrate to withdraw a case falling under s. 491 of the same Code.

IN THE MATTER OF THE PETITION OF DINENDRO NATH SHANIAL ... VIII 851

s. 48. See TRANSFER OF CASE.

s. 70. See JURISDICTION OF CRIMINAL COURTS.

s. 119. See EVIDENCE.

s. 172. See ABSCONDING OF ACCUSED.

s. 227, cl. (b); 240; 323. See CRIMINAL PROCEEDINGS.

s. 263—*Discretion of Court—Verdict of jury—Principles guiding the Court's discretion under s. 263 of the Criminal Procedure Code (Act X of 1872)—Intention and inference of fraud.* Notwithstanding the large discretionary powers vested in the High Court under s. 263 of Act X of 1872, the Court will adhere generally to the principle of the Courts in England, viz., that the Court will not set aside the verdict of a jury unless it be perverse and potently wrong or may have been induced by the error of the Judge; and when the Court is asked to do so on the ground that the verdict is against the weight of evidence, the question is, not whether the learned Judge who tried the case was or was not dissatisfied with the verdict, or whether he would have come to the same conclusion as the jury, but whether the verdict was such as reasonable men ought to have come to. Where a person, in the course of an action brought against him to gain possession of a property, uses a forged document for the purpose of supporting his title, though there may be no

Criminal Procedure Code—(continued.)

Act X of 1872—(continued.)

necessity for the use of it, such a user is clearly fraudulent. A general intention to defraud, without the intention of causing wrongful gain to one person or wrongful loss to another, would, if proved, be sufficient to support a conviction; and such an intention is a necessary inference which the jury should be directed to draw, if they are satisfied that the accused has uttered a forged document as a true one, meaning it to be taken as such, and knowing it to be forged. Under s. 263 of the Code of Criminal Procedure, a Court is authorized to ask the jury such questions as are necessary to ascertain what their verdict really is; but where the verdict, although perhaps erroneous, is not ambiguous, it is the duty of the Judge to record it without further question.

IN THE MATTER OF DHUNUM KAZEE ... IX 59

- s. 295. See RECORD OF INFERIOR COURT.
- ss. 295—297. See MAGISTRATE, POWER OF.
- s. 296. See REVISION.
- s. 297. See SUPERINTENDENCE OF HIGH COURT.
- s. 323. See CRIMINAL PROCEEDINGS.
- s. 346. See CONFESSION.

s. 349—*Acquittal of prisoner—Withdrawal of pardon granted to approver after judgment of acquittal—Conviction on trial improperly originated, Power of High Court to set aside.* At a sessions trial, the Judge, after acquitting the prisoner, passed an order withdrawing a pardon already granted to an approver (who had given his evidence as such approver before the Sessions Court), and ordered his commitment.

The approver was charged, tried, and found guilty. *Held* by MITTER, J., that the order withdrawing the pardon and committing the approver was contrary to the provisions of s. 349 of the Criminal Procedure Code, the words "before judgment has been passed" being words inserted in the section to put a limit to the time within which the power of withdrawal of the pardon conferred in the Court of Sessions may be actually exercised; and that therefore the trial of the approver was illegal.

The power of directing commitments conferred upon the Sessions Court by s. 349 of the Criminal Procedure Code can be exercised only before judgment has been passed.

Held by MACLEAN, J., that it is not necessary that the order should be made before judgment is passed, but that it must appear to the Judge before he passes judgment, that the conditions of the pardon have not been complied with; and that, in the present case, it was impossible to hold, that because the actual order of commitment of the accused was written (although in the judgment) after the acquittal, therefore it did not appear to the Judge before passing judgment that there were grounds for his order.

Per MACLEAN, J.—The High Court may, without reference to the Local Government, set aside a conviction made upon a trial improperly originated.

IN THE MATTER OF THE PETITION OF NOBIN CHUNDRA BANIKYA.

THE EMPRESS v. NOBIN CHUNDRA BANKYA ... VIII 560
 ss. 445, 446, 453—*Penal Code (Act XLV of 1860), ss. 167, 466, 471—Separate trials—Offences of the same kind—Amendment of charge.* The prisoner was committed for trial on fifty-five charges, including three charges under ss. 167, 466, and 471 of the Penal Code. At the trial before the District Judge sitting with assessors, the Court informed the prisoner that the trial would be confined to the three charges last mentioned. The prisoner was convicted on these, but the Court allowed evidence to be adduced by the prosecution on all the remaining charges, and in respect of these the prisoner was acquitted. On appeal to the High Court,—

Held, that the District Judge should have exercised the powers conferred on him by ss. 445 and 446 of the Code of Criminal Procedure, and then have proceeded to hold separate trials; that he should not have tried together the charges under ss. 167 and 466 of the Penal Code, as the offences were not of the same kind within the meaning of s. 453 of the Code of Criminal Procedure; but the convictions on these charges were upheld, as it did not appear that the prisoner had been prejudiced by the mode of trial adopted.

IN THE MATTER OF THE PETITION OF SREENATH KUR. THE EMPRESS v. SREENATH KUR ... VIII 450

s. 453—*Penal Code (Act XLV of 1860), ss. 411, 413—Offences of different kinds—Procedure.* A prisoner cannot be tried at the same trial for receiving or retaining (s. 411, Penal Code), and habitually receiving or dealing in (s. 413),

Criminal Procedure Code—(continued)**Act X of 1872—(concluded.)**

stolen property. The proper course is to try the accused first for the offences under s. 411, and if he is convicted, to try him under s. 413, putting in evidence the previous convictions under s. 411, and proving the finding of the rest of the property in respect of which no separate charge, under s. 411, could be made or tried by reason of the provisions of s. 453 of the Criminal Procedure Code.

IN THE MATTER OF THE PETITION OF UTTOM KOONDoo. THE EMPRESS
v. UTTOM KOONDoo VIII 634

See JOINDER OF CHARGES.

s. 454—*Committal on two separate charges—trial as for one offence—Separate trial.* Where persons are charged with rioting and also with causing hurt, although they may be tried as for one offence under s. 454 of the Criminal Procedure Code, it is not illegal to try them for both offences separately.

IN THE MATTER OF THE PETITION OF AMERUDDIN. AMERUDDIN v. FARID
SARKAR... .. VIII 481

s. 468. See SANCTION TO PROSECUTION.

s. 492. *Form of summons under.* See RECOGNIZANCE TO KEEP PEACE.

ss. 504, 505. See SECURITY FOR GOOD BEHAVIOUR.

s. 518—*Jurisdiction of Magistrate—Protection of property.* A Magistrate has no jurisdiction to make an order under s. 518 of the Code of Criminal Procedure merely for the protection of property.

IN THE MATTER OF THE PETITION OF PRAYAG SINGH ... IX 103

See SUPERINTENDENCE OF HIGH COURT.

Perpetual Injunction—Magistrate, power of. A Magistrate has no power to pass a perpetual injunction under s. 518 of the Code of Criminal Procedure.

Gopi Mohun Mullik v. Taramoni Chowdhurani followed.

BRADLEY v. JAMESON VIII 580

s. 521. See MAGISTRATE, POWER OF.

s. 536. See MAHOMEDAN LAW, MAINTENANCE.

s. 579. See ARMS ACT, 1878.

Act X of 1882—

s. 123. See APPEAL IN CRIMINAL CASE.

s. 133—*Nuisance—Erection of buildings—Unconditional order.* Every order made under s. 133 of the Code of Criminal Procedure, Act X of 1882, must appoint a time within which, and a place where, the person to whom it is directed may appear before the Magistrate, and move to have the order set aside or modified. No unconditional order can be made under that section.

THE EMPRESS v. BROJOKANTO ROY CHOWDHURI ... IX 637

s. 309—*Trial by assessors—Evidence—Summing up of evidence—Delivery of opinions assessors—Sessions Judge, Duties of.* The power of summing up the evidence given by s. 309 of the new Code of Criminal Procedure, Act X of 1882, is intended to be exercised in long or intricate cases, and the Sessions Judge should confine himself to summing up the evidence and should not obtrude on the assessors his opinion of the worthlessness or otherwise of certain portions of the evidence. The Sessions Judge should also conform strictly to the words of s. 309, and require *each* assessor to state his opinion orally. The Sessions Judge should not utilize the services of the pleader for the prosecution for the purpose of recording his summing up to the assessors. If he is not capable of recording the substance of it himself, he should employ an independent person for that purpose.

SHADULLA HOWLADAR v. THE EMPRESS ... IX 875

s. 408. See APPEAL IN CRIMINAL CASES.

s. 439. See REVISION.

Cross Appeal—

See CIVIL PROCEDURE CODE, 1882, s. 561.

Cross Decrees—

See SET-OFF.

Cultivation—

See LANDLORD AND TENANT.

Custody—

Escape from. See PENAL CODE, ss. 224, 225.

Of children, Right to. See KIDNAPPING.

Custom—

See LIMITATION ACT, 1877, s. 26.

Cuttack, Tenures in—

See LANDLORD AND TENANT.

Damages—

See MALICIOUS PROSECUTION : MESNE PROFITS.

For trespass, Suit for. See SPECIAL APPEAL.

Measure of. See MORTGAGE.

Right to sue for. See SALE IN EXECUTION OF DECREE.

Suit for—Neglect of tenants to pay Road Cess or Public Works Cess—Beng. Act X of 1871, s. 25—Beng. Act VIII of 1869, s. 44. Tenants are liable in damages for neglect to pay road and public works cesses.

SARODA PROSAD GANGOOLY v. PROSUNNO COOMAR SANDIAL ... VIII 290
See CIVIL PROCEDURE CODE, 1877, s. 43.

Daughter—

Share of unmarried. See HINDU LAW, PARTITION.

Succession of, before marriage. See HINDU LAW, INHERITANCE.

Daughter-in-law—

See HINDU LAW, INHERITANCE.

Death of—

Appellant. See COSTS.

Sole Defendant. See APPEAL.

Debtor and Creditor—

See HINDU LAW, CONTRACT.

Debts—

Apportionment of. See PARTITION.

Direction in will for payment of. See SALE IN EXECUTION OF DECREE.

Due by ancestor, Decree against heirs for. See SALE IN EXECUTION OF DECREE.

Legally contracted by father. See HINDU LAW, ALIENATION.

Secured by mortgage of immovable property. See SALE IN EXECUTION OF DECREE.

Debutter Lands—

Suit to set aside alienation of. See PARTIES.

Declaration of Title—

And possession, Suit for. See CIVIL PROCEDURE CODE, 1877, s. 43.

Declaratory Decree—

Suit for. See HINDU LAW, REVERSIONER : JURISDICTION OF REVENUE COURT.

Hindu Law—Reversioner—Alienation by Hindu Widow—Parties—Vested and contingent interest—Specific Relief Act (I of 1877), s. 42. The plaintiff, claiming to be entitled in reversion to certain property on the death of his grandfather's widow, sued for a declaration that certain alienations made by the widow were void as against him. To this suit the widow and her alienee were defendants. The defence was, that the plaintiff was not the reversioner, and certain parties, who claimed to be the real reversioners, intervened, and were made defendants by order of the Court. The plaintiff obtained a declaration of his reversionary right, and the deeds of sale were, on certain conditions, declared void as against him. The intervenors appealed to the High Court.

Held on appeal, that, notwithstanding the provisions of s. 42 of the Specific Relief Act (I of 1877), the plaintiff was not entitled to the relief sought, and that the defendants, who claimed as reversioners, should not have been made parties to the suit.

Section 42 of the Specific Relief Act refers only to existing and vested rights, and not to contingent rights.

GREEMAN SINGH v. WAHARI LALL SINGH ... VIII 12

Specific Relief Act I (of 1877), s. 42. Certain trusts of a house were declared in favour of A and B for life, subject to forfeiture upon the happening of particular events, and further trusts in favour of the issue of A and B were also declared. The settlor died leaving a will under which C took an estate for his life with remainder to the settlor's son E absolutely. E assigned his interest in the trust

Declaratory Decree—(continued.)

promises to the plaintiff, who now sued the *cestuis que trustent* and C, praying that, in the events which had happened, it might be declared that the life-estates of A and B had been forfeited. He also asked for various declarations as to his rights.

Held, that no declaratory decree could be made.

BHUVENDRO BHUSAN CHATTERJEE v. TRIGUNANATH MOOKERJEE ... VIII 761

See CIVIL PROCEDURE CODE, 1859, SS. 7 AND 15: OUDH ESTATES ACT, SS. 8, 9, AND 10: SMALL CAUSE COURT, MOFUSSIL: SPECIFIC RELIEF ACT, s. 19.

Decree—

Against father of joint family. See HINDU LAW, ALIENATION.

Heirs for debt due by ancestor. See SALE IN EXECUTION OF DECREE.

Insolvent. See SALE IN EXECUTION OF DECREE.

Construction of decree—Mortgage-decree directing accounts, &c., to be taken and report given—Tender of principal and interest before report—Refusal to accept tender and subsequent charge of interest. A decree directed accounts to be taken of what was due for principal and interest under a mortgage, such interest to be allowed "up to the time of payment hereinafter mentioned or until six months from the date of the decree," whichever first should happen; and further directed the plaintiff to pay what should be reported due for principal and interest up to the date of payment and costs, with interest at 6 per cent. from the date of taxation until payment, within six months after the Registrar should make his report. The plaintiff tendered a sum sufficient to cover the principal and interest due, but insufficient to cover costs, at a time prior to the drawing up of the Registrar's report. *Held*, that the payment of principal and interest "hereinafter mentioned" referred to a time after the Registrar had made his report, because the sum to be paid was a sum reported to be due by the Registrar, and that, therefore, a tender made before the Registrar's report was given was not a sufficient tender to stop interest from the date of the tender.

ADMINISTRATOR-GENERAL OF BENGAL v. MIRZA AHMED BEGG ... IX 33

Execution of decree—Interest—Mesne profits. A decree stated that mesne profits were to be recovered "with interest from the date of their ascertainment." *Held*, that the Court executing this decree had no authority to allow interest year by year upon the collections which ought to have been received.

HURRO DURG CHOWDHRAIN v. SURUT SUNDARI DEBI ... VIII 332

Form of decree—Drawing up of decree—Duty of judgment-debtor and decree-holder. It is the duty of the judgment-debtor, as well as the decree-holder, to see that the decree is properly drawn up; and if he does not do so, the Court will execute it according to its terms.

KRISHNOKISHORE DUTT v. ROOPLALL DASS ... VIII 687

Form and contents of decree. Decrees of Court should be drawn up by the Judge in such a way as to make them self-contained and capable of execution without referring to any other document.

JOYTARA DASSEE v. MAHOMED MOBARUCK ... VIII 975

Mesne profits (Wasilat)—Local enquiry. A decree declared the plaintiff entitled to the possession of land with wasilat from a date named, directing "the amount thereof to be ascertained on local enquiry," and to bear interest from the date of its ascertainment until payment, without saying more. *Held*, that the decree-holder was entitled to wasilat until the date of delivery of possession to him.

Semble.—It was not necessary for the judicial officer who made the enquiry to hold a Court on the spot.

FAKHARUDDIN MAHOMED ASHAN v. THE OFFICIAL TRUSTEE OF BENGAL VIII 178

Sale of—Decree on mortgage-bond—Registration—Right to execute decree. A decree-holder purported to sell to A, by private sale, all his right, title, and interest in a mortgage-decree obtained by him in a suit on a mortgage-bond against the mortgagor. The deed of sale was not registered. Afterwards, by a registered deed of sale, A conveyed all his right, title, and interest in the same decree to B. *Held*, that the right to execute the decree as a mortgage-decree did not pass to B.

KOOB LAIL CHOWDHRY v. NITYANUND SINGH ... IX 839

Suit by purchaser at sale in execution of decree on mortgage against assignee of mortgagor. Form of decree discussed, where a person who, at a sale in execution of a mortgage-decree, has purchased a portion of the mortgaged property, brings a suit for that portion against the assignee in possession as a mortgagor.

BEPIN BEHARI BUNDOPADHYA v. BROJO NATH MOOKHOPADHYA ... VIII 357

Decree—(continued.)

- Absolute, service of, on respondent.* See DIVORCE ACT, s. 16.
- Against defendants jointly.* See CONTRIBUTION, SUIT FOR.
- Agreement to pay debt due under, by instalments.* See KISTIBANDI.
- Ex-parte.* See 'RES JUDICATA.'
- Ex-parte—After application to defend refused.* See APPEAL.
- Ex parte, setting aside.* See LIMITATION ACT, 1877, ART. 164.
- Form of.* See JURISDICTION OF REVENUE COURT.
- For rent on failure to prove kabuliat.* See PLAINT.
- Not limiting amount of mesne profits.* See EXECUTION OF DECREE.
- Payable by instalments.* See EXECUTION OF DECREE.
- Statement in.* See EVIDENCE ACT, 1872, s. 53.
- Transfer of.* See EXECUTION OF DECREE.

Decree-Holder—

- Duty of.* See DECREE.

Deed—

- Attempt to enforce.* See LIMITATION ACT, 1871, SCHED. II, ART. 93.

Default—

- In payment on due date.* See INTEREST.

Defaulter—

- Purchase by.* See SALE FOR ARREARS OF RENT.

Defence—

- Order for striking out.* See PRACTICE.

Defendant—

- Application to add.* See PARTIES.

Delivery—

- By instalments.* See CONTRACT.
- Of goods.* See EVIDENCE (PAROL EVIDENCE).
- Of possession.* See TRANSFER OF PROPERTY.

Departmental Rules—

- Of treasury.* See PAYMENT INTO COURT.

Deposition—

- Of medical witness.* See CRIMINAL PROCEEDINGS.
- Refusal of application for copies of.* See PRESIDENCY MAGISTRATES' ACT, s. 170.

Direction—

- In will for payment of debts.* See SALE IN EXECUTION OF DECREE.

Directors—

- Discretion of.* See COMPANIES' ACT, s. 34.

Disability—

- Of minority.* See REGISTRATION ACT, 1877, s. 35.
- To sue.* See HINDU LAW, INHERITANCE.

Discharge—

- Purchaser from insolvent before.* See INSOLVENCY.

Discretion—

- Of Court.* See COMPANIES' ACT, s. 34.
- Of Court as to re-hearing.* See REVIEW.
- Of suit.* See APPEAL.

Dismissal—

- For non-appearance.* See CIVIL PROCEDURE CODE, 1877, s. 103: 'RES JUDICATA.'
- On failure to pay summons costs.* See 'RES JUDICATA.'
- Of suit.* See CIVIL PROCEDURE CODE, 1877, s. 57.

Dispossession—

- See LIMITATION ACT, 1877, s. 26: ONUS PROBANDI: POSSESSION.

Distribution—

- Of sale proceeds.* See SALE IN EXECUTION OF DECREE.

District Judge—

- See JURISDICTION.
- Jurisdiction of.* See MINOR.

Divorce—

- See MAHOMEDAN LAW, MARRIAGE.

Divorce Act (IV of 1869)—

s. 16—*Practice—Decree absolute—Service of decree on respondent.* It is not necessary, in order that a decree nisi for dissolution of marriage may be made absolute, that the decree should be served upon the respondent.

HICKS v. HICKS VIII 756

Document—

Construction of. See COMPROMISE.

Documentary Evidence—

Objection as to admissibility of. See EVIDENCE TAKEN ON COMMISSION.

Donor—

Possession retained by. See HINDU LAW, GIFT.

Duly Stamped—

See STAMP ACT, 1879, s. 3.

Dying Statement—

See EVIDENCE.

Easement—

Implied grant—Modes of acquiring easements—Limitation Act (XV of 1877), s. 26.

In a suit for an injunction to restrain the defendant from using a path on the plaintiff's land it appeared that the land held by the plaintiff and defendant had originally belonged to one owner, and that the plaintiff and the defendant had obtained their respective tenements more than twenty years previously. The path had been admittedly made by the original owner, but the plaintiff contended that, when he purchased the land, he had closed the path. This the Munsif disbelieved, and refused the injunction. The District Judge, treating the case as if it fell under s. 26 of the Limitation Act, and being of opinion that the defendant had not proved twenty years' peaceable, open and uninterrupted exercise of the right of way, gave the plaintiff a decree.

Held, that the mode of acquiring an easement provided by s. 26 of the Limitation Act is not the only way in which an easement may be acquired, but an easement may also be acquired by implied grant. In the present case the use of the path might be absolutely necessary to the enjoyment of the defendant's tenement, in which case there would be an easement of necessity; or the use of the path, though not absolutely necessary to the enjoyment of the defendant's tenement, might be necessary for its enjoyment in the state in which it was at the time of severance, and in this case, if the easement were apparent and continuous, there would be a presumption that it passed with the defendant's tenement.

CHARU SURNOKAR v. DOKOURI CHUNDER THAKOOR VIII 956

Right of way—Unity of possession—Severance.

SHAMA CHURN DEY v. CHUNDER COOMAR MOOKERJEE, CHUNDER COOMAR MOOKERJEE v. KOYLASH CHUNDER SETT VIII 677

Right to passage of water—Water, in defined channel. From time immemorial a certain 'al' formed the boundary of two pieces of land belonging to the plaintiffs and the defendants respectively. The plaintiffs' land was on a higher level than that of the defendants, and from time immemorial the surplus water used to flow from the plaintiffs' land through certain passages in the 'al' and across the defendants' land. The defendants closed up the passages and increased the height of the 'al.'

Held, that, it having been established that, for a long series of years, the waters from the plaintiffs' lands had been accustomed to escape in a particular direction, and by certain separate passages across the defendants' land, the defendants could not do anything which would interfere with the plaintiffs' rights in this respect.

IMAM ALI v. PORESH MUNDUL VIII 468

Ejectment—

See BENG. ACT VIII OF 1869, s. 27, 59: LANDLORD AND TENANT: RIGHT OF OCCUPANCY.

Suit for. LIMITATION ACT, 1877, ART. 120: ONUS PROBANDI.

Endowed Property.—

See MAHOMEDAN LAW, WAKF.

Endowment—

See HINDU LAW, ENDOWMENT.

Enhancement of Rent—

See LANDLORD AND TENANT.

Land let for purpose of clearing at certain rent. When land is let for the purpose of clearing jungle, or other reclamation, and on this ground, or any other ground mentioned in the lease, a reduced rent is provided for the first few years, and it is said that the rent is to be at a certain rate as the full rent, such rent is not liable to enhancement.

HURO PRASAD ROY CHOWDHRY v. CHUNDEE CHURN BOYRAGEE ... IX 505

Notice of. See LANDLORD AND TENANT.

Landlord and tenant—Accretion—Arrears of rent. Suit for—Notice of enhancement. When land has accreted to a ryot's holding, the rent paid by the ryot may be enhanced in respect thereof under the provisions of cl. 3, s. 18 of Beng. Act VIII of 1869; and no suit for rent in respect of such accretion will lie unless a proper notice of enhancement has been previously given.

Ramniddhee Manjee v. Parbutty Dasse followed.

BROJENDRA COOMAR BHOOMICK v. WOOPENDRA NARAIN SINGH ... VIII 706

Notice of enhancement—Suit for arrears of rent. The plaintiffs sued for the arrears of rent of the years 1284, 1285, and also for the arrears of rent of the year 1286, the latter at an enhanced rate. The notice of enhancement was not proved, and the defendant insisted that the suit should be dismissed.

Held, that though the notice of enhancement had not been proved, the plaintiffs were not thereby precluded from the arrears of rent at the old rate.

Soorasoodery Dabee v. Golan Ally, Brojomath Tewaree v. Grant, Bhugwan Dutt Jha v. Sheo Mungul Singh, and Bhubo Soondaree Chowdhraim v. Kasheernath Acharjee referred to.

GHUNSHYAM SINGH v. TARA PROSHAD COONDOO.

Notice of. See CIVIL PROCEDURE CODE, 1859, s. 243.

Suit for. See CIVIL PROCEDURE CODE, 1882, ss. 42-43.

Co-sharers—Notice of enhancement—Parties. A and B were talukdars of a certain village, each having an eight annas share. A certain ryot held a jote within the village, in respect of which he paid his rent separately—eight annas to A and eight annas to B. A served a notice of enhancement on the ryot, but the notice was signed by A only, and it did not appear that the consent of B had been previously obtained. A afterwards instituted a suit for arrears of rent at the enhanced rate, making B a defendant to the suit. *Held,* that the notice of enhancement was sufficient to maintain a suit so framed.

BIDHU BHUSHUN BASU v. KOMARADDI MUNDUL ... IX 864

See CO-SHARERS.

Entire Contract—

See LIEN FOR WORK DONE ON GOODS.

Entry in Register—

See EVIDENCE ACT, s. 35.

Equity and good conscience—

Law of. See LANDLORD AND TENANT.

Error—

In title of petition of appeal. See PRACTICE.

Escape—

From custody while being taken before Magistrate. See PENAL CODE, ss. 224, 225.

Estoppel—

See CONTRACT: CO-SHARERS.

Agreement not to appeal—Subsequent appeal. After a plaintiff had obtained a decree, and under it, in execution, arrested his judgment-debtor, the latter filed a petition in Court agreeing not to prefer any appeal against the judgment obtained by the plaintiff, and the judgment-creditor at the same time agreed to release the judgment-debtor from arrest, and to take payment of the sum decreed to him by instalments. An order was passed by the Court embodying this arrangement.

The judgment-debtor, in contravention of this arrangement, preferred an appeal,—*held,* that the judgment-debtor having induced the decree-holder to believe, and having expressly undertaken that he would not prefer an appeal, and having by the representation and undertaking procured his own release from arrest, was estopped from acting contrary to his deliberate representation and undertaking.

PROTAP CHUNDER DASS v. ARATHOON. ARATHOON v. PROTAP CHUNDER DASS ... VIII 455

Estoppel—(continued.)

Evidence Act, s. 115—Sale in execution of decree—Intervenor in Rent Suit. A purchase by a mortgagee, at a sale in execution of a decree upon his mortgage of the right, title, and interest of the mortgagor, who has been estopped from asserting a title to the property as against certain parties, does not place such mortgagee in a better position as regards the estoppel. A suit for rent by a zamindar and patnidar against a darpatnidar, was defeated by the defence of the latter that he had conveyed his interest to others, against whom the former afterwards obtained a decree, and brought the darpatni to sale in execution, buying their right, title, and interest therein himself. From the darpatnidar, who had thus disclaimed title, a third party claimed to be mortgagee, and set up a decree on his mortgage followed by a purchase of the tenure at a sale in execution. He was thereupon allowed to intervene in a suit for rent brought by the zamindar and patnidar against an ijaradar of lands within the darpatni estate. *Held*, that, notwithstanding this purchase, the intervening mortgagee was bound by the estoppel arising out of the mortgagor's disclaimer of title in the suit above-mentioned.

PORESHNATH MUKERJI v. ANATHNATH DEB ... IX 265

Evidence—

See CRIMINAL PROCEEDINGS: 'ONUS PROBANDI.'

Dying Statement—Presence of accused. The dying statement of a deceased person must be taken in the presence of the accused; if not so taken, the writing cannot be admitted to prove the statement made. The statement may be proved in the ordinary way by a person who heard it, and the writing may be used for the purpose of refreshing the witness' memory.

IN THE MATTER OF THE PETITION OF SAMIRUDDIN. THE EMPRESS v. SAMIRUDDIN ... VIII 211

Memorandum made by Police Officer, Refreshing witness' memory—Examination of witness—Criminal Procedure Code (Act X of 1872), ss. 119 and 126. A prisoner on his trial is not entitled to insist that a memorandum made by a Police-Officer under the provisions of s. 119 of the Code of Criminal Procedure shall, in the course of the examination of such officer, be referred to by the latter for the purpose of refreshing his memory.

Reg. v. Uttanchand Kapurchand distinguished.

IN THE MATTER OF THE PETITION OF KALI CHURN CHUNARI.

THE EMPRESS v. KALI CHURN CHUNARI ... VIII 154

Parol Evidence—Proof of delivery—Suit for goods sold and delivered. In a suit, which was brought for the price of goods sold and delivered, the plaintiff swore to the fact of the sale, and tendered in evidence a written admission of the defendant, that the goods had been supplied to him. The writing was rejected as unstamped, and the suit was dismissed.

Held, that the Judge should have allowed the plaintiff an opportunity of proving by oral testimony the delivery of the goods sold, and their value.

BINJA RAM v. RAMAMOHUN ROY ... VIII 282

Possession—Thak Maps. Value of thak maps as evidence of possession discussed.

JOYTARA DASSEE v. MAHOMED MOBARUCK ... VIII 975

Admissibility of. See CONFESSION.

Criminal Procedure Code (Act X of 1872). ss. 119, 323—Statements of witnesses to a Police Officer during an investigation—Refreshing memory—Medical witnesses, Evidence of—Opinion of experts how elicited—Examining at Sessions trial medical witness who has been examined before the Magistrate—Post-mortem examination reports. In giving evidence a Police Officer may refresh his memory by referring to documents in which he has, under s. 119 of Act X of 1872, reduced into writing statements of persons examined by him during an investigation, but the documents themselves cannot be used as evidence, and a Judge should not read such documents to a jury in order to point out discrepancies between the evidence and previous statements of the witnesses. The evidence of a medical man who has seen, and has made a *post-mortem* examination of the corpse of the person touching whose death the inquiry is, is admissible, firstly, to prove the nature of injuries which he observed; and, secondly, as evidence of the opinion of an expert as to the manner in which those injuries were inflicted and as to the cause of death. A medical man who has not seen the corpse is only in a position to give evidence of his opinion as an expert. The proper mode of eliciting such evidence is to put to the witness hypothetically the facts which the evidence of the other witnesses attempts to prove, and to ask the witness's

Evidence—(continued.)

opinion on those facts. Section 323 of Act X of 1872 does not in any way preclude the Judge at a Sessions trial from calling and examining the medical witness who has been examined before the Magistrate, and in every case in which the deposition taken by the Magistrate is essentially deficient or requires further elucidation, such witness should be called and examined by the Sessions Judge. A medical man in giving evidence may refresh his memory by referring to a report which he has made of his *post-mortem* examination, but the report itself cannot be treated as evidence, and no facts can be taken therefrom.

ROGHUNI SINGH v. THE EMPRESS ... IX 455

Local investigation—Judgment on facts observed by Judge but not proved. In a suit respecting boundaries, the Munsiff, before settling the issues in the case, visited the locality, and in his judgment relied upon certain facts which had come under his observation during his visit. These facts were not proved by any evidence, and the Munsiff did not make any report as to them. The District Judge reversed the Munsiff's decision on the oral evidence given in the case, holding that he could not take notice of the facts observed by the Munsiff himself, and on which he had based his judgment. *Held*, that though the result of the inquiry instituted by the Munsiff was not evidence according to the definition in Evidence Act, it was a matter before the Court which might have been taken into consideration. *Held*, also, that the Munsiff should have put the result of his investigation upon paper.

JOY CQOMAR v. BUNDHOO LALL ... IX 363

Registration of tenure—Common registry Act XI of 1859, s. 39. The fact that a tenure is registered in the Common registry under Act XI of 1859, s. 39, is not of itself *prima facie* evidence that such a tenure exists.

LUKHYNARAIN CHUTTQADHYA v. GORACHAND GOSSAMY ... IX 116

Admissibility of. See REGISTRATION ACT, 1877, ss. 17; 49; STAMP ACT, 1879.

Contradicting document. See EVIDENCE ACT, s. 92.

Failure to produce, at hearing. See APPEAL.

Of possession. See ONUS PROBANDI.

Evidence taken on Commission—

Commission—Documentary evidence, objection to admissibility of—Evidence taken by Commissioner beyond jurisdiction—Notice to produce original document—Refusal to produce—Evidence Act (I of 1872), s. 63, sub-section 3, 65, 66. If, when evidence is taken before Commissioners, a document is tendered and objected to on any ground, the opposite party is not precluded from objecting to the document at the trial on any other ground. It is not necessary to state all the objections to the admissibility of a document when it is first tendered, but the party objecting is at liberty to take any fresh objection whenever the party producing the document tenders it in evidence.

Where a commission to take evidence is issued to any place beyond the jurisdiction of the Court issuing the commission, it is not necessary, in order to admit secondary evidence of the contents of a document, that the party tendering it should have given notice to produce the original, nor is it necessary for him to prove a refusal to produce the original.

RALLI v. GAU KIM SWEE ... IX 939

Evidence Act—

I of 1872, s. 32, cl. 6—*Horoscope.* In a suit to recover possession of immoveable property, the plaintiff tendered in evidence a horoscope which he said had been given to him by his mother, and had been seen by members of his family and used on the occasion of his marriage. He was unable to say by whom the horoscope, or an endorsement on it, which purported to state what his name was, had been written. *Held*, that the horoscope was not admissible under s. 32, cl. 6 of the Evidence Act.

RAMNARAIN KALLIA v. MONEE BIBEE AND RAMNARAIN KALLIA v. GOPAL DOSS SING ... IX 618

s. 35—*Admission—Statement in decree—Practice of Mofussil Courts.* In a suit for possession of a fishery, the plaintiff sought to put in evidence an admission alleged to have been made in the year 1818 by the defendant's predecessor in title in a written statement in a former suit. The only evidence of the admission was that contained in the decree in the former suit, the ordinary party of which was prefaced with a short statement of the pleadings in the suit. Under the old practice of Mofussil Courts, it was the duty of the Court to enter in the decree an abstract

Evidence Act—(continued.)

of the pleadings in each case. *Held*, that the statement in the decree was evidence of the admission under s. 35 of the Evidence Act (Act I of 1872). *Lekraj Kuar v. Mahpal Singh*, referred to.

PARHUTTY DASSI *v.* PURNO CHUNDER SINGH ... IX 586

Evidence contradicting document—Mortgage—Conditional sale. It does not necessarily follow from s. 92 of the Evidence Act that subsequent conduct and surrounding circumstances may not be given in evidence for the purpose of showing that what on the face of it is a conveyance is really a mortgage. This rule turns on the fraud which is involved in the conduct of the person who is really a mortgagee, and who sets himself up as an absolute purchaser, and the rule of admitting evidence for the purpose of defeating this fraud would not apply to an innocent purchaser without notice of the existence of the mortgage, who merely bought from a person who was in possession of title deeds and was the ostensible owner of the property.

KASHI NATH DASS *v.* HURRIHUR MOOKERJEE ... IX 898

Land Registration Act (Beng. Act VII of 1876), s. 55—Entry in register, effect of—Question of possession. Entries made under Beng. Act VII of 1876 by the Collector recording the names of proprietors of revenue-paying estates are not evidence under s. 35 of the Evidence Act of the fact of proprietorship. That section relates to the class of cases where a public officer has to enter in a register or other book, some actual fact which is known to him, *e.g.*, the fact of a death or a marriage. The entry by the Collector in the register under Beng. Act VII of 1876 is not, properly speaking, the entry of a fact. It is a statement that the person is entitled to the property; it is the record of a right, not of a fact. *Per GARTH, C.J.—Sembly*, that s. 55 of Beng. Act VII of 1876 constitutes the Collector a competent Court under particular circumstances for determining as between two disputants the question of possession, and his recorded decision upon that question in the register might be evidence of the fact of possession as between those two parties. *Ram Bushan Mahlo v. Jebli Mahlo*, explained.

SARASWATI DASI *v.* DHANPAT SINGH ... IX 491

s. 63, cl. 3, and ss. 65 and 66. See EVIDENCE TAKEN ON COMMISSION.

s. 89—*Measurement charts.* Chittas made by Government for its own private use are nothing more than documents prepared for the information of the Collector, and are not evidence against private persons for the purpose of proving that the lands described therein are or are not of a particular character or tenure.

RAM CHUNDER SAO *v.* BUNSEEDHUR NAIK ... IX 741

s. 92. See GOVERNMENT SECURITIES, CONTRACT FOR SALE OF.

Mortgage—Sale—Conduct of parties—Oral evidence when admissible to prove that an apparent sale is a mortgage—Admissibility of parol Evidence to vary a written contract. The defendant, in answer to a suit by the plaintiff for possession of certain land, alleged that the kobala, which purported to be an out-and-out sale in favour of the plaintiff, and on which the plaintiff based his title to the property, was intended by the parties to operate only as a mortgage; and to prove such allegations tendered evidence of the circumstances under which the kobala was executed, and of the conduct of the parties to show that the document had all along been treated as a mortgage and intended to operate as such. *Held*, that such evidence was admissible. *Held*, also, that s. 92 of the Indian Evidence Act made no alteration in the law as laid down in *Kashi Nath Chatterjee v. Chand Charan Banerjee*, but is in accordance with what was decided in that case. *Baksu Lakshman v. Gorinda Kanji*, followed; *Ram Dojal Bajpie v. Hera Lal Paray*; and *Daimoddee Paik v. Karm Taridat*, dissented from.

HEM CHUNDER SOOR *v.* KALLY CHURN DAS ... IX 528

s. 115. See ESTOPPEL.

Examination of Accused—

See CONFESSION.

Excise Act—

Beng. Act VII of 1878. See STATUTE, CONSTRUCTION OF.

1878, ss. 15, 17, and 61 *Specified quantity of spirits—Maximum amount.* Where, under s. 15, Beng. Act VII of 1878, the Chief Commissioner of Assam, exercising the powers of the Board of Revenue, fixed, by a circular order, the limit at six quart bottles of country spirit as allowable for retail sales, and an accused was charged under s. 17 with possessing more than that quantity, but the amount he had was less than the amount stated in s. 15, —

Excise Act—(continued.)

Held, that he was not guilty of any offence under s. 61, and that no lesser quantity than that specifically mentioned in s. 15 of country spirits which might have been declared to be the maximum quantity by any such order made under the provisions of s. 15 could be deemed to be the quantity specified in s. 15 within the meaning of s. 61.

EMPRESS v. KOLA LALANG ... VIII 214

ss. 41, 42, and 59—*Sale of liquor by servant—Breach of condition of license—Licenses—Production of.* The conviction of servants of a licensed vendor of spirits for a breach of the license is not necessarily i. gal.

In re Ishur Chunder Shaha followed.

The Empress v. Nuddiar Chand Shaw dissented from.

Two servants of a licensed vendor of spirits were charged with having committed two breaches of the conditions of the license, and the maximum fine for each breach was inflicted.

Held, that the Magistrate was competent to punish each of the servants separately in this manner.

The Excise-officer, to whom a licensed vendor of spirits is bound to produce his license, must be an Excise officer of the higher grades, not any Police officer who may be exercising the powers of an Excise officer.

IN THE MATTER OF THE PETITION OF BANAY MADHUB SHAW. THE
EMPRESS v. BANAY MADHUB SHAW ... VIII 207

Exclusion from Share—

See LIMITATION ACT, 1877, SCHED. II, ART. 127.

Execution of Decree—

See LIMITATION.

Application for. See CIVIL PROCEDURE CODE, 1877, SS. 230 : 245 : LIMITATION ACT, 1877, SCHED. II, ART. 179 : LIMITATION ACT, 1871, ART. 167 : s. 7 : ARTS. 179, 633, 641, 730 : ' RES JUDICATA. '

Decree in mortgage—Sale in execution of decree—Property in different districts—Jurisdiction—Civil Procedure Code (Act X of 1877), s. 19. A suit was instituted on a mortgage of a single revenue-paying estate in the Court of the Subordinate Judge of the District of Backergunge, under the provisions of s. 19, Act X of 1877, and a decree was obtained for the sale of the mortgaged property. On an application for execution of the decree to the Court which passed it—

Held, that the Court was competent to order a sale of the whole of the mortgaged property, though only a portion of it was situated in the district of Backergunge.

Kally Prosunno Bose v. Dinonath Mullick cited and followed.

SHURROOP CHUNDER GOOHO v. AMEERRUNNISSA KHATOON ... VIII 763

Decree not limiting amount of mesne profits. A Court, in execution-proceedings, cannot look behind the decree when the decree does not limit the amount of wastal to be awarded.

JADOMONY DABEE v. HAFEZ MAHOMED ALI KIFAN ... VIII 295

Decree payable by instalments—Instalments—Construction of decree—Limitation.

A consent decree for Rs. 350 directed payment of the money by fourteen half-yearly instalments of Rs. 25 each, in Cheyt and Assin of each year, the first instalment to be paid in the month of Cheyt 1283 (March-April 1877). The decree contained a provision that in default of payment of any one instalment, the execution-creditor should have the option of executing the decree for the whole amount remaining unpaid. Default was made in payment of the first instalment, but the judgment-debtor paid up (not on due date) the instalment which fell due up to, and including Assin 1285 (October-November 1878), when he stopped making any payments. On the 26th of November 1881 the decree-holder applied for execution in respect of all sums then remaining unpaid under the decree. The District Judge allowed execution to issue for all sums which had fallen due within three years previously to the date of the application for execution, but refused to allow execution to issue in respect of the instalments not then due. *Held*, that the execution-creditor must be considered to have waived his right to execute the decree for the whole amount, but was entitled under the decree to realize any instalments which were still due.

NILMADHUB CHUCKERBUTTY v. RAMSODOY GHOSE ... IX 857

Execution on the application of one of several joint decree-holders. The effect of a Privy Council judgment being that each of two co-plaintiffs was entitled to a

Execution of Decree—(continued.)

moiety of a taluk in the possession of the defendant, who then purchased the interest of one of them. *Held*, that the other co-plaintiff could obtain execution according to the extent of her interest in the estate.

HURRISH CHUNDER CHOWDHRY v. KALISUNDARY DEBI ... IX 482

Execution simultaneously in two or more districts. A decree may be executed simultaneously in two or more districts.

Saroda Prosaid Mullick v. Lutchncepul Singh Doogar followed.

KRISHTOKISHORE DUTT v. ROOPLALL DASS ... VIII 687

For rent. See SUPERINTENDENCE OF HIGH COURT.

In suit instituted before April 1873. See LIMITATION.

Joint decree—Payment out of Court to one of several joint judgment-creditors—Part satisfaction certified to the Court—Application for execution of full amount of decree—Civil Procedure Code (Act XIV of 1882), ss. 231, 244, 258. On an application for execution for the full amount due under a decree by some of several joint decree-holders, the judgment-debtor objected to execution being granted for the full amount of the decree on the ground that he had already paid off a large portion of the money due under the decree to B. one of the joint decree-holders. The payment was made out of Court, but B, who claimed to be entitled to a 12½ annas share in the decree, certified the payment in the manner prescribed by s. 258 of the Civil Procedure Code (Act XIV of 1882), and represented that his claim had been satisfied in full. The other joint decree-holders denied B's right to the 12½ annas share claimed by him, and refused to recognise the payment said to have been made to him. The lower Court disallowed the objection, and granted execution for the full amount of the decree. *Held* that, regard being had to the provisions of the General Clauses Act (Act I of 1868) the word "decree-holder" in s. 258 of Act XIV of 1882 should be read in the plural, and looking at the provisions of s. 231 of the latter Act, the Court ought not to recognise payments made out of Court, unless made and certified for the benefit of all the joint decree-holders of any portion of the decree in excess of that to which the decree-holder so paid is undisputedly entitled. *Held*, also, that a judgment-debtor is entitled to credit for any sum paid *bona fide* to one of several joint decree-holders, and duly certified to the Court by the latter, and that the other joint decree-holders cannot execute the decree for more than their own share. *Held*, further, that in this case the lower Court was wrong in wholly ignoring the payment certified by the decree-holder B, and that it should have determined, *first*, whether the payment to B was a fraud on the other joint decree-holders; and, *secondly*, what amount the latter were entitled to have out of the whole decree, the latter being the main question between the applicants for execution and the judgment-debtor, and as such clearly within the scope of s. 244 of the Civil Procedure Code. *Ranee Nyma Koor v. Doolee Chund; Brojeswari Chowdhranee v. Tripoora Sounderey Debi; and Mahima Chandra Roy v. Pyari Mohan Chowdhry.*

TARRUCK CHUNDER BHUTTACHARJEE v. DIVENDRO NATH SANYAL ... IX 831

Mode of execution—Civil Procedure Code (Act X of 1877), ss. 235 and 260—Special appeal, power of High Court in. Upon an application under s. 235 of Act X of 1877 (Civil Procedure Code) for the execution of a decree, which directed the judgment-debtors forthwith to pull down and remove such portion of a wall as had been erected by him upon the wall of the decree-holder, the mode in which the assistance of the Court was required to be given was stated in column (j) of such application to be by giving the decree-holder possession of his wall by pulling down the wall erected thereon. The Court directed an order to issue to the Nazir to remove the judgment-debtor's wall from the top of the decree-holder's wall.

Held, that the decree-holder's application could not be granted in that form, and that he should have asked the assistance of the Court to be given in the way provided for by s. 260 of Act X 1877, by the imprisonment of the judgment-debtor, or the attachment of his property, or both.

Held also, that the Court was wrong in passing the order it had, but that it should have pointed out to the decree-holder the manner in which he should have asked the assistance of the Court to be given and the remedy to which he was entitled; and that, upon such amended application being made, the proper course to pursue was to serve a notice on the judgment-debtor, directing him to comply with the order contained in the decree within a time to be fixed by such notice; and that if he failed to comply with such order within the time so limited, the Court might then, at the instance of the decree-holder, make an order, either for the judgment-debtor's imprisonment, or for the attachment of his property, due regard being had to the provisions of s. 260 in the latter case.

Execution of Decree—(concluded.)

Held further, that the High Court, in special appeal, should not vary the order for execution which had been passed in such a way as to give the decree-holder that relief for which he did not ask.

PROTAP CHUNDER DOSS v. PEARY CHOWDHRAIN ... VIII 174

Order in. See APPEAL.

Order of Privy Council. See CIVIL PROCEDURE CODE, 1877, s. 610.

Order staying. See LIMITATION ACT, 1877, SCHED. II, ART. 179.

Suit to stay execution against certain property, until judgment-creditor had proceeded against other property—Cause of action—Civil Procedure Code (Act X of 1877), s. 244, cl. (c)—Part satisfaction—Suit for land—Jurisdiction—Letters Patent, cl 12. One Khelut Chunder was entitled to a share in Pargana Alumpore; before he obtained possession, Government revenue on the whole estate fell due. Khelut failed to pay his share, and his co-sharer, Kaminee, to save the estate, paid the whole sum due, and subsequently sued Khelut for the amount, eventually obtaining a decree. Subsequently this decree became vested in one Rutnessur, and the Pargana Alumpore came into the possession of one Kaliprosono Ghose. Rutnessur obtained an order for execution against the property of Khelut, and having transferred his decree to the High Court, proceeded to enforce the decree against Kristo Mohinee, the widow of Khelut, and her son, by attaching the family dwelling-house in Calcutta. The widow and son then brought this suit against Kaliprosono to have the share of Khelut in Alumpore ascertained, and praying for a decree calling upon Kaliprosono to pay the amount of the value of the share of Alumpore in satisfaction of Rutnessur's decree.

Held, that the suit could not be maintained so far as it attempted to make the decree a charge against Alumpore.

Questions as to part satisfaction of a decree cannot, according to cl. (r) s. 244 of Act X of 1877, be raised in a separate suit. That section alludes to parties to the decree or their representatives; but it is not on that account open to a plaintiff to evade the section by adding an unnecessary party to the suit.

Held on appeal, that the suit was rightly dismissed; that, as far as Rutnessur was concerned, it had already been decided that Rutnessur was entitled, if he so chose, to execute his decree against the Calcutta property; and that, therefore, that question was *res judicata*; and that, as regards the plaintiff's claim that the patni given by Kaliprosono to Hurry Churn should be treated as part-payment to Rutnessur, such a question could only be decided in execution-proceedings.

That the mere existence of the agreement between Kaliprosono, Rutnessur, and Hurry Churn did not entitle the plaintiff to join them as co-defendants in the suit. That, as far as Kaliprosono was concerned, the suit brought against him could only be treated as a suit to establish a charge or lien on land out of Calcutta, and therefore the Court had no jurisdiction to try it.

KRISTO MOHINEE DOSSEE v. KALIPROSONO GHOSE ... VIII 402

Transfer of decree for execution—Order passed in Court to which proceedings are transferred—Appeal irregularly brought after time has been granted to apply to Original Court. Under s. 239 of Act X of 1877, a Court to which a decree has been transferred may refer the objector to the Court which passed the decree.

Certain objections were taken in an execution-proceeding, and the Judge before whom the objections were heard passed an order disposing of the objections save as to two, which he decided he had no jurisdiction to entertain. The objector then made a special application to the judge to obtain time to make an application with reference to these objections to the Court from which the decree had been transferred, and accordingly time was granted him to do so; but, instead of applying, the objector preferred an appeal to the High Court against the order of the Judge disposing of the objections. The High Court, on hearing the appeal, made the appellant pay the costs of the appeal, disapproving strongly of the course taken by the objector.

JASSODA KOOR v. THE LAND MORTGAGE BANK OF INDIA ... VIII 916

See LIMITATION: LIMITATION ACT, 1871, ART. 167: MESNE PROFITS: MORTGAGE: RIGHT OF SUIT.

Ex parte Orders—

See BENG. ACT. VIII OF 1869, s. 38.

Experts—

See EVIDENCE.

Explanation of order passed—

See RECORD OF INFERIOR COURT.

Express Trust—

See LIMITATION ACT, 1877, s. 10.

Extinction of Charge—

See MORTGAGE.

Extortion—

See ABETMENT.

Extradition Act, 1879—

s. 9. See JURISDICTION OF CRIMINAL COURT.

Fact—*Findings of.* See SECOND APPEAL.*Under observation of Judge, but not proved.* See EVIDENCE.*Failure to produce evidence at hearing.* See APPEAL.**Failure to pay Rent—**

See LANDLORD AND TENANT.

False Charge—*Prosecution for.* See SANCTION TO PROSECUTION.**Family Property—***Suit by Lunatic to recover.* See HINDU LAW, INHERITANCE.**Father—***Self-acquired property of.* See HINDU LAW, PARTITION.**Final Disposal of Suit—**

See COSTS.

Fine—

See MUNICIPAL CONSOLIDATION ACT, 1876, s. 77.

Fishery, Right of—

See LIMITATION ACT, 1877, s. 26.

Foreclosure, Notice of—

See MORTGAGE.

Foreign Jurisdiction—*And Extradition Act, 1879, s. 9.* See JURISDICTION OF CRIMINAL COURT.**Forfeiture—**

See LANDLORD AND TENANT: LIMITATION ACT, 1871, SCHED. II. ART. 144.

Relief against. See BENGAL ACT, VIII OF 1869, s. 52.*Forgery and abetment of forgery.* See FRAUD.**Frame of Suit—**

See PARTIES.

Fraud—*Allegation of.* See PLAINT.

Forgery and abetment—Using forged document—Penal Code, s. 471—Intention to defraud—Inference of fraud. Where a person, in the course of an action brought against him to gain possession of a property, uses a forged document for the purpose of supporting his title, though there may be no necessity for the use of it, such a user is clearly fraudulent. A general intention to defraud, without the intention of causing wrongful gain to one person or wrongful loss to another, would, if proved, be sufficient to support a conviction: and such an intention is a necessary inference which the jury should be directed to draw, if they are satisfied that the accused has uttered a forged document as a true one, meaning it to be taken as such, and knowing it to be forged.

IN THE MATTER OF DHUNUM KAZEE IX

53

Misrepresentation—Kabuliat—Contract of tenancy. Three plots of land were let to A under one kabuliat. A relinquished two plots, but admitted to being in possession of one, alleging that the kabuliat had been obtained by fraud and misrepresentation.

Held, that as the lease was an entire contract, one portion only could not be repudiated on the ground of fraud: but that, if the tenancy was to be avoided on the ground of fraud, it must be avoided *in toto*.

ANARULLAH SHAIKH v. KOYLASH CHUNDER BOSE VIII

118

Full Bench Decision—

See REVIEW.

General Clauses Consolidation Act, 1868—

s. 2, cl. 5. See JURISDICTION.

s. 6. See LIMITATION ACT, 1871, ART. 167.

Ghatwal—

See LIMITATION ACT, 1877, ART. 139.

Ghatwali Tenure—

See JAGHIR : SALE IN EXECUTION OF DECREE.

Gift—

See HINDU LAW, GIFT : WILL.

Ineffectual. See HINDU LAW, WILL.

Of interest. See LIMITATION ACT, 1877, SCHED. II, ART. 123.

Over of accrued share. See HINDU LAW, WILL.

Requisites of. See MAHOMEDAN LAW, GIFT.

To grandson after death of annuitants. See HINDU LAW, WILL.

To unborn person. See HINDU LAW, WILL.

Void for remoteness. See HINDU LAW, WILL.

Gomasta—

See BENGAL ACT VIII OF 1869, s. 32.

Good Behaviour—

Security for. See APPEAL IN CRIMINAL CASE.

Goods sold and delivered—

Suit for. See EVIDENCE (PAROL EVIDENCE).

Government—

Effect of partition as against. See PARTITION.

Land acquired by, for public purposes. See KABULIAT, CONSTRUCTION OF.

Revenue. See CONTRIBUTION, SUIT FOR.

Securities, contract for sale of—Time bargain—Contract Act (IX of 1872, ss. 23 and 30—Evidence Act (I of 1872), s. 92—Tender—Readiness and willingness.

The question whether an unambiguous written contract for the sale and purchase of Government paper is a contract or agreement by way of wager, must be decided on the expressed terms of the contract itself, and parol evidence is not admissible to vary or contradict those terms. Where a contract for the sale and purchase of Government paper provides for the delivery of the paper on a subsequent date, it is not necessary, in order to sustain an action against the buyer for non-acceptance on the due date, that the plaintiff should have taken the Government paper contracted for to the place of business of the defendant and then and there made an actual tender of it.

JUGGERNATH SEW BUX v. RAM DYAL IX 791

Government Securities—

Meaning of "Negotiating." See PRINCIPAL AND AGENT.

Grandfather's Estate—

See HINDU LAW, INHERITANCE.

Grandmother—

Share of. See HINDU LAW, PARTITION.

Grant—

See ONUS PROBANDI.

Implied. See EASEMENT.

In perpetuity. See POTTA.

Of land. See LANDLORD AND TENANT.

Ground for transfer—

See TRANSFER OF CASE.

Grounds of Appeal—

See COSTS.

Guarantee—

See PRINCIPAL AND SURETY.

Guardian—

See KIDNAPPING : MAHOMEDAN LAW, GUARDIAN.

Act XL of 1858—Guardian and minor—Relation of manager of joint estate to co-sharers under age. A co-sharer in ancestral family estate, under the Mitakshara law, the co-proprietors being minors, though he may have power to manage the estate, is not, in consequence, the guardian of such minors for the purpose of binding them by the execution of a bond charging the estate: nor is the eldest male member of the family, being of full age, guardian of such minors for the purpose of defending suits brought against them for money advanced in respect of the estate, unless he has obtained a certificate of administration under Act XL

Guardian—(continued.)

of 1858, s. 3. That Act shows that he is not guardian of the minors; the care of whose persons and property (unless taken under the protection of the Court of Wards, by s. 2) are subject to the jurisdiction of the Civil Courts.

DURGAPERSAD v. KESHOPERSAD SINGH ... VIII 656

Application for execution by. See LIMITATION ACT, 1877, s. 7.

*Appointment of—*See MAJORITY ACT, 1875, s. 3.

*Minor plaintiff—Guardian ad litem—*Act XL of 1858, s. 3. A Mahomedan created a *wuqf* of all his property, and appointed his minor grandson mutwali, providing that, during the minority, the property should be managed by the minor's father. In execution of a decree against the minor's father, the endowed property was attached and sold. In a suit by the minor through his sister, as guardian, to recover possession of the property, in which suit the sister was not made guardian *ad litem* by an order of Court, but was allowed to sue by the District Judge. *Held*, that the suit was maintainable as framed.

LUCHMIPUT SINGH v. AMIR ALUM ... IX 176

Registration of, as proprietor of shares See PRESIDENCY BANKS ACT, 1876, s. 4.

Guardianship—

*Of illegitimate child.—*See KIDNAPPING.

Hathchitta.

See STAMP ACT, 1879, SHED. I, CL. 1.

Heir of deceased Mahomedan—

*Suit by creditor against—*See MAHOMEDAN LAW, DEBTS.

High Court—

Charter Act, s. 14. See CHIEF JUSTICE, POWER OF.

Circular No. 4, 1881. See PAYMENT INTO COURT.

Jurisdiction of. See REVISION.

Power of. See REVISION: SECOND APPEAL.

To set aside conviction on trial improperly originated. See CRIMINAL PROCEDURE CODE, 1872, s. 349.

High Court's Criminal Procedure Act, 1875

ss. 14 and 147—*Commitment, application to quash—*24 and 25 Vict., c. 104, ss. 13 and 15. The words "or other proceeding" in s. 147 of Act X of 1875, do not include a commitment, and an application to have a commitment quashed can be entertained under the provisions of that section. Applications under s. 14 of that Act must be disposed of by the High Court in the exercise of its Ordinary Original Criminal Jurisdiction.

CHAROO CHUNDER MULLICK v. THE EMPRESS ... IX 397

s. 76—See COMMISSION IN CRIMINAL CASE.

Hindu inhabitants of Calcutta—

Suits between. See LANDLORD AND TENANT.

Hindu Law—

See COMPROMISE OF FAMILY DISPUTE. TRANSFER OF PROPERTY.

Adoption—Termination of authority to adopt—Succession of adopted son to collaterals in gotra not that of father by adoption. An instrument of permission (*anumati patra*) to a Hindu wife to adopt should she be left a widow, provided that "dattaka (adopted) son shall be entitled to perform your and my shraddh and that of our ancestors, and to succeed to the property." The husband and wife had a son born, who survived his father, succeeded to the property, and died before his mother, leaving a widow, who, as heir, took possession of it for her widow's estate. The mother then professed to exercise the above power, and in the suit arising thereupon—*Mussamut Bhoobunmoyee Debia v. Ramkishore Acharj Chowdhry*—It was decided that the son's widow, having acquired a vested interest, a new heir could not be so substituted for her.

Held, that although such a substitution might have been disallowed without the adoption being held invalid for all other purposes, the above decision had determined that, upon the vesting of the estate in the widow, the power of adoption was incapable of execution, and was at an end; and that this would have been the conclusion if the question of the validity of the power had been raised without any previous decision upon it.

An adopted son occupies the same position in the family of the adopter as natural-born son, except in a few instances, which are accurately defined both in the

Hindu Law—(continued.)

Dattaka Chandrika and Dattaka Mimansa, governing authorities in the Bengal school.

An adopted son succeeds not only lineally, but collaterally to the inheritance of his relations by adoption.

Sumbhoochunder Chowdhry v. Naraini Dibeh referred to and followed.

Held in this case, that the adopted son of the maternal grandfather of the deceased, though the gotra into which he was adopted was not the same as the latter's, was an heir nearer to him than such maternal grandfather's grandnephew.

PADMAKUMARI DEBI CHOWDHURI *v.* THE COURT OF WARDS ... VIII 302

Adoption—Simultaneous adoption. A simultaneous adoption is not valid according to Hindu Law. The adoption of one son alone is actually and in itself wholly sufficient to satisfy the purpose of the law; the adoption of two is not within the scope of the power of adoption, and where such a thing is attempted, neither of the children is the legally adopted son of the deceased, although the ceremonies of adoption may have been performed as regards each and also at the same time.

GYANENDRO CHUNDER LAHIRI *v.* KALLA PAHAR HAJEE ... IX 50

Alienation—See Civil Procedure Code, 1882, s. 283.

Alienation by father—Mitakshara—Joint family—Sale in execution of money-decree against father of Mitakshara family. The mere fact of a decree being passed against the father only of a joint family governed by the Mitakshara law will not lead necessarily to the conclusion that what was sold in execution of that decree is only the father's interest in the joint family property. Notwithstanding the decree being against the father only under certain circumstances, there may be a valid sale of a joint property belonging to the family in execution thereof. In execution of two money-decrees against A alone, the right, title and interest of A in certain joint family property was sold, and the entire share of the joint family was taken possession of by the auction-purchasers. In a suit by the minor son and the wife of A, who with A constituted a joint family governed by the Mitakshara law to recover possession of their shares in the property sold, *held* that, although the plaintiffs were not parties to the decrees, in execution of which the sales took place, the mere fact of A being sued alone was not sufficient to justify the finding that only his right, title and interest passed under the sales, and that as the facts of the case showed that the decrees were passed with reference to transactions which clearly concerned the joint family, the whole of the share of the joint family in the properties sold passed to the auction-purchaser, the plaintiffs having failed to show that the debts, which were the foundation of the decrees in execution of which the sales were held, were contracted for immoral purposes.

Umbla Prosad Tewary v. Ram Sahay Lal, and Ponnappa Pillai v. Pappayyayangar, followed; *Ramplul Singh v. Dey Narain Singh,* dissented from.

SHEO PROSHAD *v.* JUNG BAHADOOR ... IX 389

Alienation—Joint family property—Mitakshara—Decree against the father of a joint family for lawful debts—Sale of the whole joint estate in execution of decree against one co-sharer. A, a judgment-creditor, having obtained a decree against B, the father of a joint Hindu family governed by the Mitakshara law, in a suit to which the sons of B were not parties, but in which it was proved that the debt had been incurred for lawful purposes, proceeded to execute his decree by attaching and selling the joint family property. Thereupon the sons came in and objected to their interest in the property being sold in execution of a decree in a suit to which they were not parties, and, on their objection being disallowed, filed a suit against A and B to have it declared that their interest in the property was not liable to be sold to satisfy the decree. *Held*, that the debt in respect of which the decree had been passed having been contracted for lawful purposes, the judgment-creditor was entitled to execute his decree against the whole of the joint family property.

Held also, that the ruling in the case of *Deendyal Lal v. Jugdeep Narain Singh* had no application to the facts of this case.

RAMDUT SING *v.* MAHENDER PRASAD ... IX 452

Alienation—Mitakshara law—Ancestral property—Right of mortgagee to sell. A Hindu, governed by the Mitakshara law, mortgaged certain property to the plaintiffs. In a suit to recover the money due under the mortgage, and for a sale of the property, brought against the mortgagor, his four sons, and the purchaser of the mortgagor's right and interest at an execution-sale, the lower Court gave the plaintiffs a decree against the mortgagor alone, holding that no necessity for the loan had been proved; but did not decide whether the property

Hindu Law—(continued.)

was the self-acquired property of the mortgagor or ancestral property. The High Court remanded the case for the trial of an issue upon this point. The lower Court found that the property was ancestral, and affirmed the original decree.

Held, that, assuming the property in dispute was ancestral, and that the mortgage was not valid against the sons, the plaintiffs were still entitled to recover the debt by the sale of the property of the father and the sons, because, supposing that the debt was contracted for personal purposes of the father, still the ancestral property in the hands of the sons was liable for the debt, it being not proved to have been contracted for immoral purposes.

Luchmun Dass v. Giridhar Choudhry followed.

GUNGA PRASAD *v.* AJUDHIA PERSHAD SINGH VIII 131

Alienation—Mitakshara Law—Mortgage by sons of an insane person—Sale in execution of decree—Suit by creditor to recover possession—Purchaser, Rights of. Although a coparcener in a Mitakshara family has a right (in a suit properly framed for that purpose) to recover the whole property from an execution-purchaser, subject to the right of the latter to have the share and interest of the debtor ascertained by partition, yet this rule will not be applicable where the suit is brought by a person who has become insane subsequent to his birth, inasmuch as no decree could be passed in his favour which could contemplate a partition between himself and the purchaser of the interest of his coparceners.

RAM SAHYE BILUKKUT *v.* LALLA LALJI SAHYE VIII 149

Alienation—Mitakshara—Joint family trade—Alienation of ancestral property by some of the members of the family—Interest of adult son affected by sale in execution of a decree against his father—Parties to suit. A family, governed by Mitakshara law, carrying on trade in the names of some of its members, having become indebted to the defendants in a large amount in respect of advances made for the purposes of the trade, some of the head members of the family executed a bond in favour of the defendants for the amount due, and hypothecated certain family properties which stood in their names as collateral security therefor. The amount not having been paid on the due date, the defendants brought a suit on the bond against the persons who had executed it, and obtained a decree which, however, did not direct that the properties hypothecated should be sold. In execution of that decree the interest of the judgment-debtors in the hypothecated properties, and in other family properties, were sold, and were purchased by the defendants, who, subsequently, under their purchase, obtained possession of the shares of the judgment-debtors and of those of their sons. The decree not having been satisfied by those sales, the defendants brought a suit against the remaining head members of the family to have it declared that their interests in the family properties were liable to satisfy the decree, and that suit also was decreed. Under the last decree the interests in the family properties of the judgment-debtors under that decree were sold, and were purchased by the defendants who subsequently obtained possession of the shares of those judgment-debtors and of the shares of their sons. Some of the sons of the judgment-debtors in both decrees were adult at the time when the suits were instituted. In suits brought, many years after the sales, by members of the family who had not been parties to the previous suits, to recover their shares in the family properties, *held*, that the interests of all the members of the family had passed on the sales. *Per MITTER, J.*—There is no distinction in principle between the case of an adult son and that of a minor son as regards a son's interest in ancestral property being liable to pass on a sale of such property in execution of a decree against his father only; but if an adult son proves that he would have been able to save the property by paying off the debt out of his private funds, if he had been a party to the suit, *quære*, whether he should not be allowed to have the sale set aside on payment of the debt due under the decree. A son's interest may pass on a sale of ancestral property in execution of a money-decree against his father, but whether it does or does not pass will have to be determined by the circumstances of each case. Delay in bringing proceedings to impeach sales is a matter for consideration in determining what interests pass on the sale.

BASO KOOR *v.* HURRY DASS IX 495

Alienation—Mitakshara Law—Ancestral property—Sale of joint family property—Debts legally contracted by father—Sale in execution of decree. There is no foundation either in the Mitakshara law itself, or in any decisions passed by the Judicial Committee, for the broad proposition that in all cases under a sale in execution of a money-decree against the father in a joint family, consisting of a father and sons, whether adults or minors, nothing but the father's share passes.

Hindu Law—(continued.)

The result of an examination of the leading cases on the subject is, that, in each such case, the question as to what was sold in execution must be first determined (the mere circumstance that a decree was obtained against the father alone is not conclusive upon the point); and it should further be enquired whether the father was sued in his representative capacity or not, and if not so sued, then whether the sons are entitled to set aside the sale *quid* their shares.

The decision of the Privy Council in *Deen Dayal Lall v. Jugdeep Narain Singh* in no way conflicts with the principle laid down in the case of *Muddun Thakoor v. Kanto Lall*.

UMBICA PROSAD TEWARY *v.* RAM SAHAY LALL. ... VIII 898

Alienation—Mitakshara Law—Ancestral property—Sale or mortgage of joint family property—suit by son to recover possession of share—Limitation—Parties—Right of purchaser at execution-sale. A suit by a Hindu governed by the Mitakshara law, to recover possession of property sold during his minority by his father, is within time if brought within three years after he attains the age of twenty-one.

A father governed by the Mitakshara law may alienate the family property to discharge debts incurred by him for purposes not illegal or immoral. If the son seeks to set aside such alienation as to his own interest, he will have to show that the purposes of the alienation were illegal or immoral.

If the son, being adult, has joined in the conveyance, or led the alienee by his conduct to suppose that he assented to the alienation, he will be estopped from disputing its validity. These propositions apply to a mortgage, so as to place the purchaser at an execution-sale under a decree upon the mortgage-bond in the position of an alienee by private sale.

If the son has been a party to the suit in which the decree upon the mortgage-bond was obtained, he is concluded; but if he has not been a party to the suit, he is not concluded, but must show that the original debt was contracted for illegal or immoral purposes, in order to recover his share of the property from the purchaser. Where the father has neither aliened nor mortgaged the family property, but it is sought by suit to make that property liable to satisfy a debt incurred by the father, the son, as well as the father, must be a party to the suit.

When the creditor sues the father alone for a debt contracted by him alone, and in execution sells the right, title, and interest of the father only, the purchaser at this sale does not take the son's interest.

RAMPHUL SINGH *v.* DEGNARAIN SINGH ... VIII 517

Contract—Debtor and creditor—Damdupat—Interest in excess of principal. Since the passing of Act XXVIII of 1855, a Hindu creditor may claim from his Hindu debtor interest in excess of the principal sum lent, should such interest have accrued. The rule of law prohibiting the recovery of interest in excess of the principal sum lent was in force in the Mofussil of Bengal not as a provision of Hindu law, but as a statutory rule introduced by Regulation XV of 1793, and embracing all persons contracting in the mofussil.

SURJYA NARAIN SINGH *v.* SIRDHARY LALL. ... IX 825

Contract—Interest exceeding principal—Suits between Hindus in Mofussil—Act XXVIII of 1855, s. 2. In suits between Hindus in the Mofussil interest exceeding the principal may be awarded.

HET NARAIN SINGH *v.* RAM DEIN SINGH ... IX 871

Custom—Alienation of impartible estate—Succession to raj. Impartibility of an inheritance does not, as a matter of law, render it inalienable.

The owner of an estate which descends as an impartible inheritance is not, by reason of its impartibility, restricted to making grants or gifts during only for his own life. The power of alienation resting upon the general law, inalienability, if existing, must depend upon family custom in this respect, and of such custom proof is required.

Anund Lal Singh Deo v. Maharaj Dieraj Gura Narain Deo followed.

In the case of a titular raj, of which the lately deceased Raja had made a *mokurari patta*, or grant in perpetuity, of part of the zamindari lands thereto belonging, in favour of a younger son, it was found, that the only custom proved was, that the raj estate descended to the eldest son to the exclusion of the other sons, and that there was no proof of a custom prohibiting such an alienation as that made by the grant.

Hindu Law—(continued.)

Held, that the mokurari grant was not invalidated by reason of the raj estate being by custom impartible.

RAJA UDAYA ADITYA DEB v. JADAB LAL ADITYA DEB ... VIII 190

Endowment—Succession to the management of a religious endowment, as sebit—Usage of the institution. On a claim to succeed to the management, as sebit, of a religious institution endowed with property, it was contended that in the absence of prescribed rule, or of established usage, succession took place according to the ordinary rules of the Hindu law of inheritance, where the sebit led a family life. *Held* that, where owing to the absence of documentary or other direct evidence, it does not appear what rule of succession has been laid down by the endower, it must be proved by evidence what is the usage. In the present instance the usage did not support the claim; and, upon the evidence, the claimant, who was out of possession, failed to make a title.

JANOKI DEBI v. GOPAL ACHARJA GOSWAMI ... IX 766

Gift—Husband and wife—Immoveable property. It is not necessary in Hindu law, in order that a wife should take an absolute estate in immoveable property under a deed of gift from her husband, that the gift should be made with such words of limitation as are ordinarily used to convey an estate of inheritance. The intention of the husband may be expressed in other ways, and is a matter of construction merely. *Koonj Behary Dutt v. Prem Chand Dutt*, distinguished.

RAM NARAIN SING v. PEARAY BHUGUT ... IX 830

Gift—Possession retained by donor—Transfer of possession—Symbolical transfer. A gift by a Hindu, unaccompanied either by possession on the part of the donee or any symbolical act, such as handing over documents of title, or permitting the donee to receive rents, is not in itself a valid transaction, even though the deed of gift be registered.

DAGAI DABEE v. MOTHURA NATH CHATTOPADHYA ... IX 854

Inheritance—Bengal school of Hindu law—Sapinda—Brother's daughter's son. According to the Bengal School of Hindu law a brother's daughter's son is a sapinda, and is, therefore, a preferable heir to the great-great-grandfather's great-great-grandson.

DIGUMBER ROY CHOWDHRY v. MOTI LAL BUNDOPADHYA ... IX 563

Inheritance—Bengal school—Oblations, offering of. According to the Bengal school of law, inheritance goes to him who offers oblations to the deceased, or to ancestors of the deceased, in which oblation the deceased would participate. Where more than one person offers such oblations, succession goes to him who offers oblations to the father of the deceased, and an heir who offers such an oblation, will be preferred to an heir who offers oblations to the grandfather and great grandfather of the deceased.

PRAN NATH SURMA JOWARDAR v. SURRUT CHUNDRA BHUTTACHARJEE VIII 460

Inheritance—Descent of lands purchased by widow out of income of life estate. Land purchased by a Hindu widow with money derived from the income of her life-estate passes, when undisposed of by her, to the heirs of her husband as an increment to the estate, and not to her heirs as property over which she had absolute control.

ANUND CHUNDRA MUNDUL v. NILMONY JOURDAR ... IX 758

Inheritance—Exclusion from inheritance—Insanity—Partition. It is not necessary that madness or insanity should be congenital to disqualify a person from inheritance; a coparcener, therefore, who has become insane whilst in possession will lose his share on partition.

RAM SAHYE BHUKKUT v. LALLA LALI SAHYE ... VIII 149

Inheritance—Mitakshara family—Suit by lunatic father to recover family property—Disability to sue. A lunatic, a member of a joint Mitakshara family, cannot sue to recover property belonging to the joint family, he being, under the Mitakshara law, disqualified from inheritance, and therefore entitled to no share or partition in the property, but only to maintenance.

RAM SOONDER ROY v. RAM SAHYE BHUGUT ... VIII 919

Inheritance—Mitakshara—Daughter-in-law. Under the Mitakshara and usages obtainin; in the district of Behar a daughter-in-law, whose husband has predeceased his father, is not in the line of heirs of her father-in-law. *Per MITTER, J.*—A daughter-in-law, not being a joint owner with her father-in-law, cannot after his death take his estate by right of survivorship.

ANANDA BIBEE v. NOWNIT LAL ... IX 315

Inheritance—Mitakshara—Sister—Male gotraja sapindas—Stridhan. According to the Mitakshara law a sister is not in the line of heirs, and is not entitled to

Hindu Law—(continued.)

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- succeed in preference to male gotraja sapindas. Nor does an estate inherited by a female become her stridhan. Such estate on her death goes to the heirs of the last male heir, and not to the heir of her separate property.
- JULLESSUR KOOR v. UGGUR ROY** ... IX 725
- Inheritance—Succession by daughter before her marriage—Subsequent marriage and birth of son—Death of such daughter—Succession of married sister.* On the death of a daughter, who had succeeded before her marriage to her father's estate, to the exclusion of her married sister, the estate so inherited by her devolves upon her married sister, who has, or is likely to have, male issue, and not upon her own son.
- TINUMONI DAS v. NIBARUN CHUNDER GUPTA** ... IX 154
- Inheritance—Succession of adopted son of one daughter and natural son of another—Grandfather's estate.* The adopted son of one daughter shares equally with the natural son of another daughter in the inheritance left by his maternal grandfather. *Uma Sunkar Maitro v. Kali Komul Mozumdar* followed.
- SURJOKANT NUNDI v. MOHESH CHUNDER DUTT** ... IX 70
- Joint family—Joint property, suit to recover—Onus probandi—Limitation Act, 1877, Arts. 127, 144.* The plaintiff sued for a share in certain property on the allegation that his ancestor K and the defendants' ancestor R were uterine brothers who, while they were living in commensality, purchased the property in question with their joint funds in the name of R; and that subsequently K left his home, and then his daughter, the plaintiff's mother, enjoyed the property jointly with R until her death, when the plaintiff succeeded to his right and interest applied to have his name registered as a joint proprietor, but his application was refused; hence this suit. The defence was that R bought the property in question with his own funds after he and his brother K had separated; that Radha Mohun, and afterwards the defendants, had been in exclusive possession for more than twelve years; and that the suit was barred by limitation. *Held* (reversing the judgment of FIELD, J.) that the onus was on the plaintiff to prove that the property was joint property. Before a plaintiff can bring his case within Art. 127 of schedule II of the Limitation Act, 1877, it is incumbent on him to show that the property in which he seeks to recover a share is "joint property."
- OBHOY CHURN GHOSE v. GOHIND CHUNDER DEY** ... IX 237
- Joint family—Separation of one member of family, effect of.* The separation of one member of a joint Hindu family does not necessarily create a separation between the other members, nor cause the general disruption of the family. *Radha Churn Dass v. Aripa Sindhu Dass*, dissented from.
- UPENDRA NARAIN MYTI v. GOPÉE NATH BERA** ... IX 817
- Partition—Bengal school of Hindu law—Widow's estate—Joint widows—Alienation—Purchaser from Hindu widow.* Where a Hindu governed by the Bengal school of Hindu law dies intestate leaving two widows his only heirs him surviving, either of those widows may sell her interest in her deceased husband's property, and the purchaser thereof is entitled to enforce a partition as against the other widow. The partition, if decreed, should be effected in such a way as would not be detrimental to the future interests of the reverendons.
- JANOKI NATH MUKHOPADHYA v. MOTHURANATH MUKHOPADHYA** ... IX 580
- Partition—Mitakshara law—Ancestral property—Wife's share on partition.* Under the Mitakshara law, where partition of ancestral property takes place between a father and a son, the wife of the father is entitled to a share.
- Mahabeer Persad v. Ramyal Singh, Laljee Singh v. Rajcoomar Singh, Jodoonath Dey Sircar v. Brojonath Dey Sircar, and Pursid Narain Singh v. Honooman Sahay* followed.
- SUMRUN THAKOOR v. CHUNDERMUN MISSEER** ... VIII 17
- Partition—Mitakshara law—Share of grandmother—Self-acquired property of father on partition.* Under the Mitakshara law, a grandmother, on partition, is entitled to a share in the joint family property.
- Semle.*—The rule of law, to be found in the 2nd Vol. of Vyavastha Chandrika, pp. 356-359, which lays down that, when the father makes the partition of his own choice, his mother is not entitled to a share, is intended to apply only to the self-acquired property of the father.
- BADRI ROY v. BHUGWAT NARAIN DOBEY** ... VIII 649
- Partition—Mithila school—Partition of share of minor—Unmarried daughter's share—Suit by mother and minor children for partition—Malversation.* A suit cannot be brought by or on behalf of a minor to enforce partition unless on the

Hindu Law—(continued.)

ground of malversation, or some other circumstances which make it for his interest that his share should be set aside and secured for him.

Property sufficient to defray the expenses of the nuptials should be given to unmarried daughters.

According to the leading authorities of the Mitakshara school, both mother and step-mother are equal sharers with the sons.

DAMOODUR MISSER v. SENABUTTY MISRAIN ... VIII 537

Reversioner—Declaratory decree, suit for—Waste by Hindu widow—Suit to set aside compromise by Hindu widow. Where the next reversioner after a Hindu widow sues, during the lifetime of the widow, for a declaration that a compromise made by her is not binding on him, it is no sufficient ground for refusing the declaration that the plaintiff may not succeed for many years to the possession of the property, or that some of the property is of a perishable nature.

UPENDRA NARAIN MYTI v. GOPAL NATH BERA ... IX 817

Widow—Power of adoption—Husband's estate, share of. A Hindu gave a power of adoption to his wife, directing that so long as the wife should live she should remain in possession of all his property, moveable and immoveable, ancestral as well as self-acquired.

Held, that the widow took a life-interest in her deceased husband's property with remainder to the adopted son.

Mussamut Bhagbutti Dace v. Chowdhry Bholanath Thakoor followed.

BEPIN BEHARI BUNDOPADHYA v. BROJO NATH MOOKHOPADHYA ... VIII 357

Will, construction of—Gift ineffectual so far as it departs from the law of inheritance—Gift over of accrued share. A gift by will, attempting to exclude the legal course of inheritance, is only effectual, in favour of such person as can take, to the extent to which the will is consistent with the Hindu law. And it is a distinct departure from that law to restrict the order of succession to males excluding females.

A testator gave by his will to three sons of his brother certain estates "for payment of the expenses of their pious acts." He also directed as follows: "The said three nephews shall hold possession of the above in equal shares, and shall pay the Government revenue of the same into the Collectorate. They shall have no right to alienate the same by gift or sale, but they, their sons, grandsons, and their descendants in the male line shall enjoy the same, and shall perform acts of piety as they respectively shall think fit for the spiritual welfare of our ancestors. If any die without leaving a male child, which God forbid, then his share shall devolve on the surviving nephews, and their male descendants, and not on their other heirs."

In a suit between the survivor of the three nephews and the testator's heir, *held*, that the attempt to alter the legal course of inheritance failed, and that the estate taken under the above clause was only for life.

The gift over of a life estate was competent; it being to persons alive, and capable of taking on the death of the testator, and to take effect on the death of a person or persons then alive.

On the death of one brother his share went to the two other brothers, and on the death of one of the latter his augmented share, made up of his original and accrued share, went to the survivor.

TAROKESSUR ROY v. SOSHI SHIKHURESSUR ROY. SOSHI SHIKHURESSUR ROY v. TAROKESSUR ROY ... IX 952

Will—Gift to grandsons after death of annuitants—Vesting, postponement of—Inconsistent declarations rejected. A testator, after charging certain annuities and other payments on his estate, gave the whole of his property to his grandsons in these words:—"I give the whole of my property to my grandsons; but until those portions of the said property and the monthly stipends which I have given to some to enjoy for the natural term of their lives shall revert to the estate after their deaths, my estate shall not be divided amongst any of my grandsons or my great-grandsons. After all the pensioners have died, and after the enjoyment of the said pensions and property shall have ceased, the executor's powers shall be annulled, and then my grandsons and my grandson's heirs—that is to say, my great-grandsons,—shall be able to divide the whole of the property and take their father's shares."

He further directed that, for five years after his death, his family should remain joint, and allowed to his executors Rs. 100 for family expenses.

Held, that the will contained sufficiently direct words of present gift to the grandsons, and that the clause in which it was attempted to postpone the enjoyment

Hindu Law—(concluded.)

in possession, and other clauses which directed accumulation, must be rejected or disregarded as inconsistent or repugnant.

Held also, that the fact that the estate was subject to partial trusts or charges did not postpone the vesting in possession; nor would it, even according to English law, let in grandsons of the testator born after his death during the continuance of the trusts.

Alangamanjori Dabee v. Sonamoni Dabee discussed by PONTIFEX, J.

CALLY NATH NAUGH CHOWDHRY v. CHUNDER NATH NAUGH CHOWDHRY VIII 378

Will—Hindu Wills Act (XXI of 1870), ss. 2, 3, and 6—Succession Act (X of 1865), ss. 98, 99, and 101—Gift to unborn persons—Remoteness, gift void for. A Hindu testator, by his will made in 1872, provided, that should he never have a son, his daughters' sons, when they come to years of discretion, should receive certain properties in equal shares; and he directed that, if his daughters have no sons, or not be likely to have sons, then that such of his daughters as should reside in the ancestral family dwelling-house should receive a certain monthly allowance. The testator died in 1873, leaving only his daughters him surviving.

Held, that the will being governed by the Hindu Wills Act, the bequest to the daughters' sons was valid. The rule of construction laid down in *Tague case* does not apply to wills of Hindus made since the passing of Act XXI of 1871.

The words "create any interest," in the last proviso to s. 3 of the Hindu Wills Act, should be read as referring only to the estate or interest which can be given, without reference to the further question to whom it can be given.

ALANGAMONJORI DABEE v. SONAMONI DABEE ... VIII 157

A gift by will to persons unborn at the time of the death of the testator, whether made prior or subsequently to the passing of the Hindu Wills Act, is void.

The words "to create an interest," in the fifth proviso to s. 3 of the Hindu Wills Act, apply both to the quantity and quality of the interest created, and in their natural and ordinary meaning include the capacity of a donee to take.

ALANGAMONJORI DABEE v. SONAMONI DABEE ... VIII 637

Hindu Widow—

See Partition.

Alienation by. See Declaratory decree, suit for: Limitation Act, 1877, Art. 141.

Purchaser from. See Hindu Law, Partition.

Suit by reversioner after death of. See Limitation Act, 1877, Sched. ii, Art. 141.

Waste by. See Hindu Law, Reversioner.

Widow's estate—Conveyance by presumptive heir—Ratification by widow—Effect of witnessing deed on rights of witness—Reversioners—Evidence of consent. During the lifetime of a Hindu widow, her son, the then presumptive heir to the property of which she was in possession, conveyed it to purchasers by deeds to which she was not a party. Subsequently she by separate deed ratified the conveyances. This deed was witnessed by a more remote reversioner. The son died during the lifetime of his mother, and the witness to the deed of ratification became the next reversionary heir. *Held*, in a suit by him after the widow's death for possession, that at the time of the conveyances the son had a mere contingent reversionary interest in expectancy, and that the subsequent ratification by his mother could not operate as a surrender of her estate so as to change the conveyances, and make them oure as absolute conveyances, but could only amount to a conveyance of her interest. *Held* also, that the fact that the reversionary heir witnessed the deed of ratification, did not in itself amount to evidence of consent to it on his part.

RAMCHUNDER PODDAR v. HARI DAS SEN ... IX 463

Hindu Wills Act—

See Statute, construction of.

s. 2. See will.

ss. 2, 3, and 6. See Hindu Law, Will.

Horoscope—

See Evidence Act, 1872, s. 32.

Hundi—

See Stamp Act, 1879, s. 3.

Husband and wife—

See Hindu Law, Gift.

Husband's Estate, share in—

See Hindu Law, Widow.

Idol, worship of—

See Limitation Act, 1877, Sched. ii, Art. 131.

Illegal Cess—

See Landlord and Tenant.

Illegitimate Child—

Guardianship of. See Kidnapping.

Immoveable Property—

See Hindu Law, Gift.

Charge on. See Jurisdiction.

Debt secured by mortgage of. See Sale in Execution of Decree.

Suit to obtain relief respecting. See Service of Summons.

Impartible estate—

Alienation of. See Hindu Law, Custom.

Implied Grant—

See Easement.

Imported Liquor—

Possession of. See Bengal Excise Act, 1878, s. 61.

Imprisonment—

Indefinite period of. See Sentence.

Improvements on land—

See Sale for Arrears of Revenue.

Incumbrance—

See Sale for arrears of rent.

Indemnity—

Bond of. See Principal and Surety.

Indian Ports Act—

s. 22. See Master and Servant.

Indigo—

Cultivation of. See Co-sharers.

Inference—

From failure to call witnesses. See Witness.

Inheritance—

Absence of words of. See Potta : See Hindu law, Inheritance.

Gift inconsistent with law of. See Hindu Law, Will.

Injunction—

See Criminal Procedure Code, 1872, s. 518 : Landlord and Tenant : Minor : Right of suit.

Insane person—

Suit by, to recover share of property. See Hindu Law, Alienation.

Insanity—

See Hindu Law, Inheritance.

Insolvency

After-acquired property—Purchaser from insolvent who had not obtained his discharge—Purchaser from Official Assignee—Rights of parties—Intervention of Official Assignee—Adverse Possession. Subject to the right and claim of the Official Assignee, and so long as he does not interfere, an insolvent, who has not obtained his final discharge, has power with respect to after-acquired property to buy and sell and give discharges, and do all other acts which he could have done before his insolvency.

The possession of such property by an insolvent in such a position may be adverse to the Official Assignee so as to bar the title of the latter by lapse of time.

KRISTOCOMUL MITTER v. SURESH CHUNDER DEB VIII

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Insolvency—

Landlord and Tenant—Sale for arrears of rent—Official Assignee—Beng. Act VIII of 1869, ss. 59 and 60—Insolvent Act, 11 and 12 Vict., c. 21. A decree for arrears of rent of an underlease was obtained against a tenant who became an insolvent, and whose tenure became vested in the Official Assignee by virtue of the provisions

Insolvency—(continued.)

of the Indian Insolvent Act, 11 and 12 Vict., c. 21. An application was made under ss. 59 and 60 of the Rent Law, Beng. Act VIII of 1869, for an order that the tenure should be sold for its own arrears. The Official Assignee objected to the sale, and contended that the decree-holder's only right was to prove in the insolvency for the amount of his debt. *Held* that, whether the arrears of rent became due before or after the insolvency of the judgment-debtor, the decree holder was entitled to sell the tenure in execution of his decree.
CHUNDER NARAIN SINGH v. KISHEN CHAND GOLECHA ... IX 855

Insolvent—

Decree against. See Sale in Execution of Decree.
Act 11 and 12 Vict., c. 21. See Insolvency.

Instalments—

Agreement to pay off debt by. See Kistibandi.
Decree payable by. See Execution of Decree.

Intention—

Of parties. See Mortgage.
To defraud. See Fraud.

Interest—

See Decree: Mesne Profits: Principal and Surety: Second Appeal.
In excess of principal. See Hindu Law, Contract.
In land. See Road Cess Act, 1871.
Loss of. See Mesne Profits.
Of applicant in estate. See Probate.

Penalty—Increased interest on default of payment—Contract Act IX of 1872, s. 74. A mortgage-bond contained a proviso that in case of default in payment of the principal sum, with interest at the rate of one per cent. per mensem on a certain day, interest should be paid at the rate of 2 per cent. per mensem from the date of the bond. *Held*, that the stipulation to pay increased interest must be construed as a penal clause.

MUTHURA PERSAD SINGH v. LUGGUN KOORER ... IX 615

Promissory Note—Default in payment on due date Enhanced rate of interest—Penalty—Breach of contract—Contract Act, s. 74. Where money is borrowed under a contract for repayment with interest on a certain day, and the contract stipulates that if the money is not paid at the due date it shall thenceforth carry interest at an enhanced rate, such a stipulation is not a penalty, and the enhanced rate agreed to be paid may be recovered in its entirety. *Mackintosh v. Hunt* followed; *Bansidhar v. Bu Ali Khan*, considered.

MACKINTOSH v. CROW, AND MACKINTOSH v. GORE ... IX 689

Interlocutory order—

In criminal matters, finality of. See Chief Justice, Power of.

Intervenor—

See Res judicata.
In rent suit. See Estoppel.

Irregularities—

In admission of evidence. See Criminal Proceedings.
In procedure. See Criminal Proceedings.

Irregularity in Sale—

See Sale for Arrears of Rent: Sale for Arrears of Revenue: Sale in Execution of Decree.

Issues, point not raised in—

See Variance between pleading and proof.

Jaghir—

Inclusion of Jaghir lands in area of settled Zamindari—Ghatwali tenure—Reg. XXIX of 1874—Liability to attachment and sale. In the area of a zamindari were included at the Permanent Settlement the mauzas which made up the mehal of a jaghir, the succession to which was subject to the sanction of Government, the jaghirdar being bound to render public services. One-third of the revenue assessed upon the jaghir mehal was retained by the jaghirdar, forming no part of the zamindari assets on which the jama of the latter was fixed. *Held*, that whether this jaghir was a ghatwali tenure or not, within the meaning of the term as applied in Reg. XXIX of 1814 (the zamindari being Pachit, adjoining,

Jaghir— (*continued.*)

and at one time included in Birbhum) the jaghir was analogous to such tenure as described in the preamble to the Regulation. *Held* also, that the nature of the tenure had not been altered by the Permanent Settlement, after which the services due by the jaghirdar remained, as before, public services, and continued to be due to the Government. That the zamindar became entitled only to the rent, or revenue, which was previously due to the Government, and in respect of which he was assessed, and did not become entitled to the services in respect whereof the one-third of the rent or revenue was allowed as compensation to the jaghirdar. That the jaghir, though hereditary, was not subject to the ordinary rules of inheritance according to the Hindu or the Mahomedan law, but was held upon the condition of approval of the heir by the Government. Thus were precluded both division of jaghir mehal upon the death of the holder, and alienation during his life. It followed that the jaghir mehal was not liable to attachment and sale in execution of a decree against the father and predecessor in estate of a jaghirdar, so approved, as assets by descent in the possession of the latter. *Raja Lelanund Singh v. The Government of Bengal* followed.

NILMONI SINGH DEO v. BAKRANATH SINGH AND THE SECRETARY OF STATE
FOR INDIA IX 187

Jaghir tenure—

See Onus Probandi.

Jalkar—

See Road Cess Act, 1871.

Jama-Wasil-Baki—

See Plaintiff.

Joinder of Charges—

Offences of the same kind committed in respect of different persons—Criminal Procedure Code (Act X of 1872), ss. 452, 453, and 455. Where an accused was charged under one charge including four counts, viz.,—(1) house breaking by night with intent to commit theft in the house of A; (2), theft from the same house; (3) house breaking by night with a like intent in the house of B; (4) theft from that house; and where he pleaded guilty to the first and third charges, *held*, that the case was within the terms of s. 453, and that the words "offences of the same kind" are not to be limited by the explanation to that section, but include a case like this, where a man has within a year committed two offences of house breaking. *Held* also, that the word "offences of the same kind" are not limited to offences against the same person. *Per* FIELD, J.—The explanation to s. 453 must be understood as extending and not as limiting the meaning of that section. *Per* MORRIS, J.—Care should be taken that accused persons are not prejudiced by charges being joined, and the Court should at all times be anxious to lend a willing ear to any application upon their behalf for separation of charges, and for separate trials upon separate charges. *Empress v. Murari* dissented from.

MANU MIYA v. THE EMPRESS IX 371

Joint—

Acquisition. See Mahomedan Law.

Darpatnidars. See Sale for Arrears of Rent.

Decree. See Contribution, suit for: Execution of Decree: Limitation Act, 1877, Art. 179.

Decree-holders. See Execution of Decree.

Decree, Money paid in satisfaction of. See Small Cause Court, Jurisdiction of.

Family. See Hindu Law, Alienation: Hindu Law, Joint family: Mahomedan Law.

Family liability of shares of members. See Costs.

Family property, Sale or mortgage of. See Hindu Law, Alienation.

Family Property, suit to recover. See Hindu Law, Joint family.

Family trade. See Hindu Law, Alienation.

Owners, adverse possession between. See Possession.

Property. See Co-shares.

Widows. See Hindu Law, Partition.

Judge, duty of, when charging jury—

See Criminal Proceedings.

Judgment—

See Letters Patent, 1865, cl. 15.

Debtor, duty of. See Decree.

Of acquittal, withdrawal of pardon granted to approver after. See Criminal Procedure Code, 1872, s. 349.

Judicature Act—

Order XVI, rules 3 and 6. See Parties.

Judicial Officer—

Protection of. See Liability of public servant.

Jurisdiction—

See Act XX of 1863, s. 14 : Cause of Action : Execution of Decree : Probate.

Appeal—Revision—Offence committed out of British India. The High Court has no power, either by way of appeal or revision, to interfere with a sentence passed by the Superintendent of the Tributary Mehals when exercising jurisdiction over offences committed in Mohurbhunj, a place not situated within the limits of British India. *Empress v. Keshub Mahajan*, and *Hursee Mahapatro v. Dinabundhu Patro*, referred to.

THE EMPRESS *v.* HURRO KOLE ... IX 288

District Judge—Suit for profits of a ship—Co-owners in a ship—Partnership—Contract Act (IX of 1872), s. 239, illus. (c), and s. 265. The fact that several persons are co-owners of a ship does not make them partners, and it is not necessary that a suit by one co-owner against the managing owner or ship's husband, for his share of the profits made by the ship before she has been sold, should be brought in the Court of the District Judge under s. 265 of the Contract Act, but such suit may be brought in the Court of the lowest grade competent to try it.

HYDER ALI *v.* ELAHEE BUX MALOOM ... VIII 1011

Extension of. See Small Cause Court Presidency Towns.

Of Civil Court. See Partition : Pensions Act, ss. 4 and 6.

Of Collector. See Partition.

Of Commissioners. See NAWAB NAZIM'S DEBTS ACT, 1873.

Of Criminal Court—Tributary mehals—Code of Criminal Procedure (Act X of 1872), s. 70—Foreign Jurisdiction and Extradition Act (XXI of 1879), s. 9—Revs. XII, XIII and XIV of 1805. The prisoners, residents of the district of Singhbhum, a district in British India, were convicted, under s. 331 of the Penal Code, at Singhbhum, of an offence committed in Mohurbhunj.

Per GARTH, C.J., PONTIFEX and MORRIS, JJ.—The territory of Mohurbhunj is not within the limits of British India; but, under the provisions of s. 9 of Act XXI of 1879, a conviction in British India for an offence committed without the limits of British India, is good.

Per MITTER, J.—Mohurbhunj is within the limits of British India; but seeing that the Tributary mehals constitute a 'district' within the meaning of the Criminal Procedure Code, and that the Superintendent of these mehals has been vested with the powers of a Sessions Judge under an order of the Government of India, a conviction under the Penal Code (having regard to the provisions of s. 70 of the Criminal Procedure Code) ought not to be set aside.

Per PRINSEP, J.—Mohurbhunj is within the limits of British India; but the Acts which extends to British India do not extend to Mohurbhunj. The territory having been expressly placed beyond the ordinary legislation, the law in force in British India cannot come into operation there until this exemption has been removed.

THE EMPRESS *v.* KESHUB MOHAJAN AND THE EMPRESS *v.* Udit Prasad. VIII 985

Of District Judge. See Minor.

Of High Court.—See Revision.

Question of title—Registration of names—Declaratory decree, suit for. It is not the province of a Revenue Court to decide questions of title between contending claimants, such questions being within the province of the Civil Courts. It is the duty of the latter in suits brought for declaration of a right to registration to declare the rights of parties in order that the revenue authorities may be duly certified as to the persons whom they ought to register.

JUGUT SHOBHUN CHUNDER *alias* DOOLAL CHUNDER DEHINGUR GOSSAMY *v.* BINAUD CHUNDER *alias* SODA SHOBHUN CHUNDER DEHINGUR GOSSAMY IX 925

Jurisdiction—(continued.)

Rajah of Tipperah—Sovereign Prince—Suit against 'Sovereign Prince' with respect to land owned by him, and situate in British India—Maintenance—Charge on immoveable property—Benefits to arise out of land—General Clauses Consolidation Act (I of 1868), s. 2, cl. 5—Civil Procedure Code (Act X of 1877), Chap. XXVIII, s. 433. The Rajah of Hill Tipperah is a Sovereign Prince within the meaning of chapter XXVIII of Act X of 1877, and cannot be sued personally in the Courts of British India except under the conditions specified in s. 433 of that Act. The fact of a defendant not subject to the jurisdiction of a Court having waived his privilege in previous suits brought against him does not give the Court jurisdiction to entertain a suit against him in which he pleads that he is not subject to such jurisdiction. A suit for maintenance which seeks to have the maintenance made a charge on immoveable property is not a suit on immoveable property within the meaning of clause c, s. 433, Act X of 1877, nor is it a suit for "benefits to arise out of land" within the meaning of the definition of the words "immoveable property" contained in Act I of 1868, s. 2, cl. 5. A claim for maintenance is not a charge upon immoveable property. A member of the royal family of Hill Tipperah brought a suit against the Rajah to have it declared that with respect to certain land situate within British India, and forming portion of the possessions of the Rajah he was entitled to the post of jehoraj, and to succeed to such land on the death of the Rajah, and also claimed maintenance, and sought to have it declared that such maintenance should be a charge on the revenues of the lands situate in British India. *Held*, that the British Courts had no jurisdiction to entertain the suit, it not being one for immoveable property.

BEER CHUNDER MANIKKYA v. RAJ COOMAR NOBODEEP CHUNDER DEB BURMONO ... IX 535

Revenue Court—Act X of 1859, s. 23—Surety for payment of rent—Decree, form of. In a suit for arrears of rent in a Revenue Court under Act X of 1859, the lessors joined as defendants the lessee, and another person whom they alleged to be a surety for the payment of the rent. An *ex parte* decree was made in favour of the plaintiffs, but it did not expressly make the alleged surety liable for the money awarded. In execution of the decree certain of the alleged surety's land was sold, and the decree-holders were the purchasers at the sale. An application under Beng. Act VII of 1876 for the registration of their names as proprietors of the land purchased having been rejected, the decree-holders brought the present suit to establish their title to, and to recover possession of, the land. *Held*, that the plaintiff's title was bad on the ground that the decree did not purport to bind the surety for the payment of the money awarded, and on the ground that a Revenue Court is not competent to entertain a suit against a person who has become surety for payment of rent.

BHUGWAN CHUNDER ROY CHOWDRI v. MANICK BIBEE ... IX 383

Small Cause Court—Suit to determine coparcener's rights in moveable property. A Small Cause Court has no power to entertain a suit for a declaratory decree.

There is nothing to prevent a Small Cause Court from determining whether a person, who has been made a co-plaintiff and claims as a co-parcener of the original plaintiff, has any right to the property sued for.

The decree in such a case, if given in favour of the plaintiffs, must order that the parties do recover possession of the property sued for in such shares as the Judge may consider them to be entitled.

A declaratory decree of the relative rights of the parties cannot be made.

AKBAR ALI v. JEZUDDIN ... VIII 399

Want of. See Small Cause Court, Presidency Towns.

Jury—

Duty of Judge when charging. See Criminal Proceedings.

Verdict of. See Criminal Procedure Code, 1872. s. 263.

Kabuliat—

Construction of—Abatement of rent for land acquired by Government for public purposes.

In a suit for rent by a zamindar against a patnidar, the latter claimed abatement of the rent on the ground that part of the land included in the patni tenure had been acquired by the Government for public purposes. The kabuliat, executed by the patnidar contained a provision to the effect that, if any of the land settled should be taken up by Government for public purposes, the zamindar and the patnidar should divide and take in equal shares the compensation money, and a further provision to the effect that the patnidar should "make no objection on the score

Kabuliat—(continued.)

of diluvion or any other cause to pay the rent fixed or reserved by this kabuliat." *Held*, that the patnidar was entitled to abatement of the rent.
 UMA SUNKUR SIKKAR v. TAHINI CHUNDER SINGH ... IX 571

Suit on. See *Plaint*.

Kidnapping—

Abetment—Penal Code (Act XLV of 1860), ss. 109, 363—Right to custody of children. A mother cannot have a right to the custody of her legitimate children adversely to the father. Ordinarily the custody of the mother is the custody of the father, and any removal of the children from place to place by the mother ought to be taken to be consistent with the right of the father as guardian, and not as a taking out of his keeping. But where a Hindu woman left her husband's house, taking with her her infant daughter, and went to the house of A, and on the same day the daughter was married to B, the brother of A, without the father's consent, it was held that A was rightly convicted under ss. 109 and 363 of the Penal Code of abetting the offence of kidnapping.

IN THE MATTER OF THE PETITION OF PRANKRISHNA SURMA. THE EMPRESS v. PRANKRISHNA SURMA ... VIII 969

Guardianship of illegitimate child—Lawful guardian—Penal Code (Act XLV of 1860), ss. 361, 366. The mother of an illegitimate child is its proper and natural guardian during the period of nurture. And where the mother, on her death-bed, entrusts the care of such child to a person, who accepts the trust and maintains the child, such a person is "lawfully entrusted" with the care and custody of the minor within the meaning of s. 361 of the Penal Code.

The explanation of the words "lawful guardian" in s. 361 is intended to obviate the difficulty the prosecution might be put to in being bound to prove strictly, in cases of abduction, that the person from whose care the minor had been abducted was the guardian of such minor within the meaning of the legal acceptance of the word.

THE EMPRESS v. PEMANTLE ... VIII 971

Kistibandi—

Agreeing to pay off a debt due under a decree by instalments—Account stated—Limitation Act (XV of 1877), sched. ii, art. 64. A, being the holder of a decree against B, B, on the 7th July 1875, entered into a kistibandi and filed it in Court, setting out that he would pay off the debt due under the decree by certain instalments, and that in default of payment of one instalment, the whole amount of the debt might be recovered by taking out execution of the decree. By the kistibandi certain immoveable property was pledged to secure the debt, but the kistibandi was not registered. B failed to pay the first instalment, which fell due on the 14th August 1875; and A, on the 19th June 1878, applied for execution of his decree, but the application was refused, and A referred to a regular suit.

In a suit brought by A on the 29th January 1879, against B for the whole debt due under the decree—*held* that, inasmuch as no appeal had been preferred against the order disallowing execution, A was bound by that decision; but that the suit might be taken to be one for an account stated in writing with an agreement for payment at a certain stated period of time as regards the instalments due, which were not barred by limitation; the suit as regards the instalments which had not fallen due being premature, and those previous to the 29th January 1876 being barred by art. 64 of the Limitation Act.

BHEKHAN DOBEY v. RAJROOP KOORER ... VIII 912

Lakheraj Grant—

See *Onus Probandi*.

Land—

Acquired by Government for public purposes. See *Kabuliat*, *Construction of*.

Acquisition Act (X of 1870), ss. 15, 39—Second Appeal—Dispute as to right to compensation. Where a dispute as to the right of one of two claimants to certain compensation awarded under the provisions of the land Acquisition Act has been referred to the Civil Court under s. 15 of that Act, a second appeal will lie to the High Court from the judgment passed in an appeal against the decision of the Court to which the dispute was referred.

ATRI BAI v. ARNOPORNA BAI ... IX 838

Grant of. See *Landlord and Tenant*.

Let for purposes of clearing. See *Enhancement of rent*.

Purchased benami by plaintiff for defendant. See *Onus Probandi*.

Land—(continued.)

Purchased by widow out of income of life estate. See Hindu Law, Inheritance.
Registration Act (Beng. Act VII of 1876)—Co-proprietors—Registration of shares in land—Evidence of possession—Evidence of title. Registration of land under Beng. Act VII of 1876 is not only not conclusive proof, but no evidence at all, upon the question of title of a proprietor so registered.

Such registration does not relieve a plaintiff from the *onus* of proving his title to land claimed by him.

Quære.—Whether, in a suit founded upon possession alone, or in which the relief sought depends solely upon possession, such registration ought not to be treated as *prima facie* evidence of actual possession at the date when the registration was effected?

RAM BUSHAN MAHTO v. JEBJI MAHTO ... VIII 853

Registration Act, Suit for possession after Order under. See *Onus Probandi*.

Registration Act, 1876, s. 55. See *Evidence Act, s. 35.*

Landlord and Tenant—

See Beng. Act VIII of 1869, s. 27; s. 52; s. 59; s. 102; Co-Sharers: Enhancement of Rent: Insolvency: Limitation: Limitation Act, 1877, arts. 139, 144: Onus Probandi: Sale for Arrears of Rent.

Buildings on land—Ownership in land and buildings—Suits between Hindu inhabitants of Calcutta 21 Geo. III, c. 70, s. 17—*Difference in law applicable in Calcutta and the Mofussil—Equity and good conscience.* At a Sheriff's sale, one Templeton bought a Hindu widow's interest in certain land in Calcutta; after passing through several hands, the land was purchased by the defendant. Between the possession of Templeton and the defendant, an intermediate holder built a house upon the land. The plaintiff, a reversionary heir to the estate after the widow's death, sued the defendant to recover possession of the house and land. The defendant admitted the plaintiff's claim to possession, but contended that he was entitled to be paid a fair price for the buildings, or to remove the materials.

Held, that he was neither entitled to compensation, nor to remove the materials, and that the question raised in the suit could not be said to be a question of either succession or inheritance so as to admit of the Hindu law being applied as directed by Geo. III, c. 70, s. 17, but that the law applicable to the case was the law of equity and good conscience as administered by the Courts of Equity in England.

The case of *Thakoor Chunder Paramanick* discussed.

JUGGUT MOHINEE DOSSEE v. DWARKA NATH BYSACK ... VIII 582

Cultivation—Changing character of lands—Forfeiture—Mandatory injunction. Where a tenant has been guilty of a breach of duty in the use of his land, such as making a tank in it, building on it improperly, or changing the character of the cultivation, such conduct does not necessarily operate as a forfeiture so as to render the tenant liable to ejectment. The tenant of an agricultural holding planted his jote with mango trees to the knowledge, but without the consent, of his landlord, thus changing the character of the land. More than three years afterwards the landlord sued for a mandatory injunction to have the mango trees removed. *Held*, that having stood by for more than three years and allowed the tenant to spend his labour and capital upon the land without taking any action in the matter, the landlord was not entitled to a mandatory injunction.

NOYNA MISSER v. RUPIKUN ... IX 609

Cuttack, tenures in—Surborakari tenures—Alienation without consent of landlord—Forfeiture, alienation by one of several co-sharers. The alienation of a surborakari tenure in Cuttack, and a fortiori the alienation of any portion of such tenure, is invalid without the consent of the landlord. Assuming that the sale of such a tenure would entitle the landlord to re-enter as upon a forfeiture, the sale of a portion thereof by one of several co-sharers would not work a forfeiture of the whole tenure.

DASSORATHY HURI CHUNDER MAHAPATTRA v. RAMA KRISHNA JANA ... IX 526

Dur-maurasi mokurari tenure—Notice of relinquishment—Surrender of lease. A tenure under a dur-maurasi mokurari lease of land, which is not let for agricultural purposes, cannot be put an end to by a mere relinquishment, on the part of the lessee, although after notice to the landlord. *Per FIELD, J.*—The principle laid down in the case of *Heera Lal Pal v. Neel Monsee Pal*, where it was held that a patnidar cannot, of his own option, relinquish his tenure, is applicable to all intermediate tenures between the zamindar and the cultivator of the soil, except those held on farming leases.

JUDONATH GHOSE v. SCHOENE KILBURN & CO. ... IX 671

Landlord and Tenant—(continued.)

Ejectment—Right of occupancy—Forfeiture—Beng. Act VIII of 1869, s. 52. The mere omission to pay rent for five years does not of itself amount to forfeiture of a ryot's right of occupancy, and will not be sufficient to sustain an action by the landlord for the recovery of the ryot's holding. A ryot having a right of occupancy cannot be legally ejected, unless under an order regularly obtained under s. 52 of the Rent Law, that is, under a decree for arrears of rent unsatisfied within fifteen days from the passing of the decree.

MUSYATULLA v. NOORZAHAN IX 808

Enhancement—Presumption—Beng. Act VIII of 1869, ss. 3, 4. Section 4, Beng. Act VIII of 1869, entitles the holder of land for the time being, however he may have acquired it, to the benefit of the presumption prescribed in that section if he can show that there has been a continuous and uniform payment of the same rent for twenty years.

TIRTHANUND THAKOOR v. HERDU JHA IX 252

Forfeiture—Waiver by acceptance of rent. A lease provided that every four years a measurement should be made either by the lessor or by the lessees, and additional rent paid for accretion to the land leased. It then provided for failure on the lessee's part to execute a kabuliati for the excess lands in the following terms: "if at the fixed time stated above we do not take an amin and cause measurement to be made you will appoint an amin and cause the entire land of the said chur to be measured, and no objection on the ground of our recording or not, our presence on such measurement chitta shall be entertained, and we will duly file a separate dowl kabuliati for the excess rent that will be found after deducting the settled land of the dowl executed by us from the land settled therein. If we do not, we will be deprived of our right of obtaining a settlement of such excess land, as well as of the land which will accrete in future to the said chur, and no objection thereto on our part shall be entertained." In a suit by the lessor, alleging that in 1876 he had caused a measurement to be made, and had called on the lessees to execute a kabuliati for the rent of certain excess lands, and praying that the lessees might be ejected, the lessees pleaded that the lessor had waived his right to enforce the forfeiture by subsequent receipt of rent. It appeared that payments had been made to the lessor by the lessees, which were accepted as rent, but were kept in suspense, subject to payment by the lessees of the "remaining amount." *Held*, that such a qualification did not make the payments anything else than payments of rent, and that the lessor had waived his right to insist on re-entry on the lessees' failure to measure the lands, or execute a kabuliati when called on to do so. *Davenport v. The Queen*, followed.

KALI KRISHNA TAGORE v. FUZZLE ALI CHOWDHRY IX 843

Grant of land—Presumption as to nature of tenure—Erection of buildings—Bastu Land—Suit to evict. Where it is conceded that lands were not let out for agricultural purposes, but that they had apparently been let out more than sixty years before suit for building purposes, the defendants' ancestors, having erected thereon a house more than sixty years before suit, and having, with the defendants, resided there from first to last, the Court is at liberty to presume that the land was granted for building purposes, and that the grant was of a permanent character.

Prosonno Coomarr Chatterjee v. Jagan Nath Bysack followed.

Prosonno Coomarr Debea v. Sheik Rutton Beparry distinguished.

GANGA DHUR SHIKDAR v. AYIMUDDIN SHAH BISWAS VIII 960

Lease, condition in—Stipulation to pay collection charges—Illegal cess. A condition in a lease, that the tenant will pay to the landlord collection charges, can be enforced if the condition is definite and certain in its nature, and forms part of the consideration for the lease.

MAHOMED FAYEZ CHOWDHRY v. JAMOO GAZEE VIII 730

Notice to quit—Reasonable Notice. A tenant other than an occupancy ryot is entitled to a reasonable notice to quit. What is a reasonable notice is a question of fact, which must be decided in each case according to the particular circumstances and the local customs as to reaping crops and letting land. It is not necessary that the notice must expire at the end of the year.

Janoo Mundur v. Brijoo Singh and Rajendronath Mookhopadhyaya v. Bassider Ruhnman Khondkar considered.

JAGUT CHUNDER ROY alias BASHI CHUNDER ROY v. RUP CHAND CHANGO IX 48

Rectification or alteration of contract of tenancy—Specific Relief Act (I of 1877), s. 31. Where a party to a contract of tenancy desires to have it rectified or altered, the suit should be brought under s. 31 of the Specific Relief Act.

ANABULLAH SHAIKH v. KOYLASH CHUNDER BOSE VIII 118

Landlord and Tenant—(concluded.)

Right of occupancy—Ejectment—Abandonment of holding—Failure to pay rent—Beng. Act VIII of 1869, ss. 6 and 22. When a tenant, having a right of occupancy, abandons his holding and ceases to pay rent for five years, it is not a right construction of s. 22 of Beng. Act VIII of 1869, to say, that the landlord may not put another tenant into possession without the formality of a suit.

Section 6 of Beng. Act VIII of 1869 expressly limits the duration of occupancy right by the words "so long as he pays the rent payable on account of the same," and distinct abandonment and cessation to pay rent disentitle the tenant from enforcing the rights which he may have previously enjoyed.

GOLAM ALI MUNDUL *v.* GOLAP SOONDERY DOSSEE VIII 612

Settlement with tenant containing a clause for re-entry—Compensation in lieu of rent—Use and occupation—Trespassers. The plaintiff made a settlement of certain land with A and B for five years, there being in the settlement a stipulation that if the tenants failed to pay rent the plaintiff might accept another tenant. A died during the tenancy, and B left the place and the property without paying rent, and thereupon the plaintiff entered into possession of the property and held khas possession of it for two years, when he in 1870 entered into a settlement of it with defendant No. 1 for six years. In 1878 B died, and defendants Nos. 2 and 3 alleging themselves to be the chela and dasiputra of B took upon themselves to collect rent from the tenants. The plaintiff thereupon brought a suit against the three defendants, treating them as trespassers, but at the same time asked for the amount of rent due and for eviction. *Held*, that defendants Nos. 2 and 3 had no right on the property at all, and that defendant No. 1, who might have been considered as holding over after the expiration of his lease, if he had been in actual sole possession, should not be made liable for the whole rent when defendants Nos. 2 and 3 were in possession as much as he was, but that as the plaintiff had elected to waive the trespass, all the defendants might, on the authority of *Ranee Lalun Monee v. Sona Monee Dabee and Lucklee Kaul Dass Chowdhry v. Sumneruddi Lasker*, be treated as tenants, and a decree for use and occupation given against them.

SURNOMOYEE *v.* DENONATH (HIR SUNNYASEE IX 908

Suit for rent—Contract to pay for excess land after measurement—Notice of enhancement—Rent Act (Beng. Act VIII of 1869), s. 14.—When a tenant contracts to pay rent at a certain rate for any such land as upon measurement may be found to be in excess of the estimated area, it is not necessary to serve him with notice under s. 14 of the Rent Act before instituting a suit for the rent of any additional land, nor is it necessary that he should be present at the measurement.

DWARKANATH *v.* BAHURAM LASKAR IX 72

Suit for rent—Registered owner, suit by, where the relationship of landlord and tenant is not shown to exist—Beng. Act VII of 1876, s. 78. The mere fact of a person being registered under the provisions of Beng. Act VII of 1876 as proprietor of the land in respect of which he seeks to recover rent is not sufficient to entitle him to sue for it. Where a landlord who was registered as owner of the land in respect of which he claimed rent, sued the occupier for such rent, but was only able to prove the fact that he was the registered owner, and was unable to show that the relationship of landlord and tenant existed, or that he had a good title to the estate of which he was the registered owner. *Held*, that the suit was rightly dismissed.

RAMKRISTO DASS *v.* SHEIKH HARAIN IX 517

Law—

Applicable in Calcutta and Mofussil, difference in. See Landlord and Tenant.

Lawful Guardian—

See Kidnapping.

Lease—

See Landlord and Tenant: Registration Act, 1877, s. 17: Stamp Act, 1879, s. 7, para. 2.

By one Co-sharer. See Co-sharers.

Surrender of. See Landlord and Tenant.

Leave to sue—

See Act XX of 1863, s. 14: Civil Procedure Code, 1877, s. 30.

Legacy, suit for—

See Limitation Act, 1877, arts. 49 and 123.

Legal Representative—

See Appeal.

Letters of Administration—

With will annexed. See Will.

Letters Patent—

1865; cl. 12. See Execution of Decree.

cl. 15—*Appeal—Remand order.* At the hearing of an appeal before a single Judge of the High Court, the case was remanded to the lower Court for the trial of certain issues of fact, the case being in the meantime retained on the file of the Court.

Held, that the order was not appealable under cl. 15 of the Letters Patent.

KALIKRISTO PAUL v. RAMCHUNDER NAG ... VIII 147

Judgment—Appeal—Refusal to transmit order of Privy Council for execution. A decision by the Judge appointed to dispose of matters relating to appeals to Her Majesty in Council, refusing to transmit for execution her order restoring a decree, is a judgment within the meaning of s. 15 of the Letters Patent of 1865, and is appealable to the High Court. *Held*, also, that a refusal to transmit such an order for execution was not a misapprehension on the part of the Judge of the extent of his jurisdiction, although, if it had been, this itself would have been a ground of appeal.

HURRISH CHUNDER CHOWDHRY v. KALISUNDERI DEBI ... IX 482

Lex Loci Contractus—

See Contract.

Liability of Public Servant—

Injury done by his act illegal though bonâ-fide—Act XVIII of 1850—Protection of Judicial Officers—Cantonments Act (XXII of 1864) s. 11—Lunatic Asylums Act (XXXVI of 1858) s. 4. Act XVIII of 1850 is for the protection of Judicial Officers, acting judicially, and of officers acting under their orders. An officer commanding in Cantonments, acting *bonâ fide* in the discharge of his public duty, and under the belief that a person was dangerous by reason of insanity, caused him to be arrested, in order that he might be examined by medical officers, and caused him to be detained in his house for that purpose, he not being a dangerous lunatic. The medical officers, while reporting him sane, recommended that he should be placed under the observation of the civil-surgeon, of the station, for which purpose the same officer caused his further detention. The Commanding Officer, who, under Act XXII of 1864, s. 11, had control and direction of the Police in the Cantonment, did not proceed or intend to proceed, under s. 4 of Act XXXVI of 1858. *Held*, that, although his belief might have justified the Commanding Officer, if he had proceeded under the provisions last mentioned, yet he not having done so, and not having any legal authority for what he had done, was not protected from liability in respect of the above acts.

SINCLAIR v. BROUGHTON ... IX 341

Liability of Sons—

In joint family not made parties. See Civil Procedure Code, 1882, s. 283.

License—

See Municipal Consolidation Act, 1876, s. 77.

Breach of condition of. See Excise Act, ss. 41, 42, and 59.

Production of. See Excise Act, ss. 41, 42, and 59.

To possess arms. See Arms Act, 1878.

Licensed Vendor—

See Bengal Excise Act, 1878, ss. 53, 60, 61.

Lien—

See Mortgage.

For work done on goods—Entire contract—Wharfinger's lien—Contract Act (IX of 1872), ss. 170, 171. Where a person does work under an entire contract with reference to goods delivered at different times such as to establish a lien, he is entitled to that lien on all goods dealt with under that contract.

Chase v. Westmore followed.

The fact that a manufacturer has a wharf upon which he receives goods brought to him by customers, does not entitle him to claim a lien as a wharfinger upon such goods.

MILLER v. NAMMYTHS PATENT PRESS COMPANY (LIMITED) ... VIII 312

Of Mortgage. See Mortgage.

Unpaid vendor—Creditor of vendor—Right of, to lien. Although an unpaid vendor holds a lien upon property sold for the consideration-money, yet a creditor of that vendor cannot claim the same right.

IIARI RAM v. DENAPUT SINGH ... IX 167

Limitation—

See Beng. Act VIII of 1869, s. 27: Execution of Decree: Hindu Law, Alienation.
Onus probandi: Possession.

Adverse possession. On the 6th of September 1865, B obtained a patni lease of certain land from the zamindar, and at an auction-sale by the Sheriff of Calcutta, on the 21st of February 1867, the zamindar's interest was knocked down to B, and a conveyance of the property to him was executed by the Sheriff on the 1st of April 1867. On the 13th of March 1879, a suit for khas possession was brought against B by C, who had bought the property at a sale in execution of a decree made on a mortgage thereof, the date of the mortgage being the 11th of January 1865, and the date of the decree being 30th of November 1865. B pleaded adverse possession.

Held, that B's possession as patnidar only could not be considered as adverse to C, who claimed the superior interest; that B's possession as purchaser could not be considered to have commenced before the date of the conveyance to him by the Sheriff—namely, the 1st of April 1867; and that, therefore, the plea of adverse possession was bad, since the suit had been instituted within twelve years of that date.

KASUMUNNISSA BIBEE *v.* NILRATNA BOSE VIII 79

Application for execution barred by. See Res-judicata.

Bengal Act VIII of 1869, s. 27—Landlord and tenant—Possession, suit for, on dispossession by landlord—Title, Claim for declaration of. Where a suit by a tenant against his landlord is both in form and substance one to recover possession on the ground of illegal dispossession by the landlord, and no question of the plaintiff's title is raised, the insertion in the plaint of a claim for declaration of the plaintiff's title is not sufficient to prevent the application of the limitation prescribed by s. 27 of Bengal Act VIII of 1869. *Mussamut & Hurjobutty Chowdrain v. Chamroo Mundul*, distinguished.

IMAM BUKSH MONDUL *v.* MOMIN MONDUL IX 280

Bengal Act VIII of 1869, s. 27—Suit for possession—Title. The limitation provisions of s. 27, Bengal Act VIII of 1869, have no application to a case in which the plaintiff relies upon his title, and seeks to recover possession upon the strength of that title, and in which the defendant denies that title. *Gooroo Doss Roy v. Ramnarain Mitter*; *Nistarinee v. Kali Pershad Doss Chowdhry*; and *Nilmadhub Shaha v. Srinubash Kurnokar* referred to.

JOYNTI DASI *v.* MAHOMED ALLY KHAN IX 423

Bengal Act VIII of 1869, s. 29—Suit for arrears of rent. After the expiration of the period prescribed by s. 29 of the Bengal Act VIII of 1869, a plaintiff suing for arrears of rent cannot insist on the pendency of another suit, brought by him for possession of the land, as preventing limitation from running, where there has been no time during which such rent could not have been recovered if he had acted on his right of suing for it. In *Tam Sarnomoyee v. Shoshee Mookhee Burmonca*, the claimant of rent was, until the setting aside of the sale that had taken place, in the possession of a person whose claim had been satisfied. The right to sue in that case had been suspended; and it was, therefore, distinguishable from the present. The plaintiff's ancestor purchased a taluk from the Government, subject to an ijara therein held by the defendants, which expired in 1866. A suit brought by the plaintiff in 1874 for possession was dismissed finally in 1876, the defendant's claim to remain in possession under another tenure being allowed. The plaintiff in 1876 sued the defendants for arrears of rent for the years 1866—1872. *Held*, that the suit was barred under s. 29 notwithstanding the proceedings of 1874.

HURO PERSHAD ROY *v.* GOPAL DAS DUTT IX 255

Bengal Act VIII of 1869, s. 30—Suit to recover balance of Tahsildar's account after dismissal—Special agreement. The defendant was tahsildar of one of the plaintiff's zamindaries, and, after his dismissal on the 24th of August 1876, he submitted an account, which was found to be incorrect, and time was given to him to make good certain items on his executing an ikrar, promising to pay whatever balance should be found due from him to the plaintiff. In a suit brought on the 28th of October 1878, to recover the balance found on inquiry to be due,—*held* that s. 30 of Act VIII of 1869 had no application, the special agreement taking the case out of the scope of that section, and therefore the suit was not barred by reason of having been brought more than one year after the defendant's dismissal. *BEER CHUNDER MANICKYA v. HURRO CHUNDER BURMON* IX 211

Limitation—(continued.)

Bengal Act VIII of 1869, s. 58—Landlord and tenant—Execution of decree—Installments. On the 10th of July 1878, a rent-decree was passed in favour of certain parties for the sum of Rs. 168, payable in two equal instalments, on the 4th of June 1879 and the 30th of October 1879, respectively. On the 18th July 1881, the decree-holders applied for execution of the decree. *Held*, by the majority of the Full Bench (GARTH, C. J., and MITTER, J., *dissenting*) that the application was barred by limitation under the provisions of s. 58, Bengal Act VIII of 1869. *Gureebullah Sircar v. Mohun Lall Shaha*, dissented from.
MANTAZUL-HUQ v. NIRBHAI SINGH ... IX 711

Bengal Act VIII of 1869, s. 58—Rent decree, Transfer of—Execution of decree, Application for. Where an application for the transfer of a rent decree for execution has been made and granted by the Court which passed the decree within three years from the date of the decree, but no application for execution is made to the Court to which the decree has been transferred within three years from the date of the decree, the execution of the decree will be barred by limitation, under the provisions of Bengal Act VIII of 1869, s. 58.
BHOLANATH ROY v. NURENDRO NATH ROY ... IX 380

Execution of Decree—Res Judicata—Act VIII of 1859, s. 246—Civil Procedure Code (Act X of 1877), s. 278. In the course of certain execution-proceedings in execution of a decree for arrears of rent, the decree-holder attached a tenure belonging to the judgment-debtor, who, pending the attachment, sold it to A, on the 21st March 1869. A then applied, under s. 246 of Act VIII of 1859, for an order to release the tenure from attachment; but the application was dismissed, on the ground that the alienation had been made pending the attachment. In 1877, the heirs and successors in title of the decree-holder abovementioned obtained another decree for arrears of rent against the same defendant, and in execution thereof again attached the tenure. A applied under s. 278 of the Code of Civil Procedure to have the property released, but his application was rejected on the 3rd of May 1879. In a suit brought by A, on the 6th of May 1879, to establish his right to, and confirm his possession of, the tenure, the lower Courts dismissed the suit, on the ground that it ought to have been brought within one year from the 21th of March 1869. On appeal to the High Court—*Held*, that the suit was not barred by limitation, nor as *res judicata*.
UMESH CHUNDER ROY v. RAJ BULLUBH SEN ... VIII 279

Question of. See Appellate Court, Power of.

Limitation Act—

XIV of 1859—

s. 20, and Act IX of 1871, s. 1—*Execution of Decree in suit instituted before 1st April 1873.* An application for execution of a decree is an application in the suit in which the decree has been obtained. From this, and from the enactment in s. 1 of Act IX of 1871, that nothing contained in s. 2, or in Part II of that Act, shall apply to suits instituted before the 1st April 1873, it follows, that nothing contained in sched. II of that Act extended to an application for execution of a decree in a suit instituted before that date. No such application was barred by s. 20 of Act XIV of 1859, if made within three years from the date of a proceeding within the meaning of that section. Although the execution of a decree may have been actually barred by time at the date of an application made for its execution, yet, if an order for such execution has been regularly made by a competent Court, having jurisdiction to try whether it was barred by time or not, such order, although erroneous, must, if unreversed, be treated as valid.

Where a sale of attached property is stayed by a Court upon the application of the judgment-debtor, on condition of the attachment remaining in force, the subsequent striking of such application from the file of the Court does not affect the rights of the decree-holder.

MUNGUL PERSHAD DCHIT v. GRILA KANT LAHIRI ... VIII 51

IX of 1871—

Art. 15 (XV of 1877), sched. II, art. 11—*Suit to recover property sold in execution—Civil Procedure Codes (Act VIII of 1869, s. 246 and Act X of 1877, ss. 280, 281 and 282.* Certain property, which the plaintiff alleged to belong to her, was sold in execution of a decree obtained by the purchaser of the property at the auction-sale, against a third party. The plaintiff put in a claim to the property under s. 246 of Act VIII of 1859, which claim was rejected on the 6th of September 1873. The plaintiff, on the 10th of January 1878, brought a suit to recover possession of the property sold. *Held*, that the suit was not barred under art. 11 of sched. II of Act XV of 1877, which refers to the section in Act X of 1877, corresponding to s. 246 of Act VIII of 1859; and that the suit was not

Limitation Act—(continued.)

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IX of 1871—(continued.)

barred by art. 15, sched. ii of Act IX of 1871, the suit not being one to set aside a summary order within art. 15 of the schedule to that Act. *Koylash Chunder Paul Chowdhry v. Premnath Roy Chowdhry*, followed.

LUCHMI NARAIN SINGH *v.* ASSRUP KOER ... IX 43

Sched. ii, art. 98—Attempt to enforce deed—Wasilat. In a suit in which the plaintiff had obtained a decree, and the defendant had appealed to Her Majesty in Council, a third party applied to be added as a respondent, on the ground that, by registered deed, the plaintiff had conveyed to him a share of the property decreed. The defendant objected that the deed was a forgery; but an order was made that the applicant should be joined as a respondent, without deciding whether the deed was or was not genuine, and "without prejudice," in the words of the order, "to any action or proceeding by the defendant."

Held, that the setting up the deed and insisting upon it for this purpose constituted "an attempt to enforce" it, and that a suit brought, more than three years after the making of that order, by the appellant against the party so joined as a respondent, to have the deed set aside as being false and fabricated, was barred by limitation under Act IX of 1871, sched. ii, cl. 93.

FAKHARUDDIN MAHOMED AHSAN *v.* THE OFFICIAL TRUSTEE OF BENGAL ... VIII 178

Art. 140. See Limitation Act, 1877, art. 111.

Art. 144—Breach of condition—Forfeiture—Alienation by Hindu widow. A Hindu widow, under an arrangement with her deceased husband's cousin, was in possession for life of a share of ancestral property of her husband's family, in which he, jointly with the cousin, had held a share in his lifetime. This share she sold as if she had held an absolute interest, and the purchaser's name was entered, instead of hers, in the revenue records; but no change of possession took place till her death.

To a suit brought by the cousin's heirs to recover the property purchased from the widow, more than twelve years after the sale, but less than twelve years after the widow's death, the defence was limitation under Act IX of 1871, sched. ii, cl. 141, commencing from the date of the sale, there having been, it was alleged, "a breach of condition or forfeiture" within the meaning of that clause.

By the terms of the arrangement contained in a solenama, the widow was to have no power to alienate; and after her death her share was to belong to the cousin.

Held, that these terms prohibited only such an alienation by the widow as would prevent the cousin's succeeding after her death, and the alienation made was good for the widow's lifetime. There was no condition against such an alienation; and if there had been, there was neither any rule of law, nor anything in the words used in the solenama, attaching forfeiture to the breach of such a condition.

Held, accordingly, that art. 141 did not apply, and the suit was not barred by limitation.

BIBI SAHODRA *v.* RAI JANG BAHADUR. LUTCHMAN SAHAI CHAUDHRI *v.* RAI JANG BAHADUR ... VIII 224

s. 2, sched. ii, art. 11—Claim to mortgaged property—Execution of Decree. In execution of a decree upon a mortgage, a claim to the mortgaged property was put in under s. 246 of Act VIII of 1859 by certain persons, on the ground that they had purchased the right, title, and interest of the judgment-debtor in execution of a previous decree. The claim was allowed on the 26th July 1877. On the 29th March 1879, the mortgagee instituted a suit to establish his right to the property. The period of limitation for such a suit under Act XV of 1877 is one year from the date of the order; but under Act IX of 1871, a longer period was prescribed. Act XV of 1877 did not come into force until the 1st of October 1877.

Held, that the provisions of the last paragraph of s. 2 of Act XV of 1877 applied, and that the suit was not barred.

RAJ CHUNDER CHATTERJEE *v.* MODHOOSOODUN MOOKERJEE ... VIII 395

s. 5. See Second Appeal.

Art. 148—Suit for redemption of mortgage—Acknowledgment of title of mortgagor or of his right to redeem. An acknowledgment to be within the meaning of art. 148, sched. II, Act IX of 1871, must be an acknowledgment of a present existing title in the mortgagor. An acknowledgment of the original making of the mortgage deed and of possession having been taken under it, coupled with the allegation of the subsequent execution of two other deeds practically superseding the mortgage and

Limitation Act—(continued.)

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IX of 1871—(continued.)

altering the relation of the parties, contained in a written statement filed previous to the expiry of the 60 years allowed, is not a sufficient acknowledgment within the meaning of that article, so as to prevent limitation from operating.

RAM DAS v. BIRJUNDUN DAS alias LALOO BABOO ... IX 616

Art. 167—Execution of decree—Limitation applicable to execution of a decree passed previous to the 1st October 1877—Limitation Act XV of 1877, art. 179—General Clauses Consolidation Act (I of 1868), s. 6, Effect of. In execution of a decree, dated the 17th January 1877, the judgment-creditor applied on the 13th May 1878 to have the property of his judgment-debtor sold on the 16th September 1878. Subsequently on the 2nd June 1881 he made further application to have the decree executed. *Held*, that the case was governed by the provisions of art. 167 of Act IX of 1871, and not by those of art. 179 of Act XV of 1877, and that as the application had not been made within any one of the periods given in the third column of art. 167, it was barred by limitation. *Held*, also, following *Mungul Pershad Ditchi v. Grija Kant Lahiri*, that although there is no corresponding provision in Act XV of 1877 to that contained in s. 1 of Act IX of 1871, all applications for execution of a decree are applications in the suit which resulted in that decree. *Held*, further, that under s. 6 of Act I of 1868 the repeal of Act IX of 1871 by Act XV of 1877 does not affect any proceedings commenced before the repealing Act came into force. *Ite Ratansi Kalianji*, followed.

BEHARY LALL v. GOBERDHUN LALL ... IX 446

XV of 1877—

See Parties.

ss. 5, 6—Suit to compel registration—Registration Act (III of 1877), s. 77. The provisions of s. 5 of Act XV of 1877 apply to suits instituted under the provisions of s. 77 of the Registration Act (III of 1877).

NIJABUTOOLLA v. WAZIR ALI ... VIII 910

s. 10—Express trust—Suit against trustees to charge property with trust. A suit against trustees for the purpose of charging certain property with the trusts declared by the author of the trust in respect of that property and for an account, is a suit to follow property, and as such, is not barred by any lapse of time.

HURRO COOMAREE DOSSEE v. TARINI CHURN BYSACK ... VIII 766

s. 19, sched. ii, art. 179—Acknowledgment in writing—Authority to sign acknowledgment. On the 7th of December 1877, additional time for payment of the amount of a decree, dated the 24th of March 1876, was granted to the judgment-debtor upon a petition signed by his vakeel. On the 4th of December 1880 a fresh application for execution was made.

Held, that it was not barred under art. 179, sched. ii of Act XV of 1877, inasmuch as the petition constituted an acknowledgment of liability under s. 19 of the same Act, and a new period of limitation began to run from the 7th of December 1877. The object of the words "application in respect of any property or right" in s. 19 is to extend to the applications mentioned in sched. ii the same privilege as is accorded to suits.

Ramlal Rai v. Satgur Rai approved of.

RAM COOMAR KUR v. JAKUR ALI ... VIII 716

s. 26. See Waqfment.

Sched. ii, Art. 12—Suit to set aside sale for arrears of Government revenue. A suit to set aside a sale for arrears of Government revenue must be brought within one year from the date when the sale becomes final and conclusive.

RAJ CHUNDR CHUCKERBUTTY v. KINOO KHAN ... VIII 329

s. 7—Minor Plaintiff—Application for execution by guardian. A plaintiff, who has obtained a decree during his minority, has the option either of applying through his guardian to execute the decree during his minority or to wait until the expiration of his minority before executing his decree. The application of the guardian is the application of the infant. The minor is under disability during the whole period of his minority. His disability does not cease, because he, through his guardian, makes two or more applications for execution however long the interval between them, provided they are all made during his minority.

MON MORUN BUKSHEE v. GUNGA SOONDARY DABEE ... IX 181

s. 7—Minority—Right to sue—Personal exemption—Assignment by minor. Under s. 7 of the Limitation Act, a minor has, in respect of a cause of action accruing during

Limitation Act—(continued.)**XV of 1877—(continued.)**

his minority, a right to sue at any time within three years of attaining his majority; but if during his minority, or if after attaining his majority and within three years thereof, such person assigns all his right and interests to a third party, who is *sui juris*, the latter cannot claim the exemptions accorded to the minor by s. 7 of the Limitation Act, but is subject to the ordinary law of limitation, governing suits in which relief of the same nature is claimed.

RUDRA KANT SURMA SIRCAR v. NOHO KISHORE SURMA BISWAS, and SAMOD ALI v. MAHOMED KASSIM ... IX 663

- s. 26—*Dispossession—Fishery—custom—suit to restrain fishing in certain bhils.*
In a suit to restrain the defendants from fishing in certain bhils, which admittedly belonged to the plaintiff's zamindari, it appeared that the plaintiff had let out some of the bhils to ijaradars who had sued the defendants for the price of fish taken by them from the bhils, and that the suit had been dismissed, on the ground that the defendants, in common with other inhabitants of the villages in the zamindari, had acquired a prescriptive right to fish in the bhils. The defendants contended that they had been in possession of the bhils for more than 12 years, and that they had a prescriptive right to fish therein, under a custom according to which all the inhabitants of the zamindari had the right of fishing. *Held*, that the mere fact that the defendants had trespassed and had misappropriated fish did not amount to a dispossession of the plaintiff, and that the suit was not barred by limitation. *Parbatty Nath Roy Chowdhry v. Mudho Paroe*, distinguished. *Held*, also, that no prescriptive right of fishery had been acquired under s. 26 of the Limitation Act, and that the custom alleged could not, on the ground that it was unreasonable, be treated as valid. *Lord Rivers v. Adams*, followed.

LUTCHMEET SINGH v. SADAULLA NUSHYO ... IX 698

- s. 11. See Appellate Court, Power of: Civil Procedure Code, 1882, s. 561.

Art. 11. See Limitation Act, 1871, art. 15.

Art. 11—*Suit for possession—Civil Procedure Code (Act VIII of 1859), s. 246.*
Where, in consequence of an adverse order passed under the provisions of Act VIII of 1859, s. 246, a suit is (since the Limitation Act (XV of 1877) came into force) instituted to establish the plaintiff's right to certain property and for possession, such suit is not governed by the provisions of art. 11, sched. II of Act XV of 1877, but by the general limitation of twelve years. *Koylash Chunder Paul Chowdhry v. Premnath Roy Chowdhry, Matonging Dass v. Chowdhry Sunmunjoy Mullik, Joyram Loo v. Paniram Dhoba and Raj Chunder Chatterjee v. Shama Churn Guran* cited.

GOPAL CHUNDER MITTER v. MOHESH CHUNDER BORAL ... IX 230

Arts. 11 and 120—*Civil Procedure Code, Act VIII of 1859, s. 246; Civil Procedure Code Act, X of 1877, s. 283—Suit to establish title to property after rejection of claim.*
The defendants attached certain property, which the plaintiffs alleged belonged to them. The plaintiffs preferred a claim to the property under s. 246 of Act VIII of 1859: this claim was disallowed on the 15th August 1877. *Held*, that the order of the 15th August 1877 not being an order passed under s. 283 of Act X of 1877, art. 11 of sched. ii of Act XV of 1877 did not apply, but that art. 120 of sched ii was applicable; and that as the first suit had not been dismissed upon the merits, the plaintiffs were entitled to maintain the second suit.

BESSESSUR BHUGUT v. MURLI SAHU ... IX 163

Arts. 19 and 123—*Suit for specific moveable property—Suit for a legacy.*
A testator bequeathed certain specific moveable property to A. B applied for and obtained a certificate under Act XXVII of 1860 on behalf of the testator's widow, and took possession of the property bequeathed. A appealed, and the case was remanded for retrial. On the 27th of March 1873, the former order was cancelled and a certificate was granted to A. On the 19th of August 1873, B was directed to deliver up the property to C, who had purchased it from A. On the 22nd of March 1878, C instituted a suit to recover the property. *Held*, that the suit was barred under art. 49 of the Limitation Act. Article 123 of the Limitation Act only applies to cases in which the property sought to be recovered is not only a legacy, but is also sought to be recovered as such from a person who is bound by law to pay such legacy, either because he is the executor of the will or otherwise represents the estate of the testator.

ISSUR CHUNDER DOSS v. JUGGUT CHUNDER SHAHA ... IX 79

Art. 61. See Kistibandi.

Art. 120. See Limitation Act, 1877, art. 11.

Limitation Act—(continued.)**XV of 1877—(continued.)**

Art. 120—Suit for ejectment—Claim to compel defendant to remove trees from land granted to him for agricultural purposes. Article 120 of sched. ii of Act XV of 1877 is applicable to an alternative claim, put forward in a suit for ejectment, to compel the defendant to remove trees from certain lands leased to him for agricultural purposes.

GUNESH DASS *v.* GONDOUR KOORMI ... IX 147

Arts. 121, 130, 149—Resumption and assessment of lakheraj land. Discussion of the law of limitation as applicable to the resumption and assessment of lakheraj lands.

KOYLASHBASHINY DOSSEE *v.* GOOOLMONI DOSSEE ... VIII 230

Art. 123—Trustee and Cestui que trust—Will—Void gift—Residue—Gift of interest—Share of rents and profits—Corpus of estate. A by his last will and testament gave his property to trustees, partly in trust for religious and other purposes, and partly to pay thereout to certain persons and their heirs forever certain annuities, being fixed portions of the net profits of a certain estate called the Hurro estate, which amounted to Rs. 3,150. A died in November 1863. On the 11th of August 1879, the heir of one of the annuitants instituted a suit claiming a share under the will, and asking for a partition of that share. The plaintiff alleged besides, that certain of the trusts and provisions in the will were invalid in law; that, consequently, a large portion of the testator's property remained undisposed of at his death, and she claimed a share of this residue as one of the heirs of the testator.

Held that, under the circumstances, the gift of the share of the rents and profits amounted to a gift of a share in the corpus of the estate; and that, in respect of that portion of the plaintiff's claim, the suit was not barred by limitation.

Kherodemoney Dossee v. Doorgamoney Dossee, Greender Chunder Ghose v. Mackintosh, Anund Moye Dabi v. Grish Chunder Myt, Mannox v. Greener, and Sookmoy Chunder Dass v. Monohari Dossee cited.

Where an estate is given by will to trustees for religious and other purposes, some of which are invalid or fail, the heirs of the testator may be barred by limitation from recovering the portion undisposed of, though they might still bring a suit against the trustees to compel them to properly administer the trusts which had not failed.

HEMANGINI DASI *v.* NORIN CHAND GHOSE ... VIII 788

Art. 123. See Limitation Act, 1877, art. 49.

Art. 127. See Hindu Law, Joint Family.

Art. 127—Suit for possession and partition—Acquiescence in alienation—Exclusion from share. In a suit to obtain a share by partition of a joint family property, the interest of the plaintiff's father having been sold in execution of a decree, limitation is to be computed from the time when exclusion from his share first becomes known to the plaintiffs.

ISSURIDUTT SINGH *v.* IBRAHIM ... VIII 653

Art. 131—Worship of idol—Turn of worship—Recurring right. A suit for a palla, or right to worship an idol in turn, is a periodically recurring right within the meaning of Act XV of 1877, sched. ii, art. 131.

Eshan Chunder Roy v. Monmohini Dasi followed.

GOPEEKISHEN GOSSAMY *v.* THAKOORDASS GOSSAMY ... VIII 807

Art. 132—Suit for arrears of maintenance charged upon immoveable property. An allowance for the maintenance of a younger member of a family, was charged upon the inheritance to which the eldest male member alone succeeded. *Held* that, a suit for arrears of such maintenance, within twelve years, is within time under Act XV of 1877.

AHMAD HOSSEIN KHAN *v.* NIHAL-UD-DIN KHAN ... IX 945

Art. 138. See Possession, Suit for.

Art. 139—Ghatwal—Adverse possession—Limitation in suit by landlord against tenant of permanent tenure. Where a permanent tenure has been granted by a ghatwal, if the successor of such ghatwal, being one of the ghatwals, to whom Regulation XXIX of 1814 applies, wishes to resume that tenure, he must bring his suit within twelve years after succeeding to the ghatwali estate. The possession of the tenant is adverse to him from the time of the decease of his immediate predecessor. Article 139, sched. ii of Act XV of 1877, regarding suits by landlords to recover possession from tenants giving twelve years time from the

Limitation Act—(continued.)**XV of 1877—(continued.)**

determination of the tenancy, does not apply to cases in which the plaintiff seeks to recover a tenure permanent in its nature and not determinable by notice.

MODHO KOORY v. TEKAIT RAM CHUNDER SINGH ... IX 411

Arts. 139, 144.—Jandlord and tenant—Suit for possession—Cause of action. The plaintiff stated that in the year 1862 he purchased a talook in which some of the defendants then held an ijara for a term of years expiring in 1868. The talook had previously been a khas mehal in the possession of the Government, and was brought by the plaintiff at an auction sale held by the Collector. The plaintiff also stated that the ijaradar defendants, in collusion with the other defendants, had continued in possession of the lands held in ijara after the term of the ijara had expired, and had refused to give up possession thereof to the plaintiff. The Judge of the lower Appellate Court found that the defendants (other than the ijaradars) had been in possession previously to the sale in 1862, and he also found that there was no evidence to support the charge of collusion with the ijaradar defendants. He therefore dismissed the suit (which was brought in 1880) on the ground of limitation. *Held*, on second appeal, that the plaintiff's cause of action arose on the expiration of the ijara, and that the suit, whether governed by articles 139 or 144 of the Limitation Act, XV of 1877, was not barred on the ground of limitation.

Woomesh Chunder Gooplo v. Raj Narain Roy cited.

KRISHNA GOHIND DHUR v. HARI CHURN DHUR ... IX 367

Art. 141.—Act IX of 1871, sched. II, art. 140—Suit by Reversioner for possession. Under article 141 of schedule II, Act XV of 1877, a reversioner who succeeds to immoveable property has twelve years to bring his suit for possession from the time when his estate falls into possession.

SRINATH KUR v. PROSUNNO KUMAR GHOSE ... IX 934

Art. 141.—Alienation by Hindu Widow—Adverse possession. A titleby adverse possession for more than twelve years accrues even during the lifetime of a Hindu widow, but if possession arises directly from any invalid alienation on her part, special provision is made for the right to sue on the part of the reversioners within twelve years from her death and the accrual of their titles.

GYA PERSAD Alias LAL PERSAD v. HEET NARAIN ... IX 93

Art. 141.—Suit by reversioners after death of Hindu widow. In 1846, a widow, under an ikarnama, made over to her brother-in-law certain properties formerly belonging to the estate of one Luchmi Narain, her late husband. The widow died in 1878. In March 1879, a suit was brought by the daughters of Luchmi Narain to recover the properties, formerly belonging to their father, from the hands of certain vendees.

Held, that the suit by the reversioners was not barred under art. 141 of Act XV of 1877, there having been no possession adverse to the widow, by dispossession for more than twelve years, the widow's cause of action having ceased when she entered into the ikarnama in 1846, and gave up her right to the property; nor, under sched. ii of Act XV of 1877, could the right of the plaintiffs be said to be barred by any Act repealed thereby, inasmuch as art. 142 of Act IX of 1871 prescribes the same period of limitation as is prescribed in art. 141 of Act XV of 1877; and that although, under Act XIV of 1859, repealed by Act IX of 1871, it was decided in *Nobin Chunder Chuckerbutty v. Guru Prasad Doss*, that adverse possession which bars a widow also bars the reversionary heirs, yet the exception laid down in that case would be applicable, and would save limitation.

PURSUT KOER v. PALUT ROY ... VIII 442

Art. 164.—Code of Civil Procedure (Act X of 1877), s. 108—Ex parte decree—Setting aside ex parte. An *ex parte* decree was obtained against a defendant who applied to have it set aside under s. 108 of the Civil Procedure Code. The application was made more than thirty days from the date of attaching the defendant's property in execution of the decree, but within thirty days of the service of the sale proclamation. *Held*, that the application was barred by limitation under art. 164, sched. II, Act XV of 1877.

IN THE MATTER OF BHAOBUNESSURY. BHAOBUNESSURY v. JUDOBENDRA NARAIN MULLICK ... IX 869

Arts. 171, 171a, and 178.—Application to revive suit—Right to apply—Pending suit. The right to apply in a pending suit—i.e. a suit in which no final order has been made,—is a right which accrues from day to day, and therefore the periods of limitation provided in arts. 171, 171a, and 178 do not apply in an application to revive such a suit.

KEDARNATH DUTT v. HARRA CHAND DUTT ... VIII 420

Limitation Act—(continued.)**XV of 1877—(continued.)**

Arts. 171b and 178. See Appeal.

Art. 176. See Arbitration.

Art. 179. See Limitation Act, 1871, art. 167.

Art. 179—Execution of decree, Application for—Acknowledgment in writing. The more payment of a Court-fee in connection with execution proceedings, with a view to obtain leave to bid for property then up for sale in execution of a decree, does not constitute "the taking of some step in aid of execution" within the meaning of art. 179, sched. II of the Limitation Act (XV of 1877), so as to prevent the execution of the decree being barred within three years from the date of such payment. An application for the execution of a decree is an application in respect of a "right" within the meaning of s. 19, Act XV of 1877, and a petition made by a judgment-debtor, and signed by his vakool, praying for additional time for payment of the amount of a decree, constitutes an "acknowledgment of liability" within the meaning of that section, and a new period of limitation should be computed from the date of such petition in order to ascertain whether the execution of the decree is barred or not under the provisions of art. 179, sched. II of the Limitation Act. *Ramhit Rai v. Satgur Rai*; and *Ram Coomar Kher v. Jakur Ali*, followed.

TORÉE MAHOMED v. MAHOMED MABOOD BUX... IX 730

Art. 179, para. 2—"Appellate Court"—Appeal. The meaning of paragraph 2 to art. 179 of the 2nd schedule of Act XV of 1877 is, that, where there has been an appeal, the period of limitation is to run from the date when the Court to which that appeal has been preferred passes an order disposing of the appeal. The words 'Appellate Court' signify the Court or Courts to which the appeal, mentioned in the article, has been preferred.

WAZIR MAHTON v. LULIT SING IX 100

Art. 179—Execution of decree—Partition—Joint Decree—Decree for partition. A consent decree for partition made between three parties contained a provision that if the plaintiffs should not have the property partitioned within two months from the date thereof, any one of the other parties to the suit might obtain partition by executing the decree. One of the parties sued out execution and obtained partition and possession of his own share. More than three years after the date of the decree, but less than three years from the date of the application just mentioned, another of the parties applied for partition under the decree. *Held*, that application was not barred by limitation under the provisions of the Limitation Act, XV of 1877, sched. II, art. 179, cl. 3. exp. 1.

MOHUN CHUNDER KURMOKAR v. MOHESH CHUNDER KURMOKAR IX 568

Art. 179—Execution of decree, Application for—Step in aid of execution—Repeal, Effect of. On the 28th September 1877 an application was made for execution of a decree. On the 8th July 1878 the decree-holder deposited Rs. 2 as Nilamsee fees that is to say, costs for bringing certain property to sale in execution of the decree. On the 28th March 1881 a further application for execution of the decree, was made. *Held*, that the deposit of Rs. 2 as Nilamsee fees on the 8th July 1878 was a step in aid of execution of the decree, and that the application of the 28th March 1881, being within three years from the date of the deposit, was not barred by limitation.

Quere.—Whether, inasmuch as Act IX of 1871 is repealed by Act XV of 1877, and the later Act contains no provision similar to that contained in s. 1 of Act IX of 1871, Act XIV of 1859 can be said to have been repealed in respect of suits instituted before the 1st of April 1873.

RADHA PROSAD SINGH v. SUNDUR LALL IX 644

Art. 179. See Limitation Act, 1877, s. 19.

Art. 179—Application for execution of decree—Order staying execution. The plaintiff obtained an *ex parte* decree on 7th February 1876, of which he applied for execution on the 31st May 1876. Thereupon the defendant applied to set aside the decree, on the ground that he had had no notice of the suit, and an order was made staying the execution of the decree. The defendant's application was rejected on the 15th November 1876, and an appeal by the defendant, pending which the stay of execution was continued, was dismissed on the 19th December 1877. Previously, *vis.*, on the 21st February 1877, the execution-case had been struck off the file. *Held* that, notwithstanding the application was made more than three years after the decree, and the plaintiff was not entitled to any deduction of the time during which the execution was stayed by order of Court, an application

Limitation Act—(concluded.)**XV of 1877—(concluded.)**

for execution made on the 10th December 1880 was, under art. 179 of Act XV of 1877, not barred, the decree not being final until the order dismissing the appeal on the 19th December 1877.

LUTFUL HUQ *v.* SUMBHUDIN PATTUCK VIII 248

Art. 179, cl. 4—Application in aid of execution—Possession—Wasilat. Where a decree is one for possession, with wasilat from the date of dispossession to the date of suit, an application for wasilat, if not made within three years from the first application in execution, is barred.

An application made by a judgment-creditor to take out of Court certain moneys there deposited by his judgment-debtor, cannot be considered to be an application to the Court to take a step "in aid of execution," and is not, therefore, within the meaning of cl. 4 of art. 179, sched. ii of Act XV of 1877.

Bunsee Singh v. Mirza Nuzuf Ali Beg distinguished.

HEM CHUNDER CHOWDHRY *v.* BROJO SOONDURY DEBEE VIII 89

Art. 179, cl. 4—Application for execution of decree by benamidar. An application for execution of a decree by a mere benamidar is not an application in accordance with law within the meaning of art. 179 (cl. 4 of sched. II of the Limitation Act (XV of 1877), such as to afford a fresh starting point for limitation.

DENO NATH CHUCKERBUTTY *v.* LALLIT COOMAR GANGOPADHYA ... IX 638

Art. 180—Execution of an order of Privy Council—Order in Council confirming a decree. Although an order of Her Majesty in Council may confirm a decree of the Court below, that order is the paramount decision in the suit; and any application to enforce it is, in point of law, an application to execute the order and not the decree which it confirmed.

Such an application is governed by art. 180, sched. ii of Act XV of 1877.

LUCHMUN PERSAD SINGH *v.* KISHUN PERSAD SINGH VIII 218

Liquor—

Sale of, by servant. See Excise Act, ss. 41, 42 and 59.

Lis Pendens—

See Mortgage.

Suit for account against executor—Sale by Sheriff in execution of decree—Right of Purchaser at Sheriff's sale against purchaser at sale by mortgagee. In 1855, a decree for an account was passed, in the Supreme Court at Calcutta, against A, an executor. A died in 1856, and the suit, which was revived against his representatives, came on for consideration on further directions on the 29th of August 1866. It was then found, that A's estate was liable for Rs. 1,32,406-11-8, and his representatives were ordered to pay this money into Court. The representatives having made default in payment, a writ of *fieri facias* was issued, under which certain property was sold by the Sheriff of Calcutta and conveyed by him to B on the 1st of April 1877. Previously to this the representatives of A had, on the 11th of January 1865, mortgaged the same property, together with other lands, "for the purpose of paying the Government revenue of certain taluqs belonging to A deceased," and the mortgagee having obtained a decree on his mortgage, the property was sold to C, in execution of the mortgage-decree, on the 30th of March 1867. In a suit for possession by C against B, the latter pleaded *lis pendens*.

Held, that the nature of the suit, in which the decree of 1855 and the subsequent order of 1866 were passed, was not such as to warrant the application of the doctrine of *lis pendens* to the mortgage of the 11th of January 1855.

Kailas Chandra Ghose v. Fulchand Jaharri followed.

KASUMUNNISSA BIBEE *v.* NILRATNA BOSE VIII 79

Local Enquiry—

See Decree.

Local Investigation—

See Evidence.

Lost Will—

See Will.

Lunatic—

Act XXXV of 1858, ss. 3, 4, 23—Appeal—Right of suit to recover Property. On an application made by the wife and son of Tajamul Hossien, an alleged lunatic, under the provisions of Act XXXV of 1858, s. 3, the daughters of the alleged lunatic, who were served with a notice under s. 4 of the same Act, appeared at the hearing

Lunatic—(continued.)

of the application, and cross-examined the witnesses examined in support of the application. The Judge found that Tajamul Hossein was of unsound mind, and appointed his wife, Mussamut Latifan, to be the guardian of his person. The daughters appealed to the High Court.

Held (on an objection being taken that the appellants had no *locus standi*), that the daughters were entitled to appeal under the provisions of s. 22, Act XXXV of 1858.

Sherman v. Schorn referred to.

Quere—Whether a right to sue to recover a property would be sufficient to confer jurisdiction under Act XXXV of 1858?

IN THE MATTER OF THE PETITION OF MAHOMED BUSHEER'UL HOSSEIN.
BIBEE MUNGHUR v. MAHOMED BUSHEERUL HOSSEIN ... VIII 263

Sylums' Act, 1858, s. 4. See Liability of Public Servant.

Suit by, to recover family property. See Hindu Law, Inheritance.

Magistrate—

Attachment and sale by. See Absconding of Accused.

Duty of. See Criminal Proceedings.

Jurisdiction of. See Criminal Procedure Code, 1872, s. 518.

Power of. See Criminal Procedure Code, 1872, ss. 47, 518.

Reference to High Court—Order of Appellate Court—Criminal Procedure Code (Act X of 1872), ss. 295, 296, and 297. A District Magistrate, being of opinion that the Sessions Judge had, on appeal, improperly set aside a conviction made by a Cantonment Magistrate, referred the matter to the High Court under s. 297 of the Code of Criminal Procedure.

Held, that the Magistrate had no power to make such a reference.

IN THE MATTER OF THE PETITION OF RAM LALL. THE EMPRESS v.
RAM LALL ... VIII 875

Review of order—Reival of order which has been quashed. On the 7th of June 1881, the Assistant Commissioner of Hylakandi, in Sylhet, passed an order under s. 518 of the Criminal Procedure Code, that the manager of a certain tea garden should discontinue holding a market on Thursdays until further notice. On the 25th of August 1881, the Assistant Commissioner reviewed this order, and having come to the conclusion that he had no power to issue a permanent injunction, struck the case off the file, at the same time referring the matter to the Deputy Commissioner. The latter declined to interfere, informing the Assistant Commissioner that he saw no illegality in his order. Thereupon the Assistant Commissioner passed an order declaring that his order of the 7th of June 1881 remained in full force. On a reference to the High Court, made by the Officiating Sessions Judge of Sylhet under s. 297 of the Code of Criminal Procedure—

Held, that the Magistrate having, on the 25th of August 1881, set aside his order of the 7th of June 1881, and struck the case off the file, he had no power to revive it without a fresh proceeding.

BRADLEY v. JAMESON ... VIII 580

Withdrawal of case—Code of Criminal Procedure (Act X of 1872), s. 521. Where a Magistrate, in a proceeding under s. 521 of the Code of Criminal Procedure, satisfies himself that there is no necessity for proceeding further under that section, he is competent to let the matter drop.

In re Shonai Paramanick followed.

IN THE MATTER OF THE PETITION OF ISSUR CHUNDER NATH. ISSUR
CHUNDER NATH v. KALI CHURN NATH ... VIII 583

Mahomedan Law—

See Will.

Acknowledgment of children as sons. The acknowledgment and recognition of children by a Mahomedan as his sons, giving them the status of sons capable of inheriting as being of legitimate birth, may, without proof of his express acknowledgment of them, be inferred from his treatment of such children, provided that certain conditions negating this relationship are absent.

The question whether such acknowledgment should be presumed or not, depends on the circumstances of each particular case. *Ashrufodd Dowlati Ahmed Hossein Khan v. Hyder Hossein Khan* referred to and followed.

MAHAMAD AZMAT ALI KHAN v. LALLI BEGUM ... VIII 422

Mahomedan Law—(continued.)

Debts—Administration, suit for—Suit by creditor of deceased mahomedan against his heir—Sale in execution of decree. After the death of a mahomedan, several of his creditors sued his widow and daughter, and obtained decrees against the assets of the deceased, which assets had come into the possession of the mother and daughter. In execution of these decrees portions of the property were sold; thereupon two married sisters of the deceased, who lived with their husbands apart from the widow and daughter, sued as heirs of the deceased to recover their shares of the property sold.

Held, that the property of the deceased having been attached and sold in payment of his debts, the plaintiffs' suit must be dismissed.

When a creditor of a deceased mahomedan sues the heir in possession, and obtains a decree against the assets of the deceased, such a suit is to be looked upon as an administration-suit, and those heirs of the deceased who have not been made parties cannot, in the absence of fraud, claim anything but what remains after the debts of the testator have been paid.

Mussanuit Nuzeerun v. Moulvie Ameerooddeen, Assamathemnessa Bibee v. Roy Lutchnooput Singh, Kishwar Khan v. Jewan Khan, Khajah Hidayutcollah v. Rai Jan Khanum, Bazayet Hossein v. Dooli Chund referred to.

MUTTYJAN v. AHMED ALI VIII 370

Debts—Sale in execution of money-decree against the representatives of deceased mahomedan—Rights of purchaser at execution-sale against mortgagee—Notice. In execution of a money-decree against the heirs of a deceased mahomedan for a debt incurred by him, A purchased certain property which had been allotted to the widow of the deceased in lieu of dower and of her share of the inheritance. Previously to the purchase, however, the widow had mortgaged the same property to B, who, at the time of the mortgage, knew of the debt for which the decree was obtained. In a suit by B against A, on the mortgage, it was not shown that there were not assets in the hands of the heirs-at-law to satisfy the debt due to A's vendor.

Held, that B was entitled to recover.

Spyd Bazayet Hossein v. Dooli Chund followed.

NARSINGH DASS v. NAJMOODDIN HOSSEIN VIII 20

Divorce—Divorce by wife. Under the Mahomedan law, a husband may give his wife the power to divorce herself from him according to the form prescribed by that law for divorce by the husband.

HAMIDOOOLA v. FAIZUNNISSA VIII 327

Endowment—Wuqf—Provisions for payment of debts and maintenance. A Mahomedan created a *wuqf* of all his property, and appointed his minor grandson *mutwali*, providing that, during the minority, the property should be managed by the minor's father. The deed contained a provision that, in the first place, certain debts should be paid, and then provided that the property should be applied towards the religious uses created and the maintenance of the settlor's grandsons and their male issue. In execution of a decree against the minor's father, the endowed property was attached and sold. In a suit by the minor through his sister, as guardian, to recover possession of the property, *held*, that, notwithstanding the provisions for payment of the debts and maintenance, the *wuqf* was valid.

LUCHMIPUT SINGH v. AMIR ALUM IX 176

Gift—Requisites of gift—Gift in futuro. Under the Mahomedan law a gift is not valid unless it is accompanied by possession, nor can it be made to take effect at any future definite period. A document, containing the words, "I have executed an *ikrar* to this effect that, so long as I live, I shall enjoy and possess the properties, and that I shall not sell or make gift to any one; but after my death you will be the owner, and also have a right to sell or to make a gift after my death."

Held to be an ordinary gift of property 'in futuro' and as such invalid under Mahomedan law.

YUSUF ALI v. COLLECTOR OF TIPPERA IX 138

Guardian—Minor—Certificate of Guardianship. Under the Mahomedan law the brother of the mother of a female minor, whose parents are dead, is entitled, in preference to a mere stranger, to the guardianship of the property of the minor, unless it be shown that he is in some way unfit to take charge of such property.

IN THE MATTER OF THE PETITION OF IMAM BUKSH. IMAM BUKSH v. THACKO BIBEY IX 599

Mahomedan Law—(concluded.)

Joint mahomedan family—Joint acquisition—Presumption. When the members of a mahomedan family live in commensality, they do not form a 'joint family' in the sense in which that expression is used with regard to Hindus; and in Mahomedan law there is not, as there is in Hindu law, any presumption that the acquisitions of the several members are made for the benefit of the family jointly.

Abraham v. Abraham and Jowala Buksh v. Dharum Sing cited. *Rupchand Chowdhry v. Latu Chowdhry* doubted.

HAKIM KHAN v. GOOL KHAN VIII 826

Maintenance—Mutta form of marriage—Criminal Procedure Code (Act X of 1872), s. 536—Shea sect. Under the law of the Shea sect of mahomedans a *mutta* wife is not entitled to maintenance, but such a provision of the law does not interfere with the statutory right to maintenance given by s. 536 of the Code of Criminal Procedure.

IN THE MATTER OF THE PETITION OF LUDDUN SAHIBA. LUDDUN SAHIBA v. MIRZA KAMAR KUDAR VIII 736

Marriage—Mutta form of marriage—Repudiation—Divorce. The *mutta* form of marriage does not admit of repudiation under the law of the Shea sect of mahomedans.

Quere.—Whether the form of divorce called *zihar* may be exercised in the *mutta* form of marriage.

IN THE MATTER OF THE PETITION OF LUDDUN SAHIBA VIII 736

Wukf or endowed property—Office of mutwali nature of—Transfer of, performance of duties of, by agent. The office of mutwali is a trust which a woman, equally with a man, is capable of undertaking, but it is a personal trust, and the office may not be transferred, nor the endowed property conveyed to any person whom the acting mutwali may select.

The word 'deputy,' in book 9, Chap. V, p. 591 of Baillie's Mahomedan law, signifies some one who, as an agent, may be employed to perform the duties of the office, as to collect rents and to assist the mutwali in expending the proceeds of the endowed property for charitable purposes.

WAHID ALI v. ASHRUFF HOSSAIN VIII 732

Maintenance—

See Mahomedan Law, Maintenance.

Arrears of. See Limitation Act, 1877, art. 132.

Suit for. See Jurisdiction: Res judicata.

Majority—

Act, 1875, s. 3. See Act XL of 1858, s. 3.

Guardian, appointment of—Period from which appointment dates—Certificate. The making of an order appointing a guardian under Act XL of 1858, and not the subsequent taking out of the certificate, is that by which a guardian is appointed of the person and property of a minor within the meaning of s. 3 of the Indian Majority Act.

CHUNEE MUT, JOHARY v. BROJONATH ROY CHOWDHRY VIII 967

Malicious Prosecution—

Damages—Costs in Criminal Court. In a suit for damages for malicious prosecution, the plaintiff is entitled to recover the costs necessarily incurred by him in defending himself on the criminal charge.

BUNNOMALI NUNDI v. HURRY DASS BYRAGI VIII 710

Malversation—

See Hindu Law, Partition.

Manager—

Of joint estate, relation of the co-sharers under age. See Guardian.

Power of. See Civil Procedure Code, 1859, s. 243.

Maps—

See Evidence.

Marriage—

See Minor.

Mutta form of. See Mahomedan Law, Maintenance: Mahomedan Law, Marriage.

Master and Servant—

Criminal act of servant—Non-liability of master—Indian Ports Act (XII of 1875), s. 22. The servants of a contractor who had engaged to discharge ballast from a ship lying in the port of Calcutta, throw the ballast into the river within the limits of the port, and thus committed an offence under s. 22 of the Indian Ports' Act

Master and Servant—(continued.)

(Act XII of 1875). It did not appear that the contractor had abetted the offence. Held, that he was not, in the absence of proof of abetment, liable for the acts of his servants.

CHUNDI CHURN MOOKERJEE v. THE EMPRESS ... IX 849

Maxim—

Optimus legis interpret consuetudo. See Registration Act, s. 17.

Measurement—

Chittas. See Evidence Act, s. 83.

Of excess land. See Landlord and Tenant.

Of land, proceedings for. See Beng. Act VIII of 1869, s. 38.

Medical witness—

See Evidence.

Deposition of. See Criminal Proceedings.

Memorandum—

Made by Police Officer. See Evidence.

Mesne Profits—

See Decree: Sale in Execution of Decree.

Amount claimed in plaint—Larger amount found due by Ameen. Where a plaintiff, in bringing a suit for possession and for mesne profits approximately estimates the amount of such mesne profits at a certain sum, and obtains a decree which leaves the amount due as mesne profits to be ascertained in execution, he is not bound down to the amount claimed in his plaint; but if more is found due to him, he is entitled on payment of further court-fees to recover the larger amount so found due.

Baboojan Jha v. Bijnath Dutt Jha, distinguished.

JADOOMONY DABEE v. HAFEZ MAHOMED ALI KHAN ... VIII 295

Execution of decree—Mesne profits how estimated—Amount stated in plaint—Estoppel. When, in a suit for possession of land and mesne profits at a rate stated in the plaint, a decree is passed which directs that the amount of mesne profits be ascertained in execution of the decree, the plaintiff is not limited to the amount or rate stated in his plaint, though it may be used as evidence against him in favour of the defendant. *Baboojan Jha v. Bijnath Dutt Jha*, explained.

GAURI PROSAD KOONDOL v. REILY ... IX 112

Interest—Damages—Wasilat. Interest calculated upon yearly rents of rent may, when claimed by the plaintiff in his plaint, be given as an essential portion of the damages, which are recoverable by a person wrongfully kept out of possession of immoveable property.

Protap Chunder Borooah v. Hance Surnomoyee followed.

The term 'mesne profits' does not include interest year by year in those profits.

Hurro Durga Chowdhurani v. Surut Sundari Debi followed.

Principles stated on which the calculation of mesne profits should be based.

RAJENDRO COOMAR ROY v. MADHUB CHUNDER GHOSE ... VIII 343

Interest, loss of. The term 'mesne profits' means the amount which might have been received from the land deducting the charges for collection; and does not include damage resulting from their not having been paid as they became due, or loss of interest year by year.

HURRO DURGA CHOWDHURANI v. SURUT SUNDARI DEBI ... VIII 332

Interest on. See Decree.

Suit for. See Civil Procedure Code, 1859, s. 7: Onus Probandi.

Suits for possession and. See Court fees Act, 1870, s. 17.

Minor—

See Act XL of 1858, s. 3: Guardian: Mahomedan Law, Guardian.

Act IX of 1861—Jurisdiction of District Judge—Marriage—Custody of minor—

Injunction. The paternal uncle of a female Hindu minor, whose father was dead, applied to the District Judge, under Act IX of 1861, for the custody of the minor, and for an injunction to prevent the mother of the minor from carrying out a projected marriage. On the 8th of March 1881, the Judge issued an *ad interim* injunction. When the application came on for hearing, it appeared that the marriage had taken place before the order of injunction had reached the parties. The District Judge found that though the mother was entitled to the custody of the minor, yet the petitioner was entitled to give the minor in marriage in preference to the mother. The District Judge also found that the marriage had not in fact been validly performed. On appeal to the High Court, it was contended that the District Judge had no jurisdiction to determine the right of

Minor—(continued.)

any party to give an infant in marriage on an application under Act IX of 1861, or to grant an injunction; and it was also contended that the magistrate was wrong in entering into the question of the *factum* of the marriage.

Held that, under the provisions of Act IX of 1861, the District Judge had jurisdiction.

Balmakund v. Janki, Wolverhampton Waterworks Co. v. Hawkesford, and Collector of Pubna v. Romanath Tagore referred to.

Held also, that for the purpose of deciding whether the injunction should issue, the Judge was justified in entering into the question of the *factum* of the marriage, though his finding, on that point would have no effect in determining its validity.

IN THE MATTER OF THE PETITION OF KASHI CHUNDER SEN. BROHMOMOYEE *v.* KASHI CHUNDER SEN ... VIII 266

Partition of share of. See Hindu Law, Partition.

Plaintiff. See Guardian: Limitation Act, 1877, s. 7.

Sons, sale of interest of. See Hindu Law, Alienation.

Suit by. See Compromise of Suit: Practice.

Minority—

See Limitation Act, 1877, s. 7.

Disability of. See Registration Act, 1877, s. 35.

Misdirection—

See Witness.

Misjoinder—

Parties—Suit to recover property sold in execution of decree. Certain properties were sold to A by private contract. Subsequently the properties were attached in execution of a decree against A's vendors and sold in execution to various purchasers. A instituted a suit against his vendors, the decree-holders, and the purchasers, to set aside the execution sale. *Held*, that the suit was not defective by reason of misjoinder of parties. *Rajaram Tewari v. Luchman Prasad*, distinguished.

HARANUND MOZOOMDAR *v.* PROSUNNO CHUNDER BISWAS ... IX 763

Misrepresentation—

See Fraud.

Mistake in law—

See Compromise of family disputes.

Mofussil Courts—

Practice of. See Evidence Act, 1872, s. 35.

Mokuridar—

See Mortgage.

Mokurari ijara—

See Potta.

Potta, suit for declaration under. See Specific Relief Act, s. 19.

Money decree on mortgage bond—

See Mortgage.

Money paid in satisfaction of Joint Decree—

See Small Cause Court Jurisdiction.

Mortgage—

See Evidence Act, 1872, s. 92. Res-judicata: Stamp Act, 1879, s. 7, para. 2.

Bond See Registration Act, 1877, s. 49: Second Appeal.

By father of joint family. See Civil Procedure Code, 1882, s. 283.

By sons of insane person. See Hindu Law, Alienation.

Decree directing accounts, &c. See Decree.

Decree on. See Execution of Decree.

Execution of decree—Apportionment of mortgage debt amongst properties mortgaged.

It appearing that the mortgagee deliberately abstained from executing his decree against eleven properties which still remained in the possession of the mortgagor, but proceeded against the one property which had passed out of the mortgagor's possession, the mortgage debt was directed to be apportioned between the twelve properties, and the mortgagee was not to be allowed to take out execution against the property which had passed out of the mortgagor's possession, except for the amount which should be apportioned to such property, without satisfying the Court that he had made every possible effort to execute the remainder of his decree against the other eleven properties.

RAM DHUN DHUR *v.* MOHESH CHUNDER CHOWDHRY ... IX 406

For payment of Government revenue. See Sale in Execution of Decree.

Mortgage—(continued.)

Money decree on mortgage bond—Mortgagee's—lien—Registration Act (XX of 1866), s. 58—Frame of suit—Parties. A and B co-mortgagees, obtained a summary decree under the Registration Act XX of 1866, s. 53, on the 6th May 1868, in respect of certain property which was again mortgaged by the owner to C and D in March 1869. C and D having also obtained a decree on their mortgage brought the property to sale in execution of their decree and purchased it themselves in December 1874. A not having had the whole of his mortgage-debt satisfied instituted a suit on the 13th December 1879 against C and D, and the representatives of B (B having meanwhile died and his representatives not joining in the suit), to enforce his lien against the mortgaged property in the hands of C and D, and to recover the share of the mortgage-debt still due to himself alone. *Held*, that A did not acquire a better right to proceed against the property by reason of its having come into the hands of C and D, nor did C and D take subject to a greater burden than the mortgagor himself, and that as A had allowed his decree against the mortgagor to be barred by limitation, he had lost all right to proceed against the property by execution were it in the hands of the mortgagor, and consequently he could not be allowed to proceed against it by suit, merely because it was in the hands of third parties. *Syul Emam Montazooddeen Mahomed v. Raj Coomar Dass, and Jonmenjoy Mullick v. Dossmoney Dossee*, referred to.

CALLY NATH BUNDOPADHYA v. KOONJO BEHARY SHAHA ... IX

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*Mortgage by executors—Suit on mortgage—Administration-suit—Writ of *fi-fa*—Sheriff's Sale—Lis Pendens—Sale in execution of decree.* In a suit by the representatives of PD, against his brother AD and after AD's death against his executors, it was found that there was over Rs. 1,32,400 due to the plaintiff from the estate of the deceased; and, on the 29th of August 1866, the executors were ordered to pay this sum into Court. The executors disobeyed; and, on the 24th of December 1866, a writ of *fi-fa* was issued from the High Court, in execution of which certain property belonging to the estate of AD was sold to the defendants on the 18th of July 1867. Previously, however, on the 12th of October 1866, the executors had mortgaged the same property to the plaintiff, who brought a suit on his mortgage on the 10th of June 1867. On the 28th of August 1867, the present defendants were made parties to that suit, and in their written statement they alleged that they had been improperly made parties and claimed a title superior to that of the plaintiff. That suit was dismissed with costs as against the present defendants, on the ground, that they were improperly added; but a decree for sale was given against the executors, in execution of which the mortgaged property was sold to the plaintiff. In a subsequent suit brought by the plaintiff for possession—

Held, that the defendants were entitled to redeem, and were not affected by the suit of 1867 as a *lis pendens*.

CHUNDER NATH MULLICK v. NILAKANT BANERJEE ... VIII

690

Mortgaged Property, Conveyance of, to mortgagee—Attachment and sale of same property under another decree—Suit by mortgagee to recover money advanced on mortgage-bond—Avoidance of conveyance—Lien. In 1874, the plaintiff advanced money to F and Z on the security of a mortgage of certain properties. In 1875, the plaintiff took a conveyance of the properties mortgaged to him, setting off the money due to him under the mortgage against the consideration-money. At the time of this conveyance, the same property was under attachment under a decree obtained by another person, and the property was, in execution of this decree, put up for sale, and purchased by one G.

In a suit brought by the plaintiff on the mortgage-bond (to recover the money lent, and asking that the properties might be made liable to satisfy the debt) against FZ, and G, it was *held*, that the conveyance of 1875 being void as against G, the plaintiff was entitled to fall back upon the lien created by the mortgage-bond.

Bissen Doss Singh v. Sheo Prasad Singh followed.

GOPAL SAHOO v. GUNGA PERSEAD SAHOO ... VIII

530

Mortgagor and mortgagee—Covenant to repay, Absence of—Suit to recover money lent—Measure of damages—Costs. Two out of several co-sharers mortgaged as their own, by way of conditional sale, a portion of the joint family property. The mortgagee foreclosed, and then instituted a suit for possession, which he withdrew with liberty to bring a fresh suit. He afterwards brought a suit for possession against the mortgagors, and their co-sharers, on the suggestion of the mortgagors that it would be undefended. It was, however, defended by the co-sharers, and the suit was dismissed. The mortgage-deed contained no covenant to repay the money lent. In an action for damages brought by the mortgagee against his mortgagors—*held*, that the plaintiff was entitled to recover the money lent and interest, and the cost of the second suit.

BHUGWAN ACHARJEE v. GOBIND SAHOO ... IX 234

Mortgage—(concluded.)

Patnidar, right of, to redeem. Terms upon which a patnidar was let in to redeem stated.

KASUMUNNISSA BIBEK v. NILRATNA BOSE ... VIII 79

Payment of—Extinction of charge—Intention of parties—Presumption. Whether a mortgage, paid off, has been kept alive or extinguished depends upon the intention of the parties; the mere fact that it has been paid off not deciding the question whether or not it has been extinguished. Express declaration of intention will cause either the one result or the other, and in the absence of such expression, the intention may be inferred, either one way or the other. A lender of money upon a mortgage, which, however, having been made by a person not having authority to charge the greater part of the property included in it, was to that extent invalid, relied upon a charge effected in a prior paid off mortgage to another mortgagee of the same property. The balance due for the prior mortgage debt had been paid out of the money advanced on the later, and the prior instrument had come into the possession of the present mortgagee. *Held*, that it must be presumed, in the absence of any expression of intention to the contrary, that the borrower, who claimed to be the owner of the property which he attempted to charge, intended that the money should be applied in paying off and extinguishing the prior mortgage, there being no intermediate incumbrance. It being, also, presumable that the lender lent the money upon the security of the later mortgage, he did not become entitled to an additional security, merely, because that which he had taken had thus proved invalid in part. *Held*, therefore, that the prior mortgage had been extinguished.

MOHESH LAL v. MOHANT BAWAN DAS ... IX 961

Right to redeem—Mokurariidar—Regulation XVII of 1806, s. 8—Notice of foreclosure. The holder of a mourasi mokurari patta under the mortgagor is not a "representative" within the meaning of s. 8 of Regulation XVII of 1806, and is therefore not entitled to notice of foreclosure under that section. *Lalla Doorga Pershad v. Lalla Luchmun Sahoy* followed.

SRIPOTI CHURN DEY v. MOHIP NARAIN SINGH ... IX 643

Mortgaged Property

Sold in execution of decree. See Limitation Act, 1877, sched. ii, art. 11.

Mortgagee—

Right of purchaser at Sheriff's sale against. See Lis Pendens.

Right of, to sell. See Hindu Law, Alienation.

Suit by. See Parties.

Suit by, to declare lien. See Review.

Moveable Property—

Suit for specific. See Limitation Act, 1877, arts. 49 and 123.

Suit to determine coparcener's rights in. See Jurisdiction.

Municipal Consolidation Act

Beng. Act IV of 1876, s. 77—License—Assessment—Fine—Boarding house-keeper.

In order to obtain a conviction under s. 77, Beng. Act IV of 1876, for keeping a boarding-house without taking out a license, it must be shown that the accused held himself out to the public as one whose business or profession it is to receive boarders for profit.

In order to pass a proper sentence of fine under s. 77, Beng. Act IV of 1876, evidence should be given of the amount of assessment on the accused's house or place of business, and of the amount payable on account of the license which the accused should have taken out.

IN THE MATTER OF THE HIGH COURTS' CRIMINAL PROCEDURE ACT (X OF 1875), AND IN THE MATTER OF THE PETITION OF WOOD. WOOD v. THE CORPORATION FOR THE TOWN OF CALCUTTA ... VIII 891

Murder—

See Charge.

Mutwalli—

Nature of office of. See Mahomedan Law, Wukf.

Nawab Nazim's Debts' Act—

XVII of 1873—

Jurisdiction of Commissioners—Parties. The Commissioners appointed under the Nawab Nazim's Debts' Act XVII of 1873 (an Act to provide for the liquidation of the debts of the Nawab Nazim, and for his protection from legal process), having ascertained and certified that a certain zamindari was nizamat property, (i.e., held by the Government for the purpose of upholding the dignity of the Nawab Nazim for the time being), the fact that this property had, before the passing of the Act,

Nawab Nazim's Debts' Act—(continued.)**XVII of 1873—(continued.)**

been conveyed by the Nawab Nazim to his son, did not deprive the Commissioners of jurisdiction to deal with the question. The plain language of s. 12 of the Act is not controlled by any words in the preamble. A suit brought by a claimant against the Government and the grantee to recover the property, without the Nawab Nazim having been joined as a party, could not proceed.

OMRAO BEGUM *v.* THE GOVERNMENT OF INDIA ... IX 701

s. 11.—*Agreement for appropriation of payments.* *Contract Act (IX of 1872), s. 60—Suit for rent.* So far as the Nawab Nazim's Debts' Act is concerned, rent due by the Nawab is on the same footing as any other debt incurred by him, and before his property can be made liable to satisfy such rent debt, the consent of the Governor-General in Council must first be obtained to the issue of execution.

ROOKHINY BULLUB ROY *v.* MULK JAMANIA BEGUM ... IX 914

"Negotiate" —

Meaning of. See Principal and Agent.

New Trial

Ground of. See Small Cause Court, Presidency Towns.

Notice of. See Small Cause Court, Mofussil.

Next Friend—

See Practice.

Non-appearance —

Dismissal of suit for. See Civil Procedure Code, 1877, s. 103: *Res judicata.*

Of defendant. See Appeal.

Non-joinder—

Of necessary party. See Parties.

Notice—

See Transfer of Case.

Of dissolution. See Partnership.

Of enhancement. See Civil Procedure Code, 1859, s. 213: Enhancement of rent, suit for: Landlord and Tenant.

Of foreclosure. See Mortgage.

Of mortgage. See Mahomedan Law, Debts. Landlord and Tenant.

Of new trial. See Small Cause Court, Mofussil.

Of relinquishment. See Landlord and Tenant.

Of sale. See Sale for Arrears of Rent.

Of sale, proof of publication of. See Sale for Arrears of Rent.

Of sale, publication of. See Sale for Arrears of Rent.

To produce original document. See Evidence taken on Commission.

To quit. See Landlord and Tenant.

Nuisance

See Criminal Procedure Code, 1882, s. 133.

Objection

Notice of. See Civil Procedure Code, 1882, s. 561.

Taken for first time in appeal. See Appellate Court, objection taken for the first time in.

Oblations —

Offering of. See Hindu Law, Inheritance.

Obstruction

Omission to remove. See Bench of Magistrates, Power of.

Occupancy —

Right of. See Landlord and Tenant.

Offence—

Committed out of British India. See Jurisdiction.

Offences —

Against other laws. See Arms Act, 1878.

Of different kinds. See Criminal Procedure Code, 1872, s. 453.

Of the same kind. See Criminal Procedure Code, ss., 445, 446, 453.

Of the same kind committed in respect of different persons. See Joinder of Charges.

Official Assignee

See Insolvency.

Assent of, to sale. See Sale in Execution of Decree.

Intervention of. See Insolvency.

Purchaser from. See Insolvency.

Omission—

To obtain Certificate enabling Court to entertain suit. See Pensions Act, ss. 4-6.
To revive suit. See Res judicata.

Onus Probandi—

See Hindu Law, Joint Family: Possession: Probate: Res Judicata: Sale for Arrears of Revenue.

Evidence—Jaghir tenure—Autladad grant Suit for possession. By a sanad dated March 1854, the plaintiff's ancestor granted to B, the defendant's ancestor, a jaghir of a certain mauza. B died in 1872, and plaintiff subsequently brought a suit to recover possession of the mauza, alleging that the grant to B was an ordinary service jaghir. The plaintiff filed a kabuliati which had been executed by B, the terms of which supported the plaintiff's allegation as to the nature of the grant. The defendant alleged that the grant was *autladad*, but failed to produce the sanad or account for its non production.

Held, that the plaintiff was entitled to a decree.

Maharaja Juggernath Saher v. Mussamat Ahlad Kowar distinguished.

THAKUR DOYAL v. RAM NARAIN SINGH ... VIII 375

Hindu Law—Benami transaction—Purchase in name of Hindu wife—Presumption—Joint family. Quere.—Whether, in the absence of any evidence to show the source from which the purchase-money was derived, there is a presumption that property purchased in the name of a Hindu wife is the property of her husband and has been purchased with his money?

Per FIELD, J. Semble.—There is no presumption one way or the other, but the burden of proof in each particular case must depend upon the pleadings and the position of the parties as plaintiffs or defendants.

CHOWDRANI v. TARINY KANTH LAHRY CHOWDRY ... VIII 515

Lakheraj grant—Suit for resumption. If a person, claiming under a badshahi lakheraj grant made before the 1st of December 1790, can show that he has held the land as lakheraj since the 1st of December 1790, this will be a conclusive bar to a suit for resumption, whether brought by the Government, or by a purchaser at a revenue-sale, or by any other person. That is, in order to prove a grant anterior to the 1st of December 1790, it is sufficient to give evidence of possession dating back to the 1st of December 1790.

Sristeedhur Sawant v. Romanath Rokhat cited.

A person seeking to resume lakheraj land must give *prima facie* evidence to show that rent has been paid for that land at some time since the 1st of December 1790.

Parbat Charan Mookerjee v. Rajkrishna Mookerjee, Sonatin Ghose v. Monira Abdul Farar, and Hurrayghur Mookhopadhyay v. Madub Chunder Baboo referred to.
 KOYLASHBASHINY DOSSEE v. GOCOLMONI DOSSEE ... VIII 230

Partition—Private arrangement—Subsequent partition by Collector. A and B were joint owners of a mauza. B leased his share in part to C. By arrangement between A and C, a partition of the lands was made, and each party collected the rents of the lands allotted to him. Forty years afterwards, a butwara of the mauza was made by the Collector between A and B, whereby lands held by C, under the previous arrangement, were allotted to A. C was not party to the butwara proceedings. In a suit brought by A against C for possession of the lands so allotted, the plaintiff alleged that the previous division of the lands between A and C was a temporary one, made after the commencement of the butwara proceedings. The lower Appellate Court found that the plaintiff's allegations had not been proved, and dismissed the suit.

Held (TOTTENHAM, J., dissenting), that the decree of the lower Court was correct, as it lay on the plaintiff to show that the private partition had come to an end.

OBHOY CHURN SIRCAR v. HURI NATH ROY ... VIII 72

Presumption as to property acquired while family is joint. The presumption is, that all acquisitions made while a family is joint are made from the joint funds, and the burden is upon the person who alleges that any property is self-acquired to prove that allegation.

RAMPHUL SINGH v. DEO NARAIN SINGH. ... VIII 517

Resumption, Suit for—Rent-free lands—Landlord and Tenant. In suits for the resumption of lands alleged by the defendant to be lakheraj, the burden of proof is in the first instance on the plaintiff to show that the lands are *mal*. The fact that the defendant is a tenant of the plaintiff's is a matter to be taken into consideration by the Court in determining whether, on the facts of the case, the plaintiff has made out a *prima facie* case; but unless the Court finds that the

Onus Probandi—(continued.)

- plaintiff has made out a *prima facie* case, judgment should be given for the defendant. *Hurryghur Mukhopadhyaya v. Madhub Chunder Baboo, Akbar Ali v. Bhuya Lall Jha, and Newaj Bundopadhyaya v. Kali Prasunno Ghose* cited.
- BACHARAM MUNDUL *v.* PEARY MOHUN BANERJEE ... IX 813
- Suit for ejectment—Proof of possession. Quere.*—Whether a plaintiff in ejectment is entitled to succeed upon mere proof of antecedent undisturbed possession?
- JOYTARA DASSEE *v.* MAHOMED MOBARUCK ... VIII 975
- Suit for mesne profits.* In suits for mesne profits when the defendants have been in possession of the property as wrong-doers, it lies upon them to show what were the sums realized as rent during the time of their possession.
- BROJENDRO COOMAR ROY *v.* MADHUB CHUNDER GHOSE ... VIII 313
- Suit for possession Land purchased benami by plaintiff for defendant—Evidence Act (I of 1872), s. 114.* The plaintiff sought to recover possession of certain lands, alleging that he had been dispossessed. The defendants, who were in possession, alleged that, at an auction-sale, the plaintiff had bought the lands benami for the defendants. *Held*, that the burden of proving a *prima facie* case that the land belonged to the plaintiff, was on him.
- HURI RAM *v.* RAJ COOMAR OPADHYA ... VIII 759
- Suit for possession after Order under the Land Registration Act (Beng. Act VII of 1876).* Where a person who, by an order of the Collector passed under the provisions of the Land Registration Act (Beng. Act VII of 1876), has been declared to be out of possession of certain land brings a suit for the recovery of possession, it lies on him in the first instance to make out a *prima facie* case.
- MUDDUN MOHUN PODDAR *v.* BHOGGOMANTO PODDAR ... VIII 923
- Suit for possession—Evidence of previous possession.* Where, in a suit for possession of land, the plaintiff proves merely that he has been in possession of the disputed land at some time within twelve years previous to the filing of the plaint, such evidence is not sufficient to throw upon the defendant the burden of proving his title to the land. *Wise v. Amrunnessa Khatoon* followed, and *Gour Paroy v. Wooma Soonduree Debi* cited.
- DEBI CHURN BOIDO *v.* ISSUR CHUNDER MANJEE ... IX 39
- Suit for possession—Previous dispossession—Limitation—Adverse possession.* In every suit for the recovery of land, on the allegation of previous dispossession by the defendant, the plaintiff must start his case by showing that, at some time within twelve years previous to the institution of the suit, he has been in possession of the land sued for. *Rajah Sahab Perhad Sein v. Maharajah Rajender Kishore Singh, Dawkins v. Lord Penhryn, and Noyes v. Crawley*, cited.
- BHOOTNATH CHATTERJEE *v.* KEDARNATH BANERJEE ... IX 125
- Where, in a suit for the recovery of land, based on title, the plaintiff alleges that he has been in possession of the land and was dispossessed therefrom by the defendant within twelve years prior to the institution of the suit, mere proof of such possession will not be sufficient to entitle the plaintiff to a decree. *Wise v. Amrunnessa Khatoon* followed; and *Kaira Manji v. Khawaz Nussio* disapproved.
- ERTAZA HOSSEIN *v.* BANY MISTRY ... IX 130
- Suit for possession of land—Presumption of possession and ownership.* If in a suit for possession of land which was covered with water more than twelve years before the institution of the suit, the plaintiff proves that he exercised acts of ownership, as by letting out the julkur to tenants, that is *prima facie* evidence of possession and ownership, and unless the defendant can make out a twelve-years' statutory title by adverse possession, the plaintiff's possession must be presumed to have continued, and it is not necessary for him to show a possession by acts of ownership within the twelve years.
- MOHINY MOHUN DAS *v.* KRISHNO KISHORE DUTT ... IX 802

Option—

Of agent to accept service of summons. See Principal and Agent.

Optional—

Registration. See Transfer of Property Act, 1882, s. 54.

Oral Evidence—

See Evidence Act, 1872, s. 92.

Order—

- Directing an account.* See Appeal. *
- Directing return of plaint for presentation in proper Court.* See Second Appeal.
- Ex parte.* See Beng. Act VIII OF 1869, s. 38.
- In Council confirming decree.* See Limitation Act, 1877, sched. ii., art. 180.
- Granting stay of execution.* See Appeal.
- In execution of decree.* See Appeal.
- In Judicial Proceedings.* See Superintendence of High Court.
- Of acquittal.* See Revision.
- Of Appellate Court.* See Magistrate, Power of.
- Of Privy Council, execution of.* See Limitation Act, 1877, sched. ii, art. 180.
- Of Privy Council, transmission of, for execution.* See Civil Procedure Code, 1877, s. 610.
- Of single Judge of High Court.* See Appeal.
- Refusal of, Application for copy of.* See Presidency Magistrates' Act, s. 170.
- Remanding Case.* See Letters Patent, cl. 15.
- Staying execution of decree.* See Limitation Act, 1877, sched. ii, art. 179.

Orders—

- Under Criminal Procedure Code, 1872, s. 518.* See Superintendence of High Court.

Oudh Estates Act—

I of 1869, ss. 8, 9 and 10—Recognition of trust—Specific Relief Act (I of 1877), s. 42—Declaratory decree, Suit for. Notwithstanding the confiscation of land in Oudh, followed by its restoration under the Government Order of 11th March 1858, affirming the absolute title of those with whom summary settlements had been made, and the granting of sanads to the latter persons, with full power of alienation, confirmed by "The Oudh Estates Act, 1869," the legal owner may, either by express agreement, or by his conduct, constitute himself a trustee for others as to the whole or part of the beneficial interest in the land, the subject of such restoration, settlement, and sanad.

A taluqdar, deceased before annexation, had provided by will for the succession of his five widows, one at a time, to his estate, with remainder to a son of his nephew. Settlement was made with the senior widow after the mutiny; a sanad granted to her as taluqdar, with full power of alienation, and her name was afterwards entered in the lists prepared under s. 8 of "The Oudh Estates Act, 1869." But certain of her acts were not explicable except on the understanding that she was abiding by the will.

Held, in a suit by the widow next in order, that such senior widow had undertaken the trust of carrying out the provisions of the will, and that a deed of gift made by her transferred only her interest, which was an estate for life.

Held also, in a suit by the remainderman for a declaration of the invalidity of the transfer by the widow as against him, that although declaratory relief might have been, at the Court's discretion, refused to him, on the ground of his remoteness in remainder, and the identity of the object of his suit with that of the other, yet he was entitled on this appeal to the decree which he sought because his suit had been wrongly decided against him on the merits.

RAMANAND KUAR v. RAGHUNATH KUAR, AND ANANT BAHADUR SINGH v. RAGHUNATH KUAR VIII 769

Owners—

- Of separate shares in permanently-settled estate.* See Partition.

Ownership—

- In land and buildings.* See Landlord and Tenant.
- Presumption of.* See Onus probandi.

Pardon—

- Withdrawal of.* See Criminal Procedure Code, 1872, s. 349.

Parol Evidence—

- Admissibility of.* See Evidence Act, 1872, s. 92.

Part satisfaction—

- See Execution of Decree.

Parties—

- See Bengal Act VIII of 1869, s. 32: Co-sharers: Declaratory Decree, Suit for: Enhancement of Rent, Suit for. Hindu Law, Alienation: Misjoinder: Nawab Nazim's Debts' Act, 1873: Sale for Arrears of Rent.
- Addition of.* See Plaint.

Parties -- (continued.)

Appellate Court, power of -- Respondent -- Civil Procedure Code, 1877, s. 559 -- Limitation Act, 1877. The discretionary power of directing a person to be made a respondent, conferred on the Appellate Court by s. 559 of the Civil Procedure Code, is not limited by any provision in the Limitation Act (XV of 1877).

MANICKYA MOYEE *v.* BORODA PROSAD MOOKERJEE ... IX 355

Application to add a defendant -- Civil Procedure Code (Act X of 1877), ss. 28 and 32 -- Judicature Act, Order vi, Rules 3 and 6. The plaintiffs brought a suit to recover certain sums of money from the defendants, due to them under certain contracts which they alleged had been entered into by themselves, and one A D, as agent of the defendants, and asked for an account.

The defendants, in their written statement, contended that there was no privity of contract between themselves and the plaintiffs, and denied the alleged agency of A D.

The plaintiffs, before the hearing, applied to the Court to have A D added as a party-defendant under ss. 28 and 32 of Act X of 1877, asking to be allowed to amend their plaint so as to pray for relief in the alternative against the original defendants or the said A D, or both against the original defendants and the said A D.

Held, that, under s. 28, they were entitled to the order on the authority of the case of *Child v. Stenning*.

BUDDREE DOSS *v.* HOARE, MILLER & CO. ... VIII 170

Frame of suit -- suit against parties who do not join as plaintiffs. A and B, co-mortgagees, obtained a summary decree under the Registration Act, XX of 1866, s. 53, on the 6th May 1868, in respect of certain property which was again mortgaged by the owner to C and D in March 1869. C and D, having also obtained a decree on their mortgage, sold the property in execution of their decree and purchased it themselves in December 1874. A not having had the whole of his mortgage debt satisfied instituted a suit on the 13th December 1879 against C and D, and the representatives of B (B having meanwhile died, and his representatives not joining in the suit), to enforce his lien against the mortgaged property in the hands of C and D, and to recover the share of the mortgage-debt still due to himself alone. *Quere* -- Whether the suit, although one for only a portion of the debt due on the mortgage (B's representatives not having joined and claimed the share due to them), was not properly framed assuming it would lie.

CALLY NATH BUNDOPADHYA *v.* KOONJO BEHARY SHAHA ... IX 651

Intention of. See Mortgage.

Non-joinder of a necessary party -- Suit to set aside alienation of debutter lands -- Trust for religious purposes. The representatives of three out of four Hindus, who were joint sebhais, managing debutter property, sued to have an alienation, made by the fourth sebai alone, set aside. They did not make the latter a party to the suit, nor did the plaintiffs ask the assistance of the Court to make him one, under s. 73 of Act VIII of 1859.

Held, that he was a necessary party. It was not enough that he was a member of the body of sebhais; and although indirectly he might have gained advantage from the suit brought by the other sebhais, this did not suffice to connect him with the suit as a party to it. No ground of making an exception to the general rule was presented.

RAJENDRONATH DUTT *v.* SHAIKH MAHOMED LAL ... VIII 42

Suit by mortgagee -- Patindar under mortgage. Where the mortgagee of a zamindari brings a suit on his mortgage against a mortgagor, who previously to the mortgage, has granted a patni lease of the zamindari to a third party, the latter should be made a defendant in order to give him an opportunity to redeem.

KASUM'UNNISA BIBEE *v.* NIGRATNA BOSE ... VIII 79

Suit for arrears of rent -- Co-sharers -- Appeal, amendment on. In a suit for arrears of rent of the plaintiff's share of a taluq, it appeared that, in the year 1279, a butwara was effected of the zamindari in which the defendants taluq was situated, and that the taluq ceased to be held exclusively by the plaintiff, and was divided between him and certain other persons, who were not made parties to the suit.

Held, that all the co-sharers should have been joined as parties, and that, as this had not been done, the suit was bad.

OBHOY GOBIND CHOWDHRY *v.* HURYCHURN CHOWDHRY ... VIII 277

Suit for rent -- Title of third party alleged by defendant -- Civil Procedure Code (Act X of 1877), s. 28. *Per FIELD, J.* -- Where a person sued for rent sets up the title of a third party, and alleges that he holds under, and pays rent to him, such third

Parties—(concluded.)

party ought not to be made a party to the suit so as to convert a simple suit for arrears of rent into one for the determination of the title to the property in respect of which the rent is claimed.

Such a suit raises only two issues, viz. :—

(1) Does the relation of landlord and tenant exist between the plaintiff and defendant?

(2) Are the alleged arrears of rent due and unpaid?

And these are questions in which the plaintiff and defendant are alone concerned, and no third party claiming a title adverse to the plaintiff can properly be made a party to the trial of these issues.

Section 28 of the Civil Procedure Code is not imperative, but allows a discretion to be exercised; and in such a suit it is better, both in the interests of Government and for the proper adjudication of the question of title, that it should be tried by a competent Court in a suit directly framed and brought for that purpose.

LODAI MOULAH *v.* KALLY DASS ROY VIII 238

Suit to set aside sale for arrears of revenue: Secretary of State Civil Procedure Code, 1877, ss. 32, 424. The Secretary of State is not a necessary party to a suit to set aside a sale for arrears of revenue, but the Government have such interest as would, on their application, entitle them to be made a party. Section 424 of the Civil Procedure Code does not preclude a Court from adding the Secretary of State as a necessary party under s. 32 of the Code.

BAL MOKOOND LALL *v.* JIRJUDHUN ROY IX 271

Partition—

See Hindu Law, Inheritance: Hindu Law, Partition: Onus Probandi.

Butwara—Proceedings under Regulation XIX of 1814—Partition by private arrangement. An allottee, under a private partition, sued to stay subsequent partition proceedings brought under Regulation XIX of 1814, and to have his possession confirmed. The defendants objected to the valuation of the suit and to the suit being heard by the Civil Courts, no proceedings having first been instituted before the Revenue Authorities.

Held, that the question, whether the Collector would have brought the lands to partition, depended upon whether they were held "in common tenancy"; if they were not so held, the Collector would be only competent to make an assignment of the revenue in proportion to the several portions of the land held by the shareholders.

That a private partition is no bar to proceedings in the Revenue Courts under s. 30 of Reg. XIX of 1814.

JOYNATH ROY *v.* JALL BAHADOOR SINGH VIII 126

By private arrangement, Suit to stay Butwara Proceedings after. See Valuation of Suit. Decree for. See Limitation Act, 1877, art. 179.

Effect of separation in estate—Apportionment of debt for which father was jointly liable. A family having become separate in estate with apportionment of a debt, once joint, among its several members, the sons of one of the latter, on their father's decease, are not liable for the whole debt for which he, at one time, was responsible jointly with the rest of the family, but only for his portion of the debt.

DURGIA PERSAD *v.* KESHOPERSAD SINGH VIII 656

Hindu widow - Revenue-paying estate—Beng. Act VIII of 1876, s. 10. A Hindu widow who has succeeded to a share in a revenue-paying estate as heir to her deceased husband is not a person having a proprietary interest in an estate for the term of her life only, within the meaning of s. 10, Bengal Act VIII of 1876. Even if she were, a Civil Court would not be debarred from decreeing partition of a revenue-paying estate at her instance if a proper case for the passing of such a decree be made out by her. *Jadomoney Dabee v. Sarodaprosomo Mukerjee; Phool Chaud Lall v. Rughobhins Sahoy, Katama Natchiar v. The Rajah of Shiragunga, and Bhagbutti Dabee v. Chowdhury Bholanath Thakoor* referred to. Principles on which Courts should order partition at the instance of a Hindu widow stated.

MOHADEAY KOOR *v.* HARUK NARAIN IX 244

Owners of separate shares in permanently-settled estate—Effect of partition as against Government. In the year 1226 F. (1819) a fourteen-anna eight-gunda share of a certain mouzah was permanently settled. The remaining one-anna twelve-gunda share was permanently settled in 1861. This share was sold for arrears of Government revenue in 1873, and purchased by the plaintiff, who subsequently applied to the Collector for partition, under the Butwara Act. The Collector refused to partition, upon the ground that the Act was not applicable to

Partition—(continued.)

- the partition of a mouzah held jointly by the proprietors of two separate estates. The plaintiff then brought the present suit, to which he made the Collector a party, to obtain a declaration that he was entitled to have his share separated from the fourteen-anna eight-gunda share by metes and bounds, and also for a decree directing a partition of the whole mouzah into two parts. *Held*, that so far as the plaintiff on the one hand, and the owners of the fourteen-anna eight-gunda share on the other, were concerned, the mouzah could be partitioned, but that such partition would not be binding upon the Government unless by consent.
- AJOODHYA PERSAD v. COLLECTOR OF DURBHUNGAH ... IX 419
- Revenue-paying Estates—Jurisdiction of Civil Court.* Partition of an estate paying revenue to Government cannot be effected in a Civil Court.
- BADRI ROY v. BHUGWAT NARAIN DOBEY ... VIII 649
- Revenue-paying estates Jurisdiction of Collector—Jurisdiction of Civil Court.* Revenue-paying estates must be partitioned by the Collector; they cannot be partitioned by metes and bounds by the Civil Court Ameen: and if the shares in such an estate are not separate estates, but are mere fractional shares of integral estates, they cannot be partitioned in the absence of the other co-sharers.
- DAMOODUR MISSEER v. SENABUTTY MISRAIN ... VIII 537
- Suit for possession on.* See Limitation Act, 1877, sched. ii, art. 127.
- Suits, Stamp on Memorandum of appeal in.* See Court Fees Act, sched. ii, art. 6 cl. 17.

Partnership—

See Jurisdiction.

Notice of dissolution of partnership—Contract Act (IX of 1872), s. 264. Section 264 of the Contract Act is not intended to be an exhaustive exposition on the question of notice of a dissolution of partnership.

The mode of notification of dissolution required in the case of old customers, who are known to the firm as having dealt with it, is an express or specific notice by circular or otherwise. But in the case of the general public the most effectual public notice which can reasonably be given is requisite.

Roop Chand Pandit v. Madhub Chunder Bose overruled.

CHUNDEE CHURN DUTT v. EDULJEE COWASJEE BLNEE ... VIII 678

Patni tenure—

See Sale for Arrears of Rent.

Patnidar—

Right of, to redeem. See Mortgage.

Under Mortgagor. See Parties.

Payment—

By one co-sharer for another. See Contribution, Suit for.

Into Court—Departmental Rules directing all moneys to be paid into the Treasury—

Rule No. 9, High Court Rules and Circular No. 4, 1881, p. 37—Beng. Act VIII of 1869, s. 52. Where a decree directs the payment of money into Court within a limited time, it is a sufficient compliance with such decree if the judgment-debtor bring the money into Court within that time, and diligently take the necessary steps required by the Departmental Rules for its actual payment into the treasury.

GUJADHUR PAUREE v. NAIK PAUREE ... VIII 528

Not certified to Court. See Sale in Execution of Decree.

Of debts, and maintenance, provisions for. See Mahomedan Law, Endowment.

Out of Court, to one of several joint decree-holders. See Execution of Decree.

To save patni from sale. See Arrears of Rent, Suit for.

To stay sale. See Regulation VIII of 1819, s. 13.

Penal Code—

s. 34, *Constructive murder under.* See Criminal Proceedings.

s. 75. See Sentence.

ss. 109, 363. See Kidnapping.

s. 143. See Unlawful Assembly.

s. 149. See Criminal Proceedings.

ss. 167, 466, 471. See Criminal Procedure Code, 1872, ss. 445, 446, 453.

s. 211. See Sanction to Prosecution.

ss. 224, 225—*Escape from Custody while being taken before a Magistrate—Subsequent conviction for such escape.* An escape from custody when being taken before a Magistrate for the purpose of being bound over to be of good behaviour is not punishable under either s. 224 or s. 225 of the Penal Code.

EMPRESS v. SHASTI CHURN NAPIT ... VIII 331

Penal Code—(continued.)

- s. 300. See Charge.
- s. 346. See Wrongful confinement.
- ss. 361, 366. See Kidnapping.
- s. 384. See Abetment.
- ss. 411, 413. See Criminal Procedure Code, 1872, s. 453.
- s. 471. See Fraud.

Penalty—

See Interest.

Pending suit—

Right to apply in. See Limitation Act, 1877, sched. ii, arts. 171, 171 (a) & 178.

Pensions Act—

ss. 4 and 6—*Jurisdiction of Civil Court—Omission to obtain previous to suit certificate enabling Court to entertain suit—Effect of certificate granted after the hearing.* Part of the property in suit consisted of land, which was assumed in the Courts below to be held on terms bringing it within the Pensions Act, 1871. After the judgment, which disposed of the principal questions in the case, had been given, final judgment was suspended upon an objection that no certificate had been obtained under that Act. The certificate having been then obtained and delivered to the Court—*Held*, that the original defect did not prevent the suit proceeding.
 MAHAMMED AZMAT ALI KHAN v. LALLI BEGUM ... VIII 422

Period—

From which appointment of guardian dates. See Majority Act, s. 3.

Permanent tenure—

See Limitation Act, 1877, art. 139.

Person affected by an order—

See Presidency Magistrates' Act, s. 170.

Personal exemption—

See Limitation Act, 1877, s. 7.

Petition of appeal—

Error in title of. See Practice.

Plaint—

See Practice.

Amendment of plaint—Appellate Court, power of—Variance between pleading and proof. When a plaintiff sues to recover possession of property on the allegation that he had purchased it with his own money, and the suit is dismissed in the Court of First Instance, the Court of Appeal is not justified in giving the plaintiff a decree for a portion of the property, on the ground that the whole was the property of a joint Hindu family in which the plaintiff was a co-sharer.
 MUKHODA SOONDURY DASI v. RAM CHURN KARMOKAR ... VIII 871

Amendment of plaint on appeal—Adding parties. In a suit for arrears of rent of the plaintiff's share of a taluq, it appeared that, in the year 1279, a partition was effected of the zamindari in which the defendant's taluq was situated, and that the taluq ceased to be held exclusively by the plaintiff, and was divided between him and certain other persons, who were not made parties to the suit.

Held, that all the co-sharers should have been joined as parties, and that, as this had not been done, the suit was bad.

Held also, that the plaint could not be amended by making the co-sharers parties at the hearing of the appeal.

ONHOY GOBIND CHOWDHRY v. HURYPURN CHOWDHRY ... VIII 277

Amendment of plaint—Second appeal. A plaintiff was not allowed to amend his plaint in second appeal.

DASSORATHY HURI CHUNDER MOHAPATTRA v. RAMA KRISHNA JANA IX 526

Amount claimed in. See Mesne Profits

Order directing return of, for presentation in proper Court. See Second Appeal.

Rejection of plaint—Civil Procedure Code, 1877, s. 54. A plaint can only be rejected under s. 54 of Act X of 1877 before it is registered.

HUBBUL HOSSEIN v. MAHOMED REZA ... VIII 192

Return of. See Civil Procedure Code, 1877, s. 57.

Suit on kabuliati—Variance between pleading and proof—Amendment of plaint—Decree for rent on failure to prove kabuliati—Jama-wasil-baki. In a suit on a

Plaint—(*continued.*)

kabuliāt, where no alternative claim for rent at an old rate is in words expressly asked for in the plaint (although it is disclosed by the plaint that the defendant had previously occupied the land in suit at a rate which the evidence proved to be lower than the rent mentioned in the kabuliāt) and where the kabuliāt is not proved, it is in the discretion of the Court to amend the plaint or the issues, and to allow an alternative claim to be tried; and when the omission to make the claim in the plaint appears to have been an inadvertence, it is right that the Court should do so.

Lukhee Kanto Doss Chowdhry v. Sumeeruddi Lusker commented upon.

The use of jama-wasil-baki observed upon.

ROUSHAN BIBEE *v.* HURRAY KRISTO NATH ... VIII 926

Verification of plaint—Allegation of fraud—Practice. In a case where the plaintiffs set up gross fraud, and where the case depends mainly upon the personal knowledge of the plaintiffs, it is imperative on the plaintiffs, or one of them, to verify the plaint.

PROTAB CHUNDER BANERJEE *v.* KRISHTO KISHORE SHAIHA ... VIII 885

Plaintiff—

See Bengal Act VIII of 1869, s. 32.

Plaintiffs

Persons not joining as. See Parties.

Pleading—

See Religious Endowment.

Pleadings

Point not raised in. See Variance between Pleading and Proof.

Point decided—

By lower Court, but not dealt with on appeal. See Res Judicata.

Point not raised—

In pleadings or issues. See Variance between Pleading and Proof.

Police—

Inspector specially empowered. See Arms Act, 1878.

Officer, memorandum made by. See Evidence.

Officer, statements of witnesses to. See Evidence.

Ports Act, 1875—

s. 22. See Master and Servant.

Possession—

See Evidence.

Adverse. See Insolvency.

And mesne profits, suit for. See Court Fees Act, 1870, s. 17.

Delivery of. See Transfer of Property.

Dispossession—Adverse possession—Presumption—Onus Probandi—Limitation—Joint owners, adverse possession between. Under the former Limitation Act the cause of action, and under the present law the event from which limitation is declared to run, must have occurred within the prescribed period, and it lies on the plaintiff to show this. Accordingly, where the suit is for possession, and the cause of action is dispossession, the plaintiff is bound to prove possession and dispossession within twelve years. Possession is not necessarily the same thing as actual user. When land has been shown to have been in a condition unfitting it for actual enjoyment in the usual modes, at such a time and under such circumstances that that state naturally would, and probably did, continue till within twelve years before suit, it may properly be presumed that it did so continue, and that the previous possession continued also until the contrary is proved. Such a presumption is in no sense a conclusive one. Its bearing upon each particular case must depend upon the circumstances of that case. Many acts which would be clearly adverse, and might amount to dispossession as between a stranger and the true owner of land, would, between joint owners, naturally bear a different construction.

MAHOMED ALI KHAN *v.* KHAJA ABDUL GUNNY... IX 744

Evidence of. See Land Registration Act.

Presumption of. See Onus Probandi.

Proof of. See Onus Probandi.

Question of. See Evidence Act, s. 35.

Subsequent suit for. See Civil Procedure Code, 1877, s. 43.

Possession—(continued.)

Suit for. See Civil Procedure Code, 1859, s. 7 ; s. 97 : Limitation : Limitation Act, 1877, arts. 11 ; 189, 144 : Onus Probandi : Review : Res Judicata.

Suit for—Sale in execution of decree—Possession, application for, by auction purchaser—Subsequent suit for possession of land sold in execution of decree—Civil Procedure Code, 1882, s. 11—Limitation Act, 1877, art. 138. In execution of a decree certain land belonging to the judgment-debtor was sold; subsequently the auction-purchaser, who had not got possession, resold the land to a third party and gave him the certificate. The latter then applied to the Court to be put into possession, but having failed in those proceedings, owing to some irregularity in the description of the boundaries of the property, he instituted a regular suit against the judgment-debtor to obtain possession. On a plea that such suit would not lie as the plaintiff could have got possession in the miscellaneous proceedings, *held*, that having regard to the provisions of art. 138 of sched. ii of Act XV of 1877, and of s. 11 of Act XIV of 1882 such suit was maintainable.

SERU MOHUN BANIA v. BHAGOHAN DIN PANDEY ... IX 602

Suit for, by reversioner. See Limitation Act, 1877, art. 141 : Res judicata.

Suit for, on dispossession by landlord. See Limitation.

Transfer of. See Hindu Law, Gift.

Unity of. See Easement.

Post Mortem Examination Reports—

See Evidence.

Potta—

See Stamp Act, 1879, s. 7, para. 2.

Construction of potta—Mokurari ijara—Absence of words of inheritance—Grant in perpetuity. The word 'mukurari' does not necessarily import perpetuity, although it may do so. Used in connection with the grant of an ijara in a potta, this word is not inconsistent with such interest being only for life.

By a potta was granted a mokurari ijara at a fixed rent in a mouza, consisting mainly of waste lands, part of the grantor's zamindari, without words of inheritance. On the death of the grantee, who brought the land under cultivation and died in possession many years after, the question arose whether the potta was for life, or for a heritable and transferable estate.

Held, that there being in the potta no words importing perpetuity, notwithstanding the use of the word 'mukurari,' the question was whether the intention of the parties that the grant should be perpetual, was shown with sufficient certainty in any other way—*e.g.*, by the other terms of the instrument, its objects, the circumstances under which it was made, or the conduct of the parties to it. *Held* also, that such intention was not shown.

BILASMONI DAS v. RAJA SHEOPERSAD SINGH ... VIII 664

Power-of-attorney—

See Principal and Agent.

Power to borrow—

See Company.

Power to negotiate shares—

See Presidency Banks Act, 1876, s. 4.

Powers of Special Commissioner—

See Chota Nagpore Tenures Act.

Practice—

See Civil Procedure Code, 1877, s. 30 : Costs : Divorce Act, s. 16 : Plaint : Small Cause Court, Mofussil : Transfer of Case.

Civil Procedure Code (Act XIV of 1882), s. 136—Non-compliance with order for Production of documents—Defence struck out. Where a defendant neglects to comply with an order for production and inspection, the Court will, although in the last resort, order his defence to be struck out.

KHAJAH ASSENOOLLA JOO v. KHAJAH ABDUL AZIZ ... IX 923

Of Mofussil Courts. See Evidence Act, 1872, s. 35.

Plaint—Minor—Next friend—Form of plaint—Error in title of petition of appeal.

A suit was brought by a minor, who appeared by her next friend, and a decree was given in her favour. The defendant appealed, making the next friend alone

Practice—(continued.)

respondent, and had the decree of the Court of First Instance modified in his favour. The next friend appealed to the High Court, where the respondent objected to the next friend being heard, on the ground that she was no party to the suit. *Held* that the Court would not entertain the objection at the instance of the party through whose fault the error occurred, but that the judgment of the Court below should be set aside, and that of the Court of First Instance restored.

BHOBOTARINI DEBI v. SREE RAM PAUL ... IX 629

Right of respondent, who has filed cross objections, to appeal, where appellant withdraws his appeal. No leave to appeal should be granted to a respondent who has filed cross objections, unless the Court is thoroughly satisfied upon affidavit that he was ready to appeal, and would have appealed within the proper time if the other side had not done so.

GOUR HARI SANYAL v. PREM NATH SANYAL ... IX 738

Rule nisi to show cause why a person should not be made a party defendant—No grounds stated in or served with the rule—Rule granted during hearing of suit—Civil Procedure Code (Act XIV of 1882), s. 32. During the hearing of a suit for recovery of immoveable property it appeared from the evidence and certain documents put in, that the plaintiff had mortgaged his right, title and interest to a third person, by whom the suit was practically being carried on. On an application by the defendant for the mortgagee to be added as a party defendant, under the provisions of s. 32 of the Civil Procedure Code, the Court directed a rule to issue calling on him to show cause why he should not be added as a party defendant or give security for costs. The rule was not applied for on petition or affidavit, and set out no grounds for the application at all. On an objection taken by the mortgagee at the hearing of the rule, *held*, that the grounds should have been stated on affidavit or have appeared on the face of the rule, and that the mortgagee was entitled to know what he had to answer, and consequently, the rule being informal, it was discharged with costs.

RAMNABAIN KALLIA v. MONEE BIBEE, AND RAMNARAIN KALLIA v. GOPAL DOSS SING ... IX 735

Preliminary Point—

Disposal of. See Costs.

Presidency Banks Act—

XI of 1876—

s. 4 — *Certificate of Administration—Act XXVII of 1860—Registration of guardian as proprietor of shares—Power to negotiate.* A, the mother and guardian of a minor, obtained a certificate under Act XXVII of 1860. Part of the property of the minor consisted of shares in the Bank of Bengal. A obtained power under her certificate to draw the dividends due upon the shares. After the passing of the Presidency Banks Act, 1876, A applied under s. 4 of that Act to be registered as proprietor of the shares. The Bank refused to register her name as proprietor, and A then applied to have her certificate amended by empowering her to negotiate the shares.

Held that she was not entitled to have such a power inserted in the certificate.

IN THE MATTER OF THE PETITION OF RADHABULLUBH SING ... VIII 300

Presidency Magistrates Act—

IV of 1877—

s. 170 — *Prosecutor, rights of—"Person affected by an order"—Application for copy of order and depositions, refusal of—Specific Relief Act (I of 1877), ss. 7, 45.* All prosecutors whose charges are dismissed by the Presidency Magistrate are affected by the order of discharge, and are therefore, entitled under s. 170 of the Presidency Magistrates' Act to obtain copies of the order made by, and of the depositions taken before, the Magistrate.

IN THE MATTER OF THE EMPRESS ON THE PROSECUTION OF THE BANK OF BENGAL v. DINONATH ROY ... VIII 166

Presumption—

See Landlord and Tenant: Muhomedan Law: Onus Probandi: Possession.

As to nature of tenure. See Landlord and Tenant.

As to property acquired by joint family. See Onus Probandi.

Of payment. See Mortgage.

Previous Conviction—

See Sentence.

Principal and Agent—

See Bengal Act VIII of 1869, s. 32.

Managing agent—Authority of agent—Liability of Principal—Banker and customer—Bills of Exchange—Indorser and acceptor N & Co., the Managing Agents of the Baree Tea Company, had a general banking account with the Oriental Bank Corporation, which account they were allowed to overdraw on having the overdraft properly secured. Under the articles of Association of the Baree Tea Company, N & Co., had power to "draw, accept, endorse, and negotiate on behalf of the Company all such cheques, promissory notes, drafts, &c., as should be necessary for enabling them to carry on the business of the Company." Purporting to act under this power N & Co., drew a bill of exchange on the Managing Agents of the Company, which was accepted by the latter, and endorsed by N & Co., to the Oriental Bank Corporation, who credited the amount to N & Co.'s general account. The amount was drawn out by cheques drawn by N & Co., personally, without reference to the Baree Tea Company, and there was no proof that the money had been applied for the purposes of the Baree Tea Company. *Held*, in an action by the Oriental Bank against the Baree Tea Company, that the latter were not liable on the bills as acceptors.

THE ORIENTAL BANK CORPORATION v. THE BAREE TEA COMPANY, LTD. IX 880

Power-of-attorney—Authority to appear and defend—Option of agent to accept service of summons. A person holding a power-of-attorney, even if authorized by the power to appear and defend suits on behalf of his principal, is at liberty to refuse to accept service of summons and appear in a suit brought against his principal, but may either act upon the power or not as he may think proper.

IN THE MATTER OF THE PETITION OF LUCHMEE CHUND ... VIII 817

Power-of-attorney—Meaning of the word 'negotiate' with reference to Government securities. W gave to A and B a power-of-attorney authorizing them jointly and severally to "negotiate, make sale, dispose of, assign and transfer," amongst other things, certain Government securities standing in his name.

B pledged the securities for an advance of Rs. 19,000, and at the same time executed a promissory note for the amount of the loan, the promissory note being signed "B, as attorney for W." In a suit by W to recover the Government securities,

Held, in the Court below, that the power-of-attorney was sufficiently wide to cover the transaction; that the transaction was a fraud on the part of B, but that the transferee (the defendant) had no notice of the fraud, and therefore the plaintiff was not entitled to succeed.

Held, on appeal, *per* WHITE, J.:—(i) That the words of the power were to be read disjunctively, and the powers conveyed by the words were to be treated as joint and several; (ii) that even supposing the word, 'negotiate' to be applicable to transactions with Government securities (which was doubtful), and that such Government securities stood in the same position as ordinary commercial notes, the word 'negotiate', did not authorize B to do more than put the Government securities in the market, or to put them in circulation in the ordinary way in which such a transaction takes place in the market, and if necessary to endorse them in the name of W; (iii) that the loan, which was the principal transaction, being irrecoverable from W, because unauthorized, the defendant could not retain the Government securities, which were deposited as security for the loan, he not having taken the precaution to ascertain whether B had authority to enter into the transaction.

Per GARTH, C.J.:—That although, on the authority of *The Bank of Bengal v. Fagan*, a power to negotiate Government securities would authorize the negotiation of Government securities by way of pledge, yet W was entitled to a decree, on the ground, that A and B had no power, under the power-of-attorney, to borrow money in the name of W; and that, therefore, the defendant was not entitled to retain the security given for the advance (*viz.*, the Government promissory note). WATSON v. JONMENJOY COONDOD ... VIII 931

Power-of-attorney—"Purchase, sell, endorse, and transfer"—Meaning of "Power to sell." N & Co., having a joint and several power-of-attorney from the plaintiff, authorizing them "to purchase, sell, endorse, and transfer for the plaintiff, and in the plaintiff's name and on the plaintiff's behalf," all shares standing in his name in the books of any public company or society, entered into a contract embodied in bought and sold notes, agreeing to sell by order and on account of N & Co. to the defendant, twenty-five Muir Mill Cotton shares, and agreeing to buy, by order and for account of N & Co., from the defendant, twenty-five Muir Mill Cotton shares in three months' time at an advanced rate; the bought and sold notes bearing the same date and being one transaction. The transfer

Principal and Agent—(continued.)

deeds were signed by a partner in the firm of N & Co., as attorney for the plaintiff, and N & Co., received the purchase-money of the shares. Previous to the time fixed for the sale of twenty-five Muir Mill Cotton shares by the defendant to N & Co., the latter became insolvent. The plaintiff then brought a suit to recover the shares from the defendant. *Held* by GARTH, C.J., that, the transaction between N & Co., and the defendant was not justified by the power-of-attorney, the contract not having been entered into "for and on behalf and in the name of the plaintiff" within the meaning of the power. That the transaction was either an actual loan, or a transaction in the nature of a loan, for the purpose of raising money. *Per* WILSON, J., that the defendant took no title to the shares for two reasons, viz.:—(i) because a power to sell is only a power to sell in the ordinary course of business—i.e., for a money price; (ii) because it was the duty of the defendant, seeing that the shares were sold to him under a power, to see that he paid the price to the plaintiff or his attorney.

JUMNA DASS *v.* ECKFORD ... IX 1

Principal and Surety—

Agreement to mortgage, Assignment of—Bond of indemnity—Guarantee—Interest. Liability of parties discussed and form of decree given in a case where, by an agreement in writing, one of the defendants, in consideration of money lent to him by B, the other defendant, agreed to execute a mortgage to B containing the usual covenants (in default the agreement to stand as a mortgage), and B assigned the agreement to the plaintiff, guaranteeing by bond of even date the payment of the principal and interest specified in the agreement.

MANICKYA MOYEE *v.* BORODA PRASAD MOOKERJEE ... IX 355

Printed form

Of contract. See Contract.

Priority—

Of registered over unregistered documents. See Registration Act, 1877, s. 50.

Prisoner—

Acquittal of. See Criminal Procedure Code, 1872, s. 349.

Private—

Arrangement, partition by. See Onus Probandi.

Privy Council—

Execution of order of. See Limitation Act, 1877, sched. ii, art. 180.

Order of, application for execution of. See Civil Procedure Code, 1877, s. 610.

Probate—

Application for revocation of probate—Jurisdiction—Interest of applicant in the estate—Reversioner—Special citation—Succession Act (X of 1865), ss. 235, 244, 250. The test of jurisdiction made use of in applications for grant of probate, may be also applied to cases in which a revocation of probate is demanded, viz., whether or no the deceased, at the time of his death, had his fixed place of abode, or had some property, moveable or immoveable, situate within the jurisdiction of the particular District Judge to whom the application is made.

A presumptive reversioner to property with which a will deals, has a sufficient interest in the property to entitle him to maintain a suit in respect of such property; and on the authority of *Nobeen Chundra Sal v. Bhoba Soondury Dabee*, he is entitled to maintain a case for the revocation of probate.

In every case in which probate of a Hindu's will is applied for, a special citation should be served upon those persons whose interests are directly affected by the will.

IN THE MATTER OF THE PETITION OF HURRO LALI SHAHA. KAMONA SOONDURY DASSEE *v.* HURRO LALI SHAHA ... VIII 570

Revocation of probate—Procedure—Succession Act (X of 1865), s. 234—Onus Probandi. Upon a petition under s. 234 of the Succession Act, praying that the probate of a will alleged to have been made by the petitioner's husband should be revoked upon the grounds that no citation was duly published, that the petitioner was a minor, living under the care of the person to whom probate had been granted, and had no opportunity of understanding his *mala fides* and improper acts, and that the will was a forgery, the District Judge held, that the burden of proof in respect of the whole case was on the petitioner, and dismissed her petition. *Held*, that the District Judge ought to have given the petitioner an opportunity of proving that she had no knowledge of the previous proceedings. If satisfied that

Probate—(continued.)

she had no such knowledge, then he should have ordered a new trial as to the factum of the will, when the person propounding it would have to prove it in the ordinary way.

IN THE MATTER OF THE PETITION OF DINTARINI DEBI. DINTARINI DEBI
v. DOIBO CHUNDER ROY VIII 880

Procedure—

See Criminal Procedure Code, 1872, s. 453 : Probate : Valuation of Suit.
Of High Court. See Second Appeal.

Proclamation of sale—

See Sale for Arrears of Rent.

Production of documents

Non-compliance with order for. See Practice.

Promissory Note—

See Bond : Cause of Action : Interest.

Acknowledgment—Stamp Act (I of 1879), s. 34. The plaintiff sued on two documents, signed by the defendant, each bearing a one-anna stamp, in one of which a sum of Rs. 208 was stated to be "due to you, and payable on the 16th July;" and in the other a sum of Rs. 515 was mentioned "for which I give you this writing, the whole amount of which will be paid up in full on the 3rd August."

Held, that the documents were not mere acknowledgments, but promissory notes, and being payable otherwise than on demand, were not sufficiently stamped, and consequently not admissible in evidence under s. 34, Act I of 1879.

MANICK CHUND v. JOMOONA DOSS VIII 645

Property--

After-acquired. See Insolvency.

Dedicated to religious purposes. See Right of Suit.

In different districts. See Execution of Decree.

Protection of. See Criminal Procedure Code, 1872, s. 518.

Sold in execution of decree, suit to recover. See Misjoinder.

Proprietors of estate—

Failure to record names of. See Sale for Arrears of Revenue.

Prosecution—

Duty of, as to calling witness. See Witness.

For false charge. See Sanction to Prosecution.

Prosecutor—

Rights of. See Presidency Magistrates' Act, s. 170.

Protection—

Of Judicial Officers. See Liability of Public Servant.

Provisions—

For payment of debts and maintenance. See Mahomedan Law, Endowment.

Public Policy—

Agreement contrary to. See Compromise of Family Disputes : Contract Act, s. 23.

Public Servant—

See Liability of Public Servant.

Public Works Cess--

See Damages, Suit for.

Publication—

Of notice of sale. See Sale for Arrears at Rent : Sale in Execution of Decree.

Purchase--

From Hindu widow. See Hindu Law, Partition.

In name of Hindu wife. See Onus Probandi.

Purchaser—

At sale in execution of decree on mortgage against assignee of mortgagor. See Decree.

At sale under mortgage for payment of Government revenue, right of, as against purchaser at Sheriff's sale. See Sale in Execution of Decree.

At Sheriff's sale, right of, as against mortgagee. See Lis Pendens.

Evidence of title of. See Sale in Execution of Decree.

From insolvent who was not obtained his discharge. See Insolvency.

Of Mortgagor's interest. See Res Judicata.

Right of. See Hindu Law, Alienation: Sale for Arrears of Revenue: Sale in Execution of Decree.

Question—*And answer, examination by.* See Confession.*Relating to the Execution of Decree.* See Civil Procedure Code, 1882, s. 244, cl. (c).**Raj—***Succession to.* See Hindu Law, Custom.**Ratification—***See Company:* Hindu Law, Widow.**Readiness and Willingness—***See Government Securities, Contract for sale of.***Reasons for Conviction —***Recording of.* See Criminal Proceedings.**Recognition of Trust—***See Oudh Estates Act, ss. 8, 9 and 10.***Recognizance to keep the peace—***Form of summons under s. 492 of the Criminal Procedure Code (Act X of 1872).**The words of s. 492 of the Code of Criminal Procedure are directory and not imperative; and an omission to insert in a summons under that section the amount of the recognizance and security required will not invalidate any subsequent proceedings binding over the parties to keep the peace.*

ABASU BEGUM v. UMDA KHANUM ...

VIII 724

Record of inferior Court—*Explanation of order passed—Criminal Procedure Code (Act X of 1872), s. 295.**Where a Sessions Judge has, under s. 295 of Act X of 1872, called for the record of an inferior Court, he is, before referring the case to the High Court for orders, bound to call upon the inferior Court for an explanation of the order passed, and should submit such explanation, together with the rest of the record, to the High Court.*

MAILAMDI FAKIR v. TARIPULLA PRAMANIK ...

VIII 644

Recorded Proprietors—*See Sale for Arrears of Revenue.***Rectification of Contract of Tenancy—***See Landlord and Tenant.***Recurring Right—***See Limitation Act, 1877, sched. ii, art. 131.***Redemption—***Suit for.* See Limitation Act, 1871, art. 148.**Reference—***To High Court.* See Magistrate, Power of: Revision.**Refreshing Memory—***See Evidence.**Of Witness.* See Evidence.**Refusal—***Of Bench of Judges to hear affidavits in support of application for transfer of Criminal Case.* See Chief Justice, Power of.*To execute deed.* See Registration Act, 1877, ss. 74, 77.*To produce document.* See Evidence taken on Commission.*To register.* See Registration Act, 1877, s. 35.*To transmit order of Privy Council for execution.* See Letters Patent, cl. 15.**Register—***Entry in.* See Evidence Act, s. 35.**Registered Owner—***See Landlord and Tenant.***Registration—***See Decree, Sale of.**Of names.* See Jurisdiction of Revenue Courts.*Of shares in land.* See Land Registration Act.*Of tenure.* See Evidence.*Suit to compel.* See Limitation Act, 1877, ss. 5 and 6: Right of Suit.

Registration Act—

1864, s. 18. See Registration Act, 1877, s. 17.
1866, s. 53. See Mortgage.

VIII of 1871, s. 17—*Sale-certificates, Registration of—Civil Procedure Code, 1859, s. 259—Maxim "Optimus legis interpret consuetudo."* Sale-certificates granted under the provisions of s. 259 of Act VIII of 1859 are not documents, the registration of which is compulsory under the provisions of s. 17 of the Registration Act of 1871.

PROKASH CHUNDER DASS v. TARACHAND DASS ... IX 82
III of 1877—

s. 17. See Vendor and Purchaser.

s. 17—*Admissibility of Evidence—Act XVI of 1864, s. 13.* Neither s. 17 of Act III of 1877, nor the similar sections of the preceding Acts, have the effect of rendering a document, which was not compulsorily registrable under Act XVI of 1864, inadmissible in evidence, under the succeeding Acts, without registration.

RAM COOMAR SINGH v. KISHARI ... IX 68

s. 17—*Lease or agreement to lease.* In a suit for possession of certain property and for the execution of a pottah, it appeared that two of the defendants had executed an agreement which was duly registered, by which they acknowledged the receipt of a portion of the salami, and covenanted to execute a pottah on a certain day. This agreement was afterwards confirmed by two of the defendants who were minors when it was entered into: the confirmation was by deed which was duly registered. Subsequently all the defendants executed a document, which provided for the payment of a portion of the salami on the day when possession should be given as provided in the first agreement, and for the payment of the remainder by instalments which were to carry interest. This document was not registered. *Held*, that it was not a "lease or agreement to lease" within the meaning of s. 17 of the Registration Act, and was admissible in evidence.

KEDARNATH MITTER v. SURENDRO DEB ROY ... IX 865

s. 35—*Refusal to register—Disability of minority.* The object of s. 35 of the Registration Act, which directs the Registering-officer to refuse to register a document if the person by whom it purports to be executed appears to be a minor, is, that if the registration authorities refuse to register on that ground, the question of minority may at once be brought into a Civil Court, and there determined.

CHUNEE MUL JOHARY v. BROJO NATH ROY CHOWDHRY ... VIII 967

s. 49—*Unregistered bond—Evidence, Admissibility of—Mortgage bond.* An unregistered bond, containing a personal undertaking to repay money borrowed, and also a hypothecation of land above Rs. 100 in value as security, may be used in evidence to enforce the personal obligation.

ULFATUNNISSA alias ELAHLIAN BIBI v. HOSAIN KHAN ... IX 520

s. 50—*Registered and unregistered documents—Priority.* A vendor sold the same property twice over to different people—once by an unregistered conveyance (the purchase-money being under Rs. 100), giving to his vendee possession, and a second time to another person by a registered conveyance at a time when the first vendee was out of possession.

Held by the Court (PRINSEP, J., dissenting), in a suit by the first vendee to recover possession, that the fact of a vendor having given possession to the first and unregistered purchaser, even if such possession continued to the date of the second conveyance, did not necessarily prevent the operation of that part of s. 50 of the Registration Act which enacts that "a registered document shall take effect as regards the property therein comprised against every unregistered document relating to the same property."

The only case in which the title of the prior unregistered purchaser can prevail against the subsequent registered purchaser for value, is when the latter takes with notice of the title of the former.

Per PRINSEP, J.—A purchaser under a registered conveyance subsequently executed cannot succeed in a suit to eject one who holds possession under a prior but unregistered conveyance, registration of which is optional.

NARAIN CHUNDER CHUCKERBUTTY v. DATARAM ROY ... VIII 597

ss. 73, 77. See Right of Suit.

ss. 74, 77—*Refusal to execute deed—Suit to compel registration.* If the non-registration of a deed has resulted from the refusal of one of the parties to it, to execute it, that matter must be enquired into by the Registrar, as directed by s. 74 of the

Registration Act—(continued.)

III of 1877—(continued.)

Registration Act, before any right to sue under s. 77 can arise, and unless the requirements of the Act have been complied with, no cause of action arises under s. 77.

Edun v. Mahomed Siddik, followed.

LAKHIMONI CHOWDHRAIN v. AKROOMONI CHOWDHRAIN ... IX 861
s. 77. See Court Fees Act, sched. iv, cl. 12, art. 17: Limitation Act, 1877, ss. 5 and 6.

Regulation—

X of 1798. See Ward of Court.

XII, XIII and, XIV of 1805. See Jurisdiction of Criminal Court.

XVII of 1806, s. 8. See Mortgage.

XIX of 1810. See Religious Endowment.

XIX of 1814. *Butwara proceedings under*. See Partition: Valuation of Suit.

XXIX of 1814. See Jaghir.

VIII of 1819—

s. 8. See Sale for Arrears of Rent.

s. 13—*Payment to stay final sale—Payment to Zamindar*. The direction in s. 13 of Reg. VIII of 1819, that money paid into Court by a taluqdar in order to stay the final sale shall be deducted from any claim of rent that may at the time be pending on account of the year or months for which the notice of sale may have been published, is satisfied by payment not into Court, but to the zamindar. If a strictly literal construction were put upon the words 'into Court,' no payment effectual to stay the sale could be made, for 'the Court' has nothing to do with these sales, which are managed by the Collector.

TARINY DEBEE v. SHAMA CHURN MITTER ... VIII 954

Payment to save sale under. See Arrears of Rent, Suit for.

I of 1824—Assessment of land formerly occupied for Government salt-works. Upon the relinquishment by the Government of lands, within the ambit of a permanently-settled zamindari, continuously used before and since the perpetual settlement of salt-works from the commencement of salt-making by the Government, until after the passing of Reg. I of 1824, the provisions of that Regulation are applicable to the mutual rights of the zamindar and of the Government.

Such lands were held by the officers of the Salt Department, in terms of cl. 11 of that Regulation, "free of rent" and "under a perpetual title of occupancy," whether belonging to a permanently-settled estate or not. The force of the Regulation and the right of the Government to assess such lands are not affected by 'khalari' payments having been made, among other compensations, by the Government to the zamindar; and cl. 11 appears to contemplate some such payment. On a settlement of the relinquished lands, 'khalari' payments, being "sums remitted to the zamindars and to be allowed in perpetuity," within the meaning of the 4th clause of s. 9 of Reg. I of 1824, must be continued to the zamindar; or, if a settlement should be made with others, he should be assessed only for the land retained by him.

THE SECRETARY OF STATE FOR INDIA v. RANI ANANDOMOYI DEBI. VIII 95

Re-Hearing—

Discretion of Court as to. See Review.

Release—

See Compromise.

Religious Endowment—

Pleading—Form of Suit—Civil Procedure Code, (Act X of 1877), ss. 1, 539—Reg. XIX of 1810—Act XX of 1863. In a suit by two of the worshippers at a certain mosque, instituted after having obtained the sanction of the Advocate-General under s. 539 of the Civil Procedure Code, against the mutawalli of the mosque and two other persons to whom the mutawalli had mortgaged part of the endowed property to secure the repayment of a loan, it appeared, that one of the mortgagees had sold some of the *wukf* property in execution of a decree which he had obtained upon his mortgage, and the property had been purchased by the other mortgagee. The plaintiffs prayed that the property purchased might be declared to be *wukf*; that the sale in execution might be declared to be invalid; that a mutawalli might be appointed by the Court; and that the costs of doing the acts of the *wukf* might be defrayed from the profits of the property belonging to the endowment.

Religious Endowment—(continued.)

Held, that so far as regarded that portion of the prayer as fell within the provisions of s. 589 of the Code, the plaintiffs were not entitled to sue, as they were not "persons having a direct interest in the trust" within the meaning of the section, and that the suit should have been instituted under s. 14 of Act XX of 1863 after sanction obtained under s. 18.

Held also, that though the plaintiffs might possibly have obtained leave to sue under s. 80 of the Code on behalf of themselves and the other persons attending the mosque, they not having obtained such leave, were not entitled to institute the suit for the purpose of obtaining the relief asked for in the other prayers of the plaint.

The words "trustee, manager or superintendent of a mosque," etc., mentioned in Act XX of 1863, mean the trustee, manager or superintendent of a mosque, etc., to which the provisions of the Act are applicable, not the trustee, etc., of any mosque. And such persons are those to whom the provisions of Reg. XIX of 1810 were applicable.

The mosques, etc., to which the provisions of that Regulation were applicable, were mosques for the support of which endowments had been granted in land by the Government of the country or by individuals; and the mosques, etc., to which the provisions of Act XX of 1863 apply are, not any mosques, etc., but any mosques for the support of which endowments in land have been made by the Government or private individuals.

JAN ALI v. RAM NATH MUNDUL VIII 32

Relinquishment—

Notice of. See Landlord and Tenant.

Remand—

See Civil Procedure Code, 1877, s. 562.

Order of. See Appellate Court, Power of.

Rent—

Acceptance of. See Landlord and Tenant.

Below Rs. 100, Suit for. See Beng. Act VIII of 1869, s. 102.

Execution of decree for. See Superintendence of High Court.

Non-Payment of. See Right of Occupancy.

Payment of, after suit but before decree. See Bengal Act VIII of 1869, s. 52.

Suit for. See Civil Procedure Code, 1882, ss. 42, 43: Land-lord and Tenant: Nawab Nazim's Debts' Act: Parties: Res Judicata: Road Cess Act, 1871, ss. 5, 7.

Rent Free Lands—

See Onus Probandi.

Rent Suit—

Intervenor in. See Estoppel.

Rents and Profits—

Share of. See Limitation Act, 1877, sched. ii, art. 123.

Repeal—

Effect of. See Appeal in Criminal Case: Limitation Act, 1877, art. 179.

Representatives—

Of deceased Mahomedan, sale in execution of decree against. See Mahomedan Law, Debts.

Repudiation—

See Mahomedan Law, Marriage.

Rescission—

Of contract. See Vendor and Purchaser.

Residue—

See Limitation Act, 1877, sched. ii, art. 123.

Res Judicata—

See Limitation.

Appeal—Point decided by lower Court, but not dealt with on appeal. In a suit for enhancement of rent, the Munsif found that the service of notice was sufficient, but that the rent could not be enhanced. On appeal, the District Judge found that the service was insufficient, and dismissed the suit, expressly declining to consider the question whether the rent was enhanceable. In a subsequent suit for enhancement by the same plaintiff against the same defendant, the Munsif

Res Judicata—(continued.)

found that no sufficient ground for enhancement had been made out, and dismissed the suit. On appeal, the District Judge agreed with the Munsif on this point, and held also, that the decision of the Munsif in the first suit, that the rent could not be enhanced, was *res judicata*.

Held, that where the decision of a lower Court is appealed to a superior tribunal, which for any reason does not think fit to decide the matter, the question is left open, and is not *res judicata*.

CHUNDER COOMAR MITTER *v.* SIB SUNDARI DASSEE ... VIII 631

Application for execution of decree—Decision that execution is barred by limitation.

When a Court, upon an application for execution, has decided that the execution is barred by limitation, and that order has become final in consequence of no appeal having been preferred therefrom, such order will, upon a subsequent application for execution of the same decree, operate as a bar to execution.

BANDEY KARIM *v.* ROMESH CHUNDER BUNDOPADHYA ... IX 65

Civil Procedure Code, Act X of 1887, s. 13—Competent Court. The decision of a Court, in order to be conclusive in another Court, must have been that of a Court which would have had jurisdiction to decide the question raised in the subsequent suit in which the decision is given in evidence as conclusive. The words "Court of competent jurisdiction," used in s. 13 of the Code of Civil Procedure, include the meaning that the first Court must not have been precluded by the pecuniary limit of its jurisdiction from deciding the question raised in the other. The two Courts must exercise such concurrent jurisdiction in regard to the pecuniary limit of their powers that the subject-matter of the second suit would not have been beyond the powers of the Court which disposed of the prior one. The defence made to a suit on a bond for Rs. 12,000 and interest thereon, in a Court having no pecuniary limit of jurisdiction, was that in a prior suit for Rs. 1,665, balance of interest, brought in a Court with power to try suits not exceeding Rs. 5,000 in value, the principal sum due on that bond had been decided to be Rs. 4,790. *Held*, that the issue as to the amount of principal due on the bond had not been heard, and finally decided by a Court of competent jurisdiction within the meaning of s. 13.

MISIR RAGHO BARDIAL *v.* SHEO BAKSH SINGH ... IX 439

Civil Procedure Code (Act VIII of 1859), s. 246; and Civil Procedure Code (Act X of 1877, ss. 371-97)—Dismissal of suit on failure to pay costs of summons. The defendants attached certain property, which the plaintiffs alleged belong to them. The plaintiffs preferred a claim to the property under s. 246 of Act VIII of 1859; this claim was disallowed on the 15th August 1877. In June 1878, the plaintiffs brought a suit to establish their title to the property attached, and for confirmation of possession. Pending this suit, the principal defendant died, and the plaintiffs applied for an order to substitute certain persons as defendants. The Court thereupon directed the issue of a summons on the defendants proposed by the plaintiffs to appear and defend the suit; but the plaintiffs failing to pay the costs of the service of this summons, the suit was dismissed on the 14th March 1879. On the 4th March 1880, the plaintiffs again brought a suit to establish their title to the same property, and for confirmation of possession. *Held*, that as the first suit had not been dismissed on the merits, the plaintiffs were entitled to maintain the second suit.

BESSESSUR BHUGUT *v.* MURLI SAHU ... IX 163

Mortgage—Purchaser of mortgagor's interest—Sale in execution of decree—Omission to revive suit. A mortgagee brought a suit on his mortgage against his mortgagor and against A, a person who had purchased the right, title, and interest of the mortgagor in execution of a money-decree obtained against him subsequently to the mortgage. Pending the mortgage-suit, and before decree, A died, but the suit was not revived against his representatives. The usual mortgage decree was passed in favour of the mortgagee, who, in execution thereof, sold a portion of the mortgaged property to B. In a suit brought by B against the representatives of A for the property purchased and for general relief—

Held, that the decree in the mortgage-suit was not binding on the representatives of A; nor, under the provisions of Act VIII of 1859, did the failure to revive such mortgage-suit prevent B from bringing the second suit against A's representatives. BEPTI BEHARI BUNDOPADHYA *v.* BROJONATH MOOKHOPADHYA. ... VIII 357

Rent-suit—Intervenor—Civil Procedure Code (Act X of 1877), s. 13. A sued B for rent in the Court of the Deputy Collector of Tipperah under the provisions of Act X of 1859. C intervened, claiming that the land in respect of which the rent was claimed was his property, and the suit was dismissed. On appeal, the District

Res Judicata—(concluded.)

Judge of Tipperāh reversed this decision and decreed the claim, on the ground that C had no right whatever to the land. In a subsequent suit brought by C against A and B for possession of the same land—

Held, that the previous decree of the District Judge did not constitute the plaintiff's claim a *res judicata*, and was no bar to the suit.

Dinanath Bose v. Kalikumar Roy followed.

MAHOMED AFSURUDDIN v. BEER CHUNDER MANIKYA VIII 470

Suit against remote reversioner—Subsequent suit for possession by reversioner. A Hindu widow and her son, the then presumptive heir to property claimed by the widow, obtained a decree against a more remote reversionary heir. The son predeceased his mother, and the person against whom the decree had been obtained became the next reversionary heir. *Held*, in a suit for possession by him, that the decree in the previous suit did not operate as a *res judicata*.

RAM CHUNDER PODDAR v. HARI DAS SEN IX 463

Suit for arrears of rent—Ex parte decree—Onus probandi. In a suit for arrears of rent of a half-share of land, the plaintiffs relied upon an *ex parte* decree for rent at a certain rate, which they had obtained in 1869 against the tenants of this share. The defendants relied upon a subsequent decree in a contested suit by the plaintiffs against the tenants of the other half-share, in which a lower rate of rent had been given. No other evidence than the decrees was produced on either side. It did not appear whether the *ex parte* decree had ever been executed.

Held, that it was open to the defendants to dispute the rate of rent claimed, and that the plaintiffs were bound to prove that they were entitled to recover it.

Nilmoney Singh v. Heera Lal Dass followed.

BHUGIRATH PATONI v. RAM LOCHUN DEB VIII 275

Suit for maintenance—Agreement as to amount of maintenance—Decree limited to agreed amount. An allowance for the maintenance of a younger member of a family was charged upon the inheritance to which the eldest male member alone succeeded. In a suit for such an allowance brought by a younger brother against the elder, who had succeeded their deceased father in the possession of the estate, *held* that an order made dismissing a claim for maintenance preferred by such younger brother against their father in his life time, founded on an *ekramana*, did not afford a defence under s. 3 of the Code of Civil Procedure. *Held*, also, that the brothers having made an agreement, fixing the allowance for maintenance at a certain sum, the younger brother agreeing to receive a less sum for a defined period, he could only obtain a decree for the allowance so reduced.

AHMAD HOSSEIN KHAN v. NIHAL-UD-DIN KHAN IX 945

Suit for possession—Co-defendants—Civil Procedure Code (Act X of 1877), s. 13. A leased lands to B, who sued C for possession of a certain mauza, alleging it to be a portion of the lands leased. A was made a defendant, and supported the case of the plaintiff, who obtained a decree. C appealed, making A and B respondents, when the decree was reversed and the suit dismissed, on the ground that the mauza sued for was the property of C, and that ruling was upheld on special appeal to the High Court. Subsequently A brought a suit against C for the same mauza, making B a defendant. *Held*, that the title to the mauza was *res judicata* between A and C, and that the suit would not lie. *Gobind Chunder Koondoo v. Faruck Chunder Bose.*

BISSORUP GOSSAMY v. GORACHAND GOSSAMY IX 120

Suit for rent dismissed for non-appearance—Subsequent suit for possession—Civil Procedure Code (Act X of 1877), s. 13. In 1870 two plots of land, numbered 155 and 147, belonging to the same owner, were sold in execution of a decree. The purchaser of plot 155 sold it to A, who, in 1873 sued the tenant of a portion of the land for rent. In this suit A prayed that it might be declared that he was the owner. The tenant alleged that B, the purchaser of plot 147, was the owner of the land in respect of which rent was sought to be recovered, and B was made a party to the suit. At the hearing A did not appear, and the suit was dismissed for default. Subsequently A sold plot 155 to the present plaintiff, who now sued for possession. *Held*, that the suit was not barred as *res judicata*.

GOBIND CHUNDER ADDYA v. AFZUL RABRANI IX 426

Suit for Road Cess under Its. 100—Subsequent suit for amount of cess over Its. 100. The decision of a District Judge deciding that the plaintiff is not entitled to sue in a suit for Road Cess where the amount claimed is less than Rs. 100, and therefore, no second appeal lies to the High Court, is a bar to a second suit in which the amount claimed is above Rs. 100.

DAVID v. GRISH CHUNDER GUHA IX 183

Respondent—

See Parties.

Service of decree on. See Divorce Act, s. 16.*Who has filed cross objections, right of, when appeal is withdrawn.* See Practice.**Restraint of trade—***Stipulation in.* See Contract.**Resumption—***Suit for.* See Onus Probandi.*Of Lakheraj lands.* See Limitation Act, 1877, sched. ii, arts. 121, 130, 149.**Revenue—***Paying estate.* See Partition.*Payment of, by one co-sharer.* See Contribution. *Suit for.***Reversioner—**See Declaratory Decree, *Suit for* : Probate. Hindu Law, Reversioner. Hindu Law, Widow.*Suit by, after death of Hindu widow.* See Limitation Act, 1877, sched. ii, art. 141.*Suit by, for possession.* See Limitation Act, 1877, art. 141.**Review—**

See Small Cause Court, Mofussil.

Civil Procedure Code, 1877, s. 630—Review granted on particular ground—Discretion of Court as to rehearing. Where a review of judgment is granted on a particular ground, the Court is not bound to rehear the whole case under s. 630 of the Civil Procedure Code : it is in the discretion of the Court to rehear the whole case, or only the particular point on which the review has been granted.

HURBANS SAHYE v. THAKOOR PURSHAD ... IX 209

Of award. See Arbitration.*Of Order.* See Magistrate, Power of.*Subsequent Full Bench decision—Ground for review—Suit by mortgagee to declare lien—Subsequent suit for possession.* The plaintiff, a mortgagee, obtained a money-decree against the defendant. A third party, in execution of another decree obtained against the same defendant, put up for sale the property included in the plaintiff's mortgage, and himself bought the right, title, and interest of his judgment-debtor in the property mortgaged to the plaintiff. The plaintiff, subsequently, in execution of his decree, bought in the same property himself, and brought a suit against the defendant and the third party to have it declared that the latter held the property subject to his mortgage. The suit was decreed by the Subordinate Judge, but eventually dismissed by the High Court, on the ground that the plaintiff, by suing for his money-decree only, had deprived himself of the benefit of his lien as against the third party. The plaintiff thereupon brought another suit against the same parties to recover possession of the mortgaged property, which suit eventually came up before a Full Bench, where it was decided that the plaintiff had no right to bring the suit for recovery of possession, but that his proper course was to sue to have his lien upon the property declared, the Court intimating that it would be open to the plaintiff to apply for a review of judgment in the suit originally brought by him.On the review coming on to be heard, it was held that the plaintiff was entitled to a review of that judgment, and that the case was distinguishable from the general rule as to reviews laid down in *Madhub Chunder Ghose v. Radhik Chowdhraiz*, *Dwarkanath Doss Biswas v. Manick Chunder Doss*, and *Shama Churn Chuckerbutty v. Bindabun Chunder Roy*, inasmuch as the granting the review did not interfere with previous decisions of the Court in other cases between other parties. JONMENJOY MULLICK v. DASSMONEY DASSRE ... VIII 700**Revision—**

See Jurisdiction.

Criminal Procedure Code, 1882, s. 408—Jurisdiction of High Court. On the 9th of December 1882, a person was convicted under ss. 457 and 109 of the Indian Penal Code, and sentenced to three years' rigorous imprisonment by a Deputy Magistrate of Assam, exercising special powers under s. 96 of the old Code of Criminal Procedure, Act X of 1872. The new Code came into force on the 1st January 1883. The prisoner presented an appeal to the High Court from the conviction and sentence abovementioned on the 23rd of January 1883. *Held*, that there was no appeal, the case being governed by s. 408 of the new Code, but that the case was a fit one for the exercise of the High Court's Revisional Jurisdiction, and should be dealt with under the powers conferred on the High Court by virtue of that jurisdiction.

RONGAI v. THE EMPRESS ... IX ... 513

Revision—(continued.)

High Court, Power of, as a Court of Revision—Order of acquittal—Criminal Procedure Code, 1872, s. 296. The High Court, as a Court of Revision, will not interfere with an order of acquittal.

IN RE THE MUNICIPAL COMMITTEE OF Dacca v. HINGOO RAJ ... VIII ... 895

Reference to High Court—Alteration of conviction from one section to another, necessity for. The necessity for altering a conviction from one section to another for cognate offences, when the accused has not been prejudiced by any such error, is no sufficient ground for a reference to the Court of Revision.

EMPRESS v. ISHAN CHUNDRA DE ... IX 847

Revisional Jurisdiction—

See Appeal.

Revival—

Of order which has been quashed. See Magistrate, Power of.

Of suit, right to apply for. See Limitation Act, 1877, sched. ii, arts. 171, 171 (a), and 178.

Revocation of Probate—

See Probate.

Right—

Of appeal. See Appeal.

Of occupancy. See Landlord and Tenant.

Of occupancy—Assam—Act X of 1859—Ejectment, suit for. Per MITTER and WHITE, JJ. (MACPHERSON, J., dissenting). Act X of 1859 does not apply to lands situated in the Assam valley district. In a suit brought to eject a tenant of certain land situated in Assam on the ground that he was a trespasser, where it was shown that he had held the land direct from the Government for a considerable time, and that the land had been made over during his tenancy to the plaintiff in exchange for certain other lands made over to the Government, and where the tenant claimed to have acquired a right of occupancy under Act X of 1859, and not to be liable to ejectment in the manner sought for. *Held, per MITTER and WHITE, JJ., that as the Act did not apply to lands situated in Assam, no such right could be claimed, and the suit being properly framed, the plaintiff was entitled to the relief he asked for.*

PRASIDHA NARAYAN KOER v. MAN KOCH ... IX 390

Of occupancy—Conditions necessary for acquiring—Non-payment of rent—Beng. Act VIII of 1869, ss. 6, 22 and 52. Two conditions only are necessary for the acquiring of a right of occupancy, viz., (1), the cultivation or holding of land for a period of twelve years; and (2), that the person holding or cultivating the land should be a ryot. The essential conditions of s. 6, Beng. Act VIII of 1869, are fulfilled without showing the payment of rent, that only being a condition necessary for the maintaining of the right when created. In a suit brought to evict a tenant who had been in possession of certain land for a longer period than twelve years, when it was shown that rent had not been paid, and notice to quit had been given—*Held, that a right of occupancy had been acquired, and that the ryot had the power to prevent forfeiture under the provisions of s. 52, Beng. Act VIII of 1869.*

NARAIN ROY v. OPNIT MISSEER ... IX 304

Of occupancy—Ejectment—Transfer—Effect of asserting a right to transfer land, by a ryot having a right of occupancy, who remains in possession. A ryot having a right of occupancy is not liable to ejectment by his superior landlord merely because he has asserted a transferable right in the lands, and sold that right to a stranger without giving up possession of the land. *Narandra Narain Roy Chowdhry v. Isha Chander Sen; and Ram Chandra Roy Chowdhry v. Bholanath Lushkhr distinguished.* *Dwarkanath Misser v. Hurrish Chandra referred to.*

SRISTEEDHUR BISWAS v. MUDAN SIRDAR ... IX 648

Of purchaser at execution-sale against mortgagee. See Mahomedan Law, Debts.

Of suit. See Act XX of 1863, s. 14 : Limitation Act, 1877, s. 7 : Sale in Execution of Decree.

Of suit—Attachment—Execution of decree—Claim to attached property—Cause of action—Civil Procedure Code (Act VIII of 1859), ss. 246, 247. Where a person whose property has been attached in execution of a decree against another person, and whose claim under s. 246 of Act VIII of 1859 has been rejected, brings a suit under the provisions of s. 247 of Act VIII of 1859, it is no objection to that suit that, previously to the filing thereof, the decree (in execution of which the property had been attached) was satisfied by the Judgment-debtor and the property released from attachment.

SREEPUTTY MIR DHA v. KARTICK SINGHA ... IX 10

Right—(continued.)

Of suit—Injunction—Property dedicated to religious purposes—Suit to restrain its use for other purposes. The plaintiff's ancestor built a temple, a bathing-ghat, a room called 'Gungajatri ghar', and a ghat close to it, to which persons on the point of death were removed, and certain ceremonies were performed. The defendants used the last mentioned ghat for the purpose of landing goods. *Held*, that if, when the plaintiff's ancestor erected the buildings, he intended to grant to the Hindu community merely a right of easement over the property, and not to transfer the ownership therein to the community, the plaintiff was entitled to maintain a suit to restrain defendants from using the ghat for trading purposes.

JAGGAMONI DASI v. NILMONI GHOSAL. ... IX

75

Of suit—Suit to compel registration—Registration Act (III of 1877), ss. 73, 77. Under the Registration Act of 1877, a suit to compel registration is maintainable only when the provisions of s. 77 of the Act have been complied with. A person omitting to make an application to the Registrar as provided by s. 73, within the time provided by s. 72, cannot be said to have complied with the conditions precedent to a suit under s. 77. Independently of s. 77 of the Act, no suit will lie. *Bhagwan Singh v. Khulu Baksh*, followed; and *Ram Ghulam v. Chotey Lal* dissented from.

EDUN v. MAHOMED SIDDIK ... IX

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Of suit to recover property. See Easement.

Of way—Extent of user—Purpose for which right claimed is strictly identical with original purpose contemplated at commencement of right. Where a right of way for a particular purpose is proved to have existed for upwards of 20 years, the Court is not bound to confine the right to the precise number of times in the year that it has been exercised, but may construe it as a right to use the road at all convenient times for the particular purpose.

GOPAL CHUNDER MUKERJEE v. JUDDOO LALL MULLICK ... IX

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Of way. See Easement.

To execute decree. See Decree, Sale of.

To passage of water. See Easement.

To redeem. See Mortgage.

To sue for damages. See Sale in Execution of Decree.

Road Cess—

Neglect of tenant to pay. See Damages, Suit for.

Road Cess Act -

*Bengal Act X of 1871—Interest in land - Jalkar.** A jalkar does not impart any interest in the soil itself, and therefore a patni of a jalkar is not 'an interest in land' within the meaning of the definition in the District Road Cess Act.

DAVID v. GRISH CHUNDER GUHA ... IX

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ss. 5, 7—Bhowli tenures—Suit for rent. Section 5 of the Road Cess Act requires the holders of any estate or tenure, of which the annual rent shall exceed one hundred rupees, to lodge returns of all lands comprised in an estate or tenure; bhowli lands are, therefore, to be included in such returns. Where such a return has not been made, the holder of the estate or tenure is precluded from suing for or recovering any rent due therefor.

JUGMOHUN TEWARI v. FINCH ... IX

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Rule—

Of High Court, No. 9. See Payment into Court.

To show cause why person should not be defendant. See Practice.

Ryots—

Rights of. See Sale for Arrears of Revenue.

Sale—

Payment to stay. See Regulation VIII of 1819, s. 13.

Sale by Magistrate—

See Absconding of accused.

Sale for Arrears of Rent—

See Insolvency.

Bengal Act VIII of 1869, ss. 59, 60—Sale Certificate—Proclamation of sale—Under-tenure. *Held*, on the construction of a sale certificate and a proclamation of sale purporting to be made under ss. 59 and 60 of the Rent Act, Bengal Act VIII of 1869, that what passed by the sale was not an under tenure, but merely the right, title, and interest of the judgment-debtor therein. The declaratory portion of a sale proclamation is not by itself sufficient to override the description of the property in the body of the document.

DWARKA NATH v. ALOKE CHUNDER SEAL ... IX

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Sale for Arrears of Rent—(continued.)

Joint owners—Darpnidars—Purchase by defaulter—Constructive trust. Of three joint owners of a darpadni, two held each a four-anna share and the third an eight-anna share. Default having been made by all three in the payment of the rent, the patnidar brought a suit and obtained a decree for the arrears. In execution of this decree, proclamation was made that the darpadni would be sold on the 5th of October 1877. Up to the commencement of the sale, the four-anna shareholders were unable to pay their proportionate amount of the decree. The eight-anna shareholder declined paying his share, and, when the sale took place, he became the purchaser of the darpadni. In a suit brought by the four-anna shareholders to recover their share from the purchaser, the lower Appellate Court, reversing the decree of the Court of First Instance, decided in favour of the plaintiffs.

Held, on second appeal, that the sale having taken place as much through the default of the plaintiffs as through the default of the defendant, the former had no equity against the latter; and that, therefore, the suit should be dismissed.

RAM LOLL MOOKERJEE v. DEBENDER NATH CHATTERJEE... ... VIII 8

Landlord and Tenant—Sale of a portion of a tenure—Bengal Act VIII of 1869, ss. 59, 60—Co-sharers—Parties. A portion of a tenure cannot be the subject of a sale under s. 61, Bengal Act VIII of 1869, so as to give the purchaser the same privilege as he would acquire by the purchase of an entire tenure under ss. 59 and 60. A landlord who was in receipt of a half share of the rent of a certain tenure caused that share of the tenure to be sold in execution of a decree for arrears of rent. After such sale A, the purchaser, took possession. Subsequently the tenant executed a mortgage, and a decree being obtained by the mortgagee the whole tenure was brought to sale in execution thereof and purchased by the mortgagee who proceeded to oust A. In a suit by A to recover possession of his half share of the tenure on the footing of his purchase. *Held*, that he could not make out a title to the half tenure with the privilege attaching to the purchase of an entire tenure under ss. 59 and 60 of Bengal Act VIII of 1869, and that as it appeared that the mortgagor, whose rights and interests only were thus sold, was only one of several co-sharers, in the absence of the co sharers who were not parties to the suit, A was not entitled to the relief he sought.

REILY v. HUR CHUNDER GHOSE IX 722

Patni tenure—Darpadni tenure—Under-tenure—Incumbrance—Bengal Act VIII of 1869, ss. 59, 60, 66. The sale of a patni tenure for its own arrears under ss. 59 and 60, Bengal Act VIII of 1869, does not *per se* avoid the darpadni tenures, but only renders them voidable at the option of the purchaser. An under-tenure is an incumbrance within the meaning of s. 66, Bengal Act VIII of 1869.

TITU BIBI, MUNSURUNNISSA BIBI, IBRAHIM MALLA v. MOHESH CHUNDER BAGCHI IX 683

Publication of notice of sale—Material Irregularity—Regulation VIII of 1819, s. 8, cl. 2. Clause 2, s. 8 of Regulation VIII of 1819, which provides that a notice of sale under the Regulation shall be stuck up in the cutchery of the zamindar, is not complied with by serving the notice upon the zamindar himself or his agent. The object of the Regulation is to make known to the holders of under-tenures and ryots and the residents of the place that the patni will be sold if the arrears are not paid off within the time specified, and if the notice is not stuck up in the cutchery, as prescribed by the Regulation, there is such a material irregularity in the publication as will avoid the sale.

GOBIND LALL SEAL v. CHANDHURRY MATTY IX 172

Regulation VIII of 1819, s. 8, cl. 2—Proof of publication of notice before sale of patni taluk for arrears of rent. The due publication of the notices prescribed by Regulation VIII of 1819, s. 8, cl. 2, forms an essential part of the foundation on which the summary power to sell a patni taluk for non-payment of rent is exercised by the zamindar who, when instituting this proceeding, is exclusively responsible for such publication being regularly conducted. Although objection to the form of the receipt, and the absence of the receipt itself, need not be regarded, if the fact of the due publication of the notices having been made is not a matter of controversy (as held in *Sona Beebeav. Lalchand Chowdhry*), yet where that fact was in doubt owing to the evidence of it not having been secured according to the provisions of the Regulation—a result due to the neglect of those representing the zamindar—the finding of the High Court that due publication had not been established by such proofs as were forthcoming, was maintained by the Judicial Committee.

MAHARAJAH OF BURDWAN v. TARASUNDARI DEBI IX 619

Sale for Arrears of Rent—(continued.)

Regulation VIII of 1819, s. 8—Due publication of notice of sale. Where there is a cutchery upon the land of a defaulting patnidar the notice required by s. 8 of Regulation VIII of 1819 must be served there; but where there is no such cutchery, the notice should be published in the manner required by the section, at the principal town or village within the taluk.

THE MAHARAJAH OF BURDWAN *v.* KRISTO KAMINI DAS

IX 931

Sale for Arrears of Revenue—

Auction-purchaser, Right of—Beng. Act VII of 1868, s. 12—Lakheraj grant—Onus Probandi. A person seeking to obtain the benefit of s. 12, Beng. Act VII of 1868, must give some *prima facie* evidence to show that the incumbrance which he seeks to avoid is an incumbrance falling within the terms of the section—that is, an incumbrance imposed on the tenure by some one who previously held it.

The law relating to lakheraj grants reviewed and explained.

KOYLASHASHINY DOSSEE *v.* GOCOOIMONI DOSSEE

VIII 290

Revenue-paying estate—Sale of share of an estate—Recorded proprietors—Omission of names of proprietors—Irregularity—Act XI of 1859, ss. 6, 33. When a notification of sale of a share in a revenue-paying estate is issued under s. 6, Act XI of 1859, the circumstance that such notification does not contain the names of all the recorded proprietors of the share, but only the name of one of them, does not amount to an irregularity within the meaning of s. 33, Act XI of 1859.

THE SECRETARY OF STATE FOR INDIA *v.* RANBEHARY MOOKERJEE

IX 591

Suit to set aside. See Limitation Act, 1877, sched. ii, art. 12: Parties.

Suit to set aside sale—Act XI of 1859, ss. 6, 20, 35—Bengal Act VII of 1868, s. 8—Certificate of title. A notification by the Collector under s. 6 of Act XI of 1859, fixing the 31st May 1879 as the date for holding the sale, was affixed in the places mentioned in the section on the 2nd May 1879. Subsequently the 31st May being ascertained to be a holiday, and the 1st June being a Sunday, the Collector, purporting to act under s. 20 of the Act, issued a notification on the 26th May, postponing the sale till the 2nd June. On that day the sale was held, and the Commissioner having upheld it on appeal, a certificate of title was given to the purchasers. *Held*, in a suit to set aside the sale, that inasmuch as the notification under s. 6 of the Act had not been affixed thirty days before the day fixed by it for holding the same, the requirements of that section had not been fulfilled, and the irregularity was not cured by the notification of the 26th May. *Held*, further, that the Court was not bound under s. 8 of Bengal Act VII of 1868 to presume conclusively that the provisions of s. 6 of Act XI of 1859, as regards the fixing of the date of sale, had been complied with. Under s. 8 of Bengal Act VII of 1868 the effect of a certificate of title having been given to the purchaser is merely that the Court is bound to presume conclusively the due service and posting of notices.

BAL MOKOOND LALL *v.* JIRJUDHUN ROY

IX 271

Under-tenure holders—Ryots, Rights of—Act XI of 1859, s. 37, except. 4—Improvements on land. A person holding land, which is not protected from the operation of s. 37 of Act XI of 1859 by any of the first three exceptions, is yet entitled to the benefit of the fourth exception in respect of any of the items mentioned therein, which may have been established on the land; and there is nothing in the words of the exception confining the benefit of it to tenure or under-tenure holders, and excluding the ryots from it.

Bhago Bibee v. Ramkant Roy Chowdhry followed.

The benefit of the fourth exception to s. 37, Act XI of 1859, must be limited to improvements effected *bonâ fide* and to permanent buildings erected before the revenue-sales, and should not be conceded to anything subsequently constructed, or which appears to have been constructed merely for the purpose of defeating the rights of an auction-purchaser. Subject to this reservation, it does not matter whether the improvements have been effected by the present holder or by some previous occupier.

AJGUR ALI *v.* ASMUT ALI

VIII 110

Sale in Execution of Decree—

See Absconding of Accused: Estoppel: Execution of Decree: Hindu Law, Alienation: Mahomedan Law, Debts: Mortgage: Possession, Suit for: Res Judicata.

Against representatives of deceased Mahomedan. See Mahomedan Law, Debts.

Attachment—Shikmi ghatwali tenure. A shikmi ghatwali tenure, held under the superior ghatwal, is not liable to be sold in execution, nor are its proceeds liable to attachment for satisfaction of the debt due from its holder.

BALLY DOBEY *v.* GANAI DEO

IX 388

Civil Procedure Code (Act X of 1877), s. 295—Rateable distribution amongst decree-holders. Where property belonging to A has been attached under a decree, and

Sale in Execution of Decree—(continued.)

other decree-holders than the attaching creditor have applied before realization of assets to participate in the sale proceeds, and amongst them a creditor who has obtained a decree against A and B, such latter creditor is entitled under s. 295 to share in the proceeds of the sale of A's property.

SHUMBHOO NATH PODDAR v. LUCKYNATH DEY ... IX 920

Civil Procedure Code (Act X of 1877), s. 311.—Irregularity in publication of intended sale. An objection to the validity of a sale of revenue-paying land, on the ground that the revenue assessed upon it had not been stated in the proclamation of the intended sale, in accordance with s. 287 of Act X of 1877, was taken, for the first time, in the Court of appeal; an application to set aside the sale, on the ground that it had taken place without proclamation made having been rejected by the Court of the First Instance, which found that proclamation had been made. *Held*, that the objection was taken too late, although if properly taken in the Court of First Instance, it would have been good to the extent that not stating the amount of the revenue was an irregularity; substantial damage, resulting from it, remaining to be proved, as required by s. 311 of Act X of 1877. *Held*, also, that inadequacy of price having been alleged as substantial damage, without having been proved to be the effect of the non-statement of the revenue, the applicant had not (as required by s. 311) proved, to the satisfaction of the Court, that he had sustained substantial damage by reason of such irregularity.

MACNAGHTEN v. MACABIR PERSHAD SINGH ... IX 656

Civil Procedure Code (Act XIV of 1882), s. 313. Section 313 of the Civil Procedure Code only applies to cases in which the judgment-debtor has no saleable interest in the property sold. It does not apply to cases where the judgment-debtor has no saleable interest in a portion only of the property.

IN THE MATTER OF THE PETITION OF RAM COOMAR DEY. RAM COOMAR DEY v. SHUSHEE BHOOSHUN GHOSSE ... IX 626

Debt secured by mortgage of immoveable property—Civil Procedure Code (X of 1877), s. 266. A debt secured by mortgage of immoveable property cannot be sold in execution of a decree under the provisions of the Civil Procedure Code applicable to moveable property.

SRINATH DUTT v. GOPAL CHUNDER MITTRA ... IX 511

Decree against Insolvent—Official Assignee, assent of, to sale—Purchaser, right of—Setting aside sale—Code of Civil Procedure (Act X of 1877), s. 313. Where in execution of a decree passed against a person who had previously been adjudicated an insolvent, portions of his property (then vested in the Official Assignee) are attached and sold, the purchaser is entitled to have the sale set aside under s. 313 of the Code of Civil Procedure, notwithstanding that the Official Assignee acquiesces in the sale, and is content to receive the sale-proceeds.

DINOHUNDHOO PAL v. SHOSHEE MOHUN PAL ... IX 217

Direction in will for payment of debts—Decree against heirs for debt of ancestor—Charge on property. A testator by his will directed payment of all his debts, and subject thereto devised his property to his heirs. After one of the testator's creditors had obtained a decree against the heirs in their representative capacity, which by its terms was to be satisfied out of the assets left by the testator, one of the heirs mortgaged his share in twelve properties left by the testator. Subsequently to the mortgage one of the mortgaged properties was sold in execution of the creditor's decree. The mortgagee afterwards brought a suit against the mortgagor and obtained a decree on his mortgage. *Held*, that as neither the direction in the will for payment of debts nor the decree in the creditor's suit created a charge on the property of the testator, the property sold in execution of the creditor's decree had been sold subject to the mortgage, and the mortgagee was entitled to execute his decree against that property.

Bazayet Hossein v. Dooki Chand, distinguished.

RAM DHUN DHUR v. MOHESH CHUNDER CHOWDHRY ... IX 406

Irregularity—Code of Civil Procedure (Act X of 1877), s. 311. The words "any person whose immoveable property has been sold" in s. 311 of the Code of Civil Procedure, do not include a person who has purchased the same property at a prior execution-sale, such prior sale not having been confirmed.

IN THE MATTER OF THE PETITION OF BHAGABUTI CHURN BHUTTACHARJEE CHOWDHRY. BHAGABUTI CHURN BHUTTACHARJEE CHOWDHRY v. BISHESHWAR SEN ... VIII 367

Irregularity—Substantial Injury—Civil Procedure Code (Act X of 1877), s. 293. At a sale in execution of a decree the property was knocked down to a bidder at

Sale in Execution of Decree—(continued.)

Rs. 260. The bidder was unable to make a deposit, and the property was immediately put up for sale and re-sold for Rs. 50. *Held*, that the judgment-debtor had sustained such substantial injury as would justify the Court in setting aside the sale, notwithstanding that the judgment-debtor might, under s. 293 of the Civil Procedure Code, have sued to recover the difference between the original bid and the price at which the property was sold.

BEOPEN CHUNDER SHICKDAR v. PURRISH NATH BISWAS ... IX

98

Material Irregularities—Civil Procedure Code (Act X of 1877), ss. 287, 289. Upon an application to set aside a sale in execution of a decree, on the ground of material irregularities in publishing and conducting it, it appeared that the sale-notification had not been fixed up in the Collector's office as required by s. 289 of Act X of 1877; that no affidavit as to search having been made in the Registry Office with regard to incumbrances as required by s. 287 of the Act had been filed; and that the sale took place on, and not after, the thirtieth day from the publication of the notice; but it also appeared that the applicant had himself been present at the sale and had purchased the property, and it was not shown that any substantial injury had resulted from the irregularities.

Held, that there was no ground for setting aside the sale.

BANDY ALI v. MADHUB CHUNDER NAG ... VIII

932

Payment not certified to Court—Fraud—Setting aside sale—Cause of action—Right of suit. A obtained a money-decree against B and others jointly for Rs. 112; and in consideration of a payment of Rs. 25 made by B agreed to release B from all liability under the decree. This payment was not certified to the Court, and A afterwards in execution of the decree had certain immoveable property belonging to B put up for sale, and this property he purchased himself. *Held*, that a suit would lie by B to set aside the sale and to recover the property from A.

ISHAN CHUNDER BANDOPADHYA v. INDRONARAIN GOSWAMI ... IX

788

Right to sue for damages—Mesne profits—Civil Procedure Code (1877), s. 266, cl. (e). The right to sue for mesne profits is a "right to sue for damages" within the meaning of s. 266, cl. (e) of the Code of Civil Procedure, and therefore cannot be sold in execution of decree. Where, therefore, the plaintiff purchased the right to sue for mesne profits at a sale in execution of a decree, *held*, that a suit by him to enforce the right was not maintainable.

SHYOM CHAND KOONDOL v. THE LAND MORTGAGE BANK OF INDIA, LIMITED ... IX

695

Sale of immoveable property—Confirmation of sale—Sale certificate—Evidence of Title of Purchaser. The order confirming a sale of immoveable property in execution of a decree is sufficient to pass the title in the property to the purchaser, and its production is sufficient evidence of the purchaser's title. The production of the sale certificate is not essential.

Doorga Narain Sen v. Baney Madhub Mozoomdar followed.

TARA PRASAD MYTEE v. NUND KISHORE GIRI ... IX

842

Sale under mortgage for payment of Government revenue—Rights of respective purchasers. In 1855, a decree for an account was passed in the Supreme Court of Calcutta against A, an executor. A died in 1856, and the suit, which was revived against his representatives, came on for consideration on further directions on 29th August 1866. It was then found that A's estate was liable for Rs. 1,32,406-11-8, and his representatives were ordered to pay this money into Court. The representatives having made default in payment, a writ of *fieri facias* was issued, under which the property was sold by the Sheriff of Calcutta, and conveyed by him to B on 1st April 1867. Previously to this the representatives of A had, on 11th January 1865, mortgaged the same property, together with other lands, "for the purpose of paying the Government revenue of certain taluqs belonging to A deceased," and the mortgagee having obtained a decree on h. mortgage, the property was sold to C under that decree on 30th March 1867. In a suit for possession by C against B,—

Held, that though the sale to B was made for the express purpose of paying the debts of A, B's title was not to be preferred to that of C, who claimed under the mortgage of 1865, which was made for the purpose of paying Government revenue; and,

Semle.—The result would be the same even if the mortgage of 1865 had not been made for the purpose of paying Government revenue, as it did not appear that the mortgagee, at the date of the mortgage, knew that there were unpaid creditors of A, and that A's representatives intended to misapply the money so advanced to them.

Greender Chander Chose v. Mockintosh followed

KASUMUNNISSA BIBER v. NILRATNA BOSE ... VIII

97

Sale in Execution of Decree—(continued.)

Setting aside sale—Irregularity. At a sale in execution of decree, certain property was knocked down to a bidder, who made default in payment of the purchase-money. Subsequently the Judge again put the property up for sale, and resold it at a lower price. The decree not being satisfied, the Judge put up other property which had been advertized for sale with the property abovementioned, without getting from the defaulter the difference between the price obtained at the second sale and that obtained at the first. On an application by the judgment-debtor to have the sale of the second property set aside.

Held, that no sufficient cause was shown for setting aside the sale.

Joy Chunder Biswas v. Kali Kishore Dey Sircar distinguished.

Khiroda Majhi Dasi v. Golam Abardari followed.

GOUR CHUNDER BISWAS v. CHUNDER COOMAR ROY ... VIII 291

Setting aside sale—"Saleable interest"—Civil Procedure Code (Act XIV of 1882) s. 313. The fact that property sold in execution of a decree is subject to a mortgage upon which a decree has been obtained, which fact is not disclosed prior to the proclamation of sale, is not sufficient to enable an auction-purchaser to set aside the sale on the ground that the judgment-debtor had "no saleable interest" in the property, within the meaning of s. 313 of the Civil Procedure Code.

Naharmul Marwari v. Sadut Ali distinguished.

PROTAP CHUNDER CHUCKERBUTTY v. PANIOTY ... IX 506

Sale Certificate—

See Registration Act, 1871, s. 17.

Sale of Goods—

See Contract.

To arrive. See Contract.

Sale of Liquor—

By Serrant. See Excise Act, ss. 41, 42 and 59.

Saleable Interest—

See Sale in Execution of Decree.

Salt-Works—

Assessment of land occupied by. See Regulation I of 1824.

Sanction to Prosecution—

Prosecution for false charge—Penal Code (Act XLV of 1860), s. 211—Criminal Procedure Code (Act X of 1872), s. 468. A Magistrate should not direct a prosecutor to be put upon his trial under s. 211 of the Penal Code without first giving him an opportunity of obtaining a judicial enquiry into the charge originally preferred by him. The sanction to prosecute, contemplated in s. 468 of the Criminal Procedure Code, is not a direction to prosecute, but is a permission granted to a private person to exercise his own unfettered discretion as to whether he will take proceedings or not.

IN THE MATTER OF THE PETITION OF GIRIDHARI MONDUL. GIRIDHARI MONDUL v. UCHIT JHA... VIII 435

Satisfaction—

Of decree certified to Court. See Execution of Decree.

Scheme—

For satisfying decree. See Civil Procedure Code, 1877, s. 326.

Sebate—

See Hindu Law, Endowment.

Second Appeal—

See Appeal: Civil Procedure Code, 1877, s. 562: Contribution, Suit for: Land Acquisition Act, ss. 15 and 39.

Changing case in. See Plaintiff.

Findings of fact—Procedure of the High Court—Interest—Mortgage bond. Where the lower Appellate Court has clearly misapprehended what the evidence before it was, and has thus been led to discard or not give sufficient weight to important evidence, and to give weight to other evidence to which it is not entitled, and has thus been led not into any mere incidental mistake, but totally to misconceive the case, the High Court will interfere in second appeal, though it is not the ordinary course of procedure for it to interfere in such cases, with any findings of fact which have been arrived at by the lower Appellate Court. In a suit on a mortgage bond the plaintiffs are entitled to recover the agreed rate of interest without any deduction.

FUTTEHMA BEGUM v. MOHAMED AUSUR ... IX 309

Second Appeal—(continued.)

Order directing plaint to be returned for presentation in proper Court. A Munsif dismissed a suit, on the ground that, if it had been properly valued, it would not have come within his jurisdiction. The District Judge affirmed the Munsif's judgment, and directed the plaint to be returned for presentation to the proper Court under s. 57 of the Civil Procedure Code. This was not done.

Held, that a second appeal would lie.

Ajoodhila Lall v. A. Gumani Lall approved.

Ajoodhin Persad v. Kristo Dyal dissented from.

JOYNATH ROY v. LALL, BAHADUR SINGH ... VIII 126

Power of High Court—Admission of an appeal after time—Limitation Act (XV of 1877), s. 5, sched. i. The High Court, sitting on second appeal, has power to look into the grounds which a Judge has given for admitting an appeal after the lapse of the period allowed by the Limitation Act.

Mowri Bema v. Surendranath Roy followed.

CHUNDER DASS v. BOSHON LALL SOOKUL ... VIII 251

Secretary of State—

See Partics.

Security—

For good behaviour. See Appeal in Criminal Case.

For good behaviour—Code of Criminal Procedure (Act X of 1872), ss. 504, 505. An accused person was convicted of theft and sentenced to two years' rigorous imprisonment, and was further ordered to enter into his own recognizances for Rs. 50 and find two sureties, each for a like sum, for his good behaviour for one year after the term of his imprisonment had expired; in default to suffer rigorous imprisonment for one year. *Held*, that the latter part of the order was bad, and that the Magistrate should have proceeded under the provisions of s. 504, cl. 2, of the Code of Criminal Procedure. *The Empress v. Partab* followed.

TAMIZ MANDAL v. UMID KARIGAR ... IX 215

For restitution of property. See Appeal.

Indefinite period of imprisonment in default of. See Sentence.

Sentence—

Indefinite period of imprisonment in default of security—Order for. An order directing an accused "to be imprisoned until he gives security," is bad; a definite period for such imprisonment, not exceeding one year, should be stated in the order.

MAILAMDI FAKIR v. TARIPULLA PRAMANIK ... VIII 644

Penal Code (Act XLV of 1860), s. 75—Previous conviction. The object of s. 75 of the Indian Penal Code is to provide for an additional sentence, not a less severe sentence, on a second conviction. Recourse should not be had to that section if the punishment for the offence committed is itself sufficient.

SHEO SARAN TATO v. THE EMPRESS ... IX 877

Separate Charges—

Committal on. See Criminal Procedure Code, 1872, s. 454.

Separate Suit—

See Civil Procedure Code, 1882, s. 244, cl. (c).

Separate Trials—

See Criminal Procedure Code, 1872, ss. 445, 446, 453; 454.

Separation—

In estate, effect of. See Partition.

Of Member of family. See Hindu Law, Joint Family.

Of shares. See Co-sharers.

Servant—

Criminal act of. See Master and Servant.

Of licensed vendor, sale of liquor by. See Bengal Excise Act, 1878, ss. 53, 60, 61.

Sale of liquor by. See Excise Act, ss. 41, 42 & 59.

Service—

Of decree on respondent. See Divorce Act, s. 16.

Of summons, option of agent to accept. See Principal and Agent.

Of summons—Service on Agent—Suit to obtain relief respecting immoveable property—Civil Procedure Code (Act XIV of 1882), s. 16. In a suit for foreclosure or sale of immoveable property, it appeared that the mortgagor had conveyed the mortgaged

Service—(continued.)

premises to trustees. The summons to one of the trustees was personally served upon his duly constituted agent, who was at the time of service in charge of the mortgaged premises. *Held*, that the service was sufficient, the suit being one to obtain "relief respecting immovable property" within the meaning of s. 16 of Act XIV of 1882.

MICHAEL v. AMEENA BIBI ... IX 738

Sessions Judge—

Duties of. See Criminal Procedure Code, 1882, s. 309.

Set-off—

Cross decrees—Civil Procedure Code (Act X of 1877), s. 246. A judgment-debtor may set off against the amount of the decree against him, the amount of a decree which he has obtained against the decree-holder and other persons.

HURRY DOYAL GUHO v. DIN DOYAL GUHO ... IX 479

Settlement—

Containing clause for re-entry. See Landlord and Tenant.

Revocation of trusts—Voluntary settlement. A, being at the time unmarried, executed a voluntary settlement by which he created trusts for himself for life, and after his death for his issue and widows (if any), with ultimate trusts over. The deed contained a provision empowering A at any time, with the consent of the trustee, to revoke the trusts, and to declare any new or other trusts. A subsequently married, and, after his marriage, executed a deed of revocation, declaring that the trust-property should be held for himself absolutely. The trustee refused to hand over the trust-property, and A thereupon instituted a suit to have the trust set aside. His wife was a minor, and there was no issue of the marriage.

Held that, although there might be cases in which, where no other person but the settlor was interested, the deed might be regarded as a mere direction as to the manner in which the settlor's property should be applied for his benefit, and as such revocable by the settlor, yet that, in the present case, there being an infant beneficiary, the deed could not be revoked.

GOLAM YASSEIN v. THE OFFICIAL TRUSTEE OF BENGAL ... VIII 887

Severance—

See Easement.

Share—

Of estate, suit for possession of. See Court Fees Act, s. 7, cl. 5 (a).

Of rents and profits. See Limitation Act, 1877, sched. ii, art. 123.

Shares—

Registration of guardian as proprietor of. See Presidency Banks Act, 1876, s. 4.

Separation of. See Co-sharers.

In land, Registration of. See Land Registration Act.

Shiea sect—

Of Mahomedans. See Mahomedan Law, Maintenance.

Sheriff—

Sale by, in Execution of Decree. See Lis Pendens.

Ship—

Suit for profits of. See Jurisdiction.

Simultaneous Execution—

See Execution of Decree.

Sister—

See Hindu Law, Inheritance.

Succession of married. See Hindu Law, Inheritance.

Small Cause Court—

Jurisdiction of. See Contribution, Suit for.

Mofussil—Act XI of 1865, s. 21—Practice—Notice—New trial—Review—Civil Procedure Code (Act X of 1877), s. 623. The notice-clause in s. 21, Act XI of 1865, is applicable only to those cases where a new trial cannot be applied for within seven days after the judgment, in consequence of there being no sitting of the Court. Where the application is made within seven days the notice is unnecessary.

If the grounds upon which the new trial is moved are proper grounds for granting a review, the applicant is entitled to proceed under s. 623 of the Code of Civil Procedure without resorting to Act XI of 1865.

RATAN KRISHEN PODDAR v. RAQHOO NATH SHAHA ... VIII 287

Small Cause Court—(continued.)

Mofussil—Suit for Contribution—Money paid in satisfaction of joint decree. A suit for contribution for money paid by one judgment-debtor in satisfaction of a joint decree against him and others cannot be entertained by a Court of Small Causes. *Rambux Chittanjo v. Mudhoosoodun Paul Chowdhry, Shaboo Majee v. Noorai Mollah* followed; *Nath Prasad v. Baijnath* dissented from.

RAMJOY SURMA v. JOYNATH SURMA ... IX 395

Suit to recover road and public works cess—(Act XI of 1865), s. 6. A suit to recover road cess and public works cess is not a claim for money on bond or other contract, but is a claim created and made recoverable by a special enactment of the Legislature, and does not fall within the provisions of s. 6 of the Mofussil Small Cause Court Act.

DAVID v. GRISH CHUNDER GUHA ... IX 183

Presidency-towns—Act IX of 1850, s. 53—Extension of jurisdiction by Act XV of 1882—Abandonment of excess. Whilst the pecuniary jurisdiction of the Small Cause Court was limited to Rs. 1,000, the plaintiffs brought a suit for that amount for damages for breach of a certain contract after abandoning the excess, and in that suit they elected a non-suit under s. 53, Act IX of 1850. Held, in a suit brought in respect of the same damages for the full amount due to them, that the plaintiffs were not precluded by their having abandoned the excess in the former suit, from recovering the full amount sued for.

SIMPSON v. GORA CHAND DOSS ... IX 473

Presidency-towns—New trial, Ground of—Want of jurisdiction. A new trial may be granted on the ground of want of jurisdiction in the Court, though such ground was not formally raised or recorded at the original hearing.

CHUNDER CHURN DUTT v. EDULJEE COWASJEE BINNEE ... VIII 678

Solicitors

Approval of title by. See Vendor and Purchaser.

Son—

Suit by, to recover possession of share. See Hindu Law, Alienation.

Sovereign Prince—

Suit against. See Jurisdiction.

Special Agreement—

See Limitation.

Special Appeal—

See Bengal Act VIII of 1869, s. 102.

Power of High Court in. See Execution of Decree.

Suit for damages for trespass—Question of title. The fact that a tenure is registered in the Common Registry under Act XI of 1859, s. 39, is not of itself *prima facie* evidence that such a tenure exists. In a suit for damages for trespass laid at a sum under Rs. 100, a special appeal will lie to the High Court if the title to the land trespassed upon has been raised in the Courts below.

LUKHY NARAIN CHATTOPADHYA v. GORACHAND GOSSAMY ... IX 116

Special Citation—

See Probate.

Special Commissioner—

Powers of. See Chota Nagpore Tenures Act.

Specific Moveable Property—

Suit for. See Limitation Act, 1877, arts. 49 and 123.

Specific Relief Act—

I of 1877—

ss. 7 and 45. See Presidency Magistrates' Act, s. 170.

s. 19—*Suit for declaration under a mokurari patta—Alternative relief—Civil Procedure Code (Act X of 1877), s. 28.* A suit to have a mokurari patta enforced as against one co-sharer granting it, and other co-sharers who repudiate it, and in the alternative to have the salami paid for the mokurari patta returned, is in substance a suit to enforce a contract, to place the plaintiff in possession of the land under the patta, and to declare his rights to it as against all the defendants; and under s. 19 of the Specific Relief Act the plaintiff is entitled to ask for compensation as against the defendant granting the patta.

Under s. 28 of the Civil Procedure Code, such an alternative claim may be allowed against one or more of the defendants.

RAJDHUR CHOWDHRY v. KALIKRISTNA BHATTACHARJYA ... VIII 963

s. 31. See Landlord and Tenant.

s. 42. See Declaratory Decree, Suit for: Oudh Estates Act, ss. 8, 9 & 10.

Specified Quantity—

Of spirits. See Excise Act, ss. 15, 17 and 61.

Spirits—

Specified quantity of. See Excise Act; ss. 15, 17 and 61.

Splitting—

Claim. See Civil Procedure Code, 1859, ss. 7 and 15.

Claims. See Civil Procedure Code, 1877, s. 43.

Remedies. See Civil Procedure Code, 1877, s. 43.

Stamp Act—

XVIII of 1869—

Bond—Agreement with covenant sounding in damages. An instrument containing a covenant to do a particular act, the breach of which is to be compensated in damages, is not a bond, and requires an eight-anna stamp only.

Remedies on such an instrument, and on a bond discussed.

GISBORNE & CO. v. SURAL BOWRI ... VIII 284

s. 2, cl. 5. See Bond.

I of 1879—

s. 3—*Hundi stamped with adhesive stamps—Admissibility in evidence—Bill of Exchange—"Duly stamped"—Stamp Act (I of 1879), ss. 10, 34, sched. i, art. 11.* The words 'duly stamped' in s. 3 of the Stamp Act signify "stamped or written upon paper bearing an impressed stamp."

A bill of exchange for Rs. 500, payable otherwise than on demand, must, under art. 11 of sched. i of the Act, be stamped with an impressed stamp of the value of six annas.

RADHAKANT SHAHA v. ABHOYCHURN MITTER ... VIII 721

s. 7, para. 2—*Stamp-duty—Lease—Patta—Mortgage.* By an instrument which recited that A was indebted to B in the sum of two lacs of rupees, and that A had taken a fresh loan of Rs. 2,59,000 from B, the former leased certain mauzas to the latter for a term of twenty years, at a yearly rental of Rs. 1, 40,000. It was provided that, from the rent of each year, a portion should be deducted in payment of A's debt to B; so that in this way the whole debt should be paid by a series of instalments extending over the term of the lease. The instrument also contained the usual clauses found in pattas. On the question, what was the proper amount of stamp-duty leviable on the document—

Held, that though the arrangement intended to be effected was partly a lease and partly an usufructuary mortgage, yet the instrument came within the provisions of s. 7, para. 2 of the Stamp Act, and should be stamped as a mortgage only.

IN THE MATTER OF A REFERENCE FROM THE BOARD OF REVENUE UNDER

S. 46 OF THE GENERAL STAMP ACT. EX PARTE HILL ... VIII 254

s. 34. See Promissory Note.

ss. 37 and 40—*Arbitration—Award—Evading payment of stamp-duty.* Six persons acted as arbitrators in a dispute between two of their fellow-villagers, and delivered their award in writing. Subsequently, the award was filed in evidence by one of the disputants in the civil suit in the Court of the Munsif of Cuttack, who, on the ground that the document bore no stamp, impounded it and forwarded it to the Collector, who ordered the writer to be prosecuted. The Deputy Magistrate, to whom the case was referred, summoned the six persons who had acted as arbitrators, and fined them Rs. 25 each. On a reference to the High Court by the District Magistrate—

Held, that the conviction was illegal, and should be set aside.

Held also, that the procedure laid down in s. 37 of the Stamp Act must be strictly followed; and that, before a prosecution can be instituted under s. 40, the Collector is bound to form an opinion as to whether the offence was committed with the intention of evading payment of the proper duty.

THE EMPRESS v. SODDANUND MAHANTY ... VIII 259

sched. i, cl. 1—Acknowledgment—Hathavilla. Whether an account signed by a debtor in the books of his creditor amounts to an acknowledgment within the meaning of the Stamp Act (I of 1879), sched. i, art. 1, is a question depending in each case upon the form and intention of the entry.

BINJA RAM v. RAJMOHUN ROY ... VIII 282

Stamp Act—(concluded.)**I of 1879—(concluded.)**

sched i, art. 11. See Stamp Act, 1879, s. 3.

Stamp-duty—Hathchitta—Evidence. Admissibility in—Acknowledgment of debt.

An account in a *hathchitta* showing advances of money made to, and part-payment made by, the defendant, the whole account being in the handwriting and signed by the defendant, is admissible in evidence without being stamped. *Brojender Coomar v. Bromonoye Chowdhrani* followed.

BROJO GOBIND SHAHA v. GOLUCK CHUNDER SHAHA, alias GOLUCK SHAHA ... IX 127

Stamp-duty—

Evading payment of. See Stamp Act, 1879, ss. 37, 40.

On Appeals in suits under Registration Act, 1877, s. 77. See Court Fees Act, sched. iv, cl. 12, art. 17.

Stamp on—

Memorandum. Of appeal in partition suits. See Court Fees Act, sched. ii, art. 6, cl. 17.

Statement—

In decree. See Evidence Act, 1872, s. 35.

Of accused person. See Confession.

Of dying person. See Evidence.

*To Police Officer—*See Evidence.

Statute—

21 *Geo. III, cap. 70, s. 17.* See Landlord and Tenant.

24 and 25 *Vict. c. 104, ss. 13 and 15.* See High Court's Criminal Procedure Act, ss. 14 and 147.

24 and 25 *Vict., cap. 104, s. 14.* See Chief Justice, Power of.

s. 15. See Superintendence of High Court.

Construction of—Exercise Act—Beng. Act VII of 1878. Penal Statutes must be construed strictly, i.e., nothing is to be regarded as within the meaning of the Statute which is not within the letter and clearly and intelligibly described in the very words of the Statute itself.

THE EMPRESS v. KOTA LALANG ... VIII 214

Construction of—Hindu Wills Act. In construing an Act of the Government of India passed in the form peculiar to the Hindu Wills Act, the sound rule of construction is to give their full and natural meaning to the provisos, and only to give effect to the enactments contained in the applied sections and chapters so far as the latter do not contravene the full and natural meaning of the provisos.

ALANGAMONJORI DABEE v. SONAMONI DABEE ... VIII 687

Stay—

Of execution, order granting. See Appeal.

Of sale of attached property. See Civil Procedure Code, 1877, s. 326. Limitation Act XIV of 1859, s. 20.

Step in aid of Execution—

See Limitation Act, 1877, art. 179.

Stipulation—

In restraint of trade. See Contract.

To pay collection charges. See Landlord and Tenant.

Stridhan—

See Hindu Law, Inheritance.

Striking off—

Application for stay of sale. See Limitation Act XIV of 1859, s. 20.

Subject to approval of Title—

By purchaser's solicitors. See Vendor and Purchaser.

Subordinate Tenure-holder—

See Court Fees Act, s. 7, cl. 5, subdivision (a).

Subsequent Decision—

Of Full Bench. See Review.

Subsequent Suit—

For consequential relief. See Civil Procedure Code, 1859, s. 7 and 15.

Substantial Injury—

See Sale in Execution of Decree.

Substitution—

Of new contract for old one. See Contract Act, s. 62.

Succession—

To management of religious endowment. See Hindu Law, Endowment.

To property, agreement as to. See Compromise of Family Disputes.

Succession Act—

s. 50. See Will.

ss. 98, 99, and 101. See Hindu Law, Will.

ss. 208 and 209. See Will.

s. 234. See Probate.

ss. 235, 244, 250. See Probate.

Suit—

Between Hindu Inhabitants of Calcutta. See Buildings on Land.

For Land. See Execution of Decree.

For possession after order under the Land Registration Act. See Onus Probandi.

For possession and mesne profits. See Court Fees Act, 1870, s. 17.

For possession of fractional share of estate. See Court Fees Act, s. 7, cl. 5 (a)

For profits of a ship. See Jurisdiction.

For road cess under Rs. 100. See Res judicata.

Form of. See Religious Endowment.

To compel registration. See Limitation Act, 1877, ss. 5 and 6 : Registration Act, 1877, ss. 74 and 77 : Right of Suit.

To determine coparcener's rights in moveable property. See Jurisdiction.

To enforce agreement as to succession to property. See Compromise of Family Disputes.

To establish title to property after rejection of claim. See Limitation Act, 1877, arts. 11 and 120.

To obtain relief respecting immoveable property. See Service of Summons.

To recover balance of Tahsildar's account after dismissal. See Limitation.

To recover money lent. See Mortgage.

To recover property sold in execution of decree. See Limitation Act, 1871, art. 15 : Misjoinder.

To recover road and public works cess. See Small Cause Court, Mofussil.

To restrain fishing in certain bhis. See Limitation Act, 1877, s. 26.

To restrain use of property except for particular purpose. See Right of Suit.

To set aside alienation of debutter lands. See Parties.

To set aside sale for arrears of Government revenue. See Limitation Act, 1877, sched. ii, art. 12.

To stay butwara proceedings under Regulation XIX of 1814, after partition by private arrangement. See Valuation of Suit.

To stay execution against certain property whilst proceeding against other property. See Execution of Decree.

Summing up evidence—

By Judge—See Criminal Procedure Code, 1882, s. 309.

Summons—

Form of, under s. 492, Criminal Procedure Code, 1872. See Recognizance to keep Peace.

Non-service of. See Appeal.

Service of, option of Agent to accept. See Principal and Agent.

Superintendence of High Court—

24 & 25 Vict., cap. 104, s. 15—Orders under Criminal Procedure Code, 1872 s. 518—Criminal Procedure Code, 1872, s. 297—Orders in judicial proceedings. Held, that orders made under s. 518 of the Code of Criminal Procedure not being orders made in a judicial proceeding, the High Court had no power to deal with them under s. 297 of the Code of Criminal Procedure; but the order of the 6th of September 1881 being illegal, the High Court would set it aside under s. 15 of the Charter Act, 24 and 25 Vict., c. 104.

In the matter of the Petition of Chunder Nath Sen followed.

BRADLEY v. JAMESON VIII
24 and 25 Vict., c. 104, s. 15—Execution of decrees for rent—Act X of 1859, ss. 23, 77 and 160—Civil Procedure Code (Act VIII of 1859), ss. 284, 294—(Act X of 1877), ss. 223, 228. Whether a decree for rent, under Act X of 1859, made in one district, can be transferred to another for execution, is a question which the High Court can decide in the exercise of its "superintendence over all Courts subject to its appellate jurisdiction," under 24 and 25 Vict., c. 104, s. 15. Decrees for rent made by the Collector under s. 23 of Act X of 1859 can be executed by a

Superintendence of High Court—(concluded.)

Civil Court to which they may be transferred under the sections of the Code of Civil Procedure relating to "the execution of a decree out of the jurisdiction of the Court by which it was passed."

NILMONI SINGH DEO v. TARANATH MUKERJEE... IX 295

Surborakari Tenures—

See Landlord and Tenant.

Surety—

See Contract: Principal and Surety.

For payment of rent. See Jurisdiction of Revenue Court.

Surrender of lease—

See Landlord and Tenant.

Temple—

Arms in. See Arms Act, 1878.

Tenants—

Neglect of, to pay road or public works cess. See Damages, Suit

Tender—

See Contract: Government Securities, Contract for sale of.

Of Principal and Interest. See Decree.

Tenure—

Presumption as to nature of. See Landlord and Tenant.

Registration of. See Evidence.

Sale of portion of. See Sale for Arrears of Rent.

Thak Maps—

See Evidence.

Time Bargain—

See Government Securities, Contract for sale of.

Tipperah Raj—

See Jurisdiction.

Title---

See Bengal Act VIII of 1869, s. 27.

Approval of. See Vendor and Purchaser.

Claim for declaration of. See Limitation.

Evidence of. See Land Registration Act.

Of purchaser, evidence of. See Sale in Execution of Decree.

Of third party. See Parties.

Question of. See Jurisdiction of Revenue Court: Special Appeal.

Transfer of—

Case—Civil Procedure Code (Act XIV of 1882), section 23—Practice—Ground for transfer. Section 23 of Act XIV of 1882 is only intended to provide for those cases where, on the ground of expense or convenience or some other good reason, the Court thinks that the place of trial ought to be changed. Parties desirous of obtaining the transfer of a case from one forum to another ought clearly to explain to the Court by petition and affidavit what is the nature of the claim and defence; they should further state what are the issues and the evidence required, and then satisfy the Court that, either on the ground of expense or convenience or otherwise, the place of trial ought to be changed.

KHATJA BIBI v. TARUK CHUNDER DUTT ... IX 980

Case—Subordinate Magistrates—Criminal Procedure Code (Act X of 1872), s. 48—Notice to the parties before the transfer is made. Before a Magistrate of a district can transfer a case from a Court subordinate to him to any other subordinate Court, notice of such intended transfer should be served upon the parties, so as to enable any or either of the parties to come forward and show cause why such transfer should not be made.

IN THE MATTER OF THE PETITION OF TEACOTTA SHEKDAR. TEACOTTA SHEKDAR v. AMEER MAJEE, HAFIZ PAIKAR ... VIII 393

Criminal case, Refusal of Bench of Judges to hear application for. See Chief Justice, Power of.

Decree. See Execution of Decree.

Possession. See Hindu Law, Gift.

Property—Hindu Law—Delivery of possession. Per Curiam.—Delivery of possession is not, under the Hindu Law, essential to complete the title of a purchaser for value.

NABAIN CHUNDER CHUCKERBUTTY v. DATARAM ROY ... VIII 597

Rent-decree for execution. See Limitation.

Transfer of Property Act—

1882, s. 54—*Optional registration.* *Per* GARTH, C. J.—Section 54 of the Transfer of Property Act virtually abolishes optional registration.

NARAIN CHUNDER CHUCKERBUTTY *v.* DATARAM ROY ... VIII 597

Transferable right—

See Right of Occupancy.

Transferee—

Right of, under blank transfer, to registration. See Companies' Act, s. 34.

Treasury—

Departmental Rules of. See Payment into Court.

Trespass—

Suit for damages for. See Special Appeal.

Trespassers—

See Landlord and Tenant.

Trial—

As for one offence. See Criminal Procedure Code, 1872, s. 454.

Tributary Mehals—

See Jurisdiction of Criminal Court.

Trust—

For religious purposes. See Parties.

Recognition of. See Oudh Estates Act, ss. 8, 9 and 10.

Revocation of. See Settlement.

Suit to charge property with. See Limitation Act, 1877, s. 10.

Trustee—

See Certificate of Administration.

And Cestui Que Trust. See Limitation Act, 1877, sched. ii, art. 123.

Unconditional order—

See Criminal Procedure Code, 1882, s. 133.

Under-tenure—

See Sale for Arrears of Rent.

Under-tenure-holders—

See Sale for Arrears of Revenue.

Unity of Possession—

See Easement.

Unlawful Agreement—

See Contract Act, s. 23.

Unlawful Assembly—

Penal Code (Act XLV of 1860), s. 143. On the trial of certain persons charged with being members of an unlawful assembly, it was proved that there was a dispute of long standing between the accused and certain other parties regarding the possession of certain land; that neither of the parties was in undisturbed possession of the land; that the accused went to sow the land with indigo, accompanied by a body of men armed with lathies; that they were prepared to use force, if necessary; and that the lathials kept off the opposite party by brandishing their weapons while the land was sowed. *Held*, that the accused were rightly convicted of being members of an unlawful assembly, under s. 143 of the Penal Code. *Sunker Singh v. Burnah Mahto*, distinguished.

IN THE MATTER OF PEARY MOHUN SIRCAR. PEARY MOHUN SIRCAR *v.* THE EMPRESS ... IX 689

Unmarried daughter's share—

See Hindu Law, Partition.

Unpaid vendor—

See Lien.

Unregistered bond—

See Registration Act, 1877, s. 49.

Use and occupation—

See Landlord and Tenant.

User—

Extent of. See Right of Way.

Using forged document—

See Fraud.

Valuation of Suit—

See Appeal to Privy Council: Civil Procedure Code, 1877, s. 57: Court Fees Act, sched. ii, art. 6, cl. 17

Procedure. Whether or not a suit has been properly valued is a preliminary question, which ought to be disposed of before the case goes to trial.

JOYTARA DASSEE v. MAHOMED MOBARUCK ... VIII 8

Suit to stay butwara proceedings under Reg. XIX of 1814, after partition by private arrangement. An allottee, under a private partition, sued to stay subsequent partition proceedings brought under Reg. XIX of 1814, and to have his possession confirmed. The defendants objected to the valuation of the suit and to the suit being heard by the Civil Courts, no proceedings having first been instituted before the Revenue Authorities.

Held, that such a suit should be considered to be one for a declaratory decree, or for something in the nature of an injunction, and that, therefore, the plaint should not be stamped according to the value of the entire estate.

JOYNATH ROY v. LALL-BAHADOUR SINGH ... VIII 1

Variance between Pleading and Proof—

See Plaint.

Point not raised in pleadings or issues. A plaintiff must recover *secundum allegata et probata*, and no decree should be given in his favour on a point not raised in the pleadings, nor embodied in an issue.

JOYTARA DASSEE v. MAHOMED MOBARUCK ... VIII 8

Vendor—

Right of Creditor of. See Lien.

Vendor and Purchaser—

Conditional contract "Subject to approval of title by purchaser's solicitors"—Rescission—Registration Act (III of 1877), s. 17, cl. (b). An agreement for the purchase and sale of certain immoveable property provided that the completion of the contract should be "subject to the approval of the purchaser's solicitors" (naming them), and that if they should not approve of the title, the vendor should refund the earnest-money and pay all costs incurred by the purchaser in investigating the title. The purchaser's solicitors disapproved of the title, and the purchaser rescinded the contract. The agreement was not registered.

Held, in a suit to recover the amount of the earnest-money and costs, that, assuming the objections to be reasonable, the purchaser was entitled to rescind the contract.

Held further, that the agreement did not require registration.

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Verdict of Jury—

See Criminal Procedure Code, 1872, s. 263.

Vested Interest—

See Declaratory Decree, Suit for.

Vesting—

Postponement of. See Hindu Law, Will.

Village Chowkidar—

See Abatement.

Void Gift—

See Limitation Act, 1877, sched. ii, art. 123.

Voluntary Settlement—

See Settlement.

Waiver by acceptance of rent—

See Landlord and Tenant.

Ward of Court—

How far incapacitated from contracting—Reg. X of 1793—Court of Wards Act (Beng. Act IX of 1879)—Contract Act (IX of 1872), s. 11. On a reasonable construction of the whole of Reg. X of 1793, a ward of Court, duly constituted as such, is not thereby absolutely incapacitated from contracting, but the power of the ward to contract is taken away so far as regards all property which, under the provisions of the law, comes under the charge and control of the Court of Wards.

